

**THE HIGH COURT
JUDICIAL REVIEW**

2007 1677 JR

BETWEEN

K. K.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL

RESPONDENT

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

Judgment of Mr. Justice Cooke delivered on the 25th day of March 2011.

1. By order of the Court (Clarke J.) of 15th June 2010, leave was granted to the applicant to seek judicial review of a decision of the Refugee Appeals Tribunal dated 25th October 2007 which had affirmed the recommendation that the applicant ought not to be declared a refugee contained in a report under s. 13 of the Refugee Act 1996 (as amended) dated 21st July 2005.

2. The two grounds upon which leave was granted were as follows:-

(i) The respondent acted irrationally and unreasonably in reaching his decision on credibility in that he was disproportionately influenced by flaws in the narrative given by the applicant's wife and ignored the husband's greater knowledge and awareness of the BDK;

(ii) The respondent's negative assessment of credibility led him to wrongly reject the medical evidence.

3. The issues raised by those grounds are explained by the fact that the applicant's appeal against the s.13 report came to be dealt with by the respondent at the same time as a similar appeal by the applicant's wife. Both are nationals of the Democratic Republic of Congo (DRC). The applicant arrived in the State and claimed asylum on 25th August 2004. His wife had arrived earlier with two infant daughters and applied for asylum on 6th July 2004. She apparently said that she was unaware at the time that her husband was alive as she had not heard from him for eighteen months. She claimed that it was by coincidence that she later discovered that he was in this country and they were then able to meet up. He, on the other hand, had managed to obtain an Irish passport in the DRC and admitted to the doctor who furnished the medical report on his injuries mentioned later in this judgment, that he had come to Ireland in order to rejoin his wife and two daughters.

4. The applicant had received education for thirteen years in the DRC and worked as a market trader in Kinshasa. He had been raised as a Catholic but had ceased to practise. He claimed that in 1998 he joined a religious group or movement allied to opposition in the DRC called Bunda Dia Kongo or "BDK". He claimed that following a period of nine months of familiarisation with the party's philosophy and objectives he was sworn in as a member and was active in propaganda and in the distribution of leaflets and papers. The BDK is acknowledged in the country of origin information as an ethnically based spiritual and political movement which campaigns for political autonomy of the Bas - Congo province of the DRC.

5. He claimed to have been forced to flee the DRC because of the persecution he sustained for his activities in the BDK. In February 2002 he had objected to excessive taxes which were imposed on traders in the market where he worked and was arrested and accused of attempting to organise a rebellion. He was brought to a police station where he claims he was beaten up by police officers.

6. The central events upon which his claim for asylum was based took place in July 2002. When he took part in a protest march on 22nd July he and others were beaten up and arrested. Many were killed and injured. He claimed that he was brought to a military camp where he was detained for seventeen months and tortured, stabbed in the leg by a soldier and raped. He was then transferred to a prison but became ill and the authorities brought him to a hospital in Kinshasa where he was visited by his brother, who then organised his escape from hospital and his flight from the DRC to Ireland. It is claimed that the release was organised by bribing a doctor to permit him to escape when he was taken for an x-ray.

7. As already mentioned, the appeals to the Tribunal against the negative recommendations in the separate asylum claims by the applicant and his wife were heard together by the respondent. It appears from the rough notes of the hearing that each appellant gave evidence to the Tribunal member in the absence of the other and that after the wife had given her evidence, this applicant was recalled and further questions were put to him. The first ground for which leave was granted thus arises out of the fact that, as is apparent from the notes of the hearing, the Tribunal member was deeply struck and influenced by a number of discrepancies between the accounts given separately by the appellants. The wife's appeal was thus rejected on grounds of credibility and the Court has been informed that an application for judicial review of that decision was refused by Clarke J. in a ruling given simultaneously with the judgment granting leave in the present case on 15th June 2010.

8. The Tribunal member also rejected the applicant's appeal for lack of credibility. In effect, the issue before the Court in the present case is whether the assessment of credibility in that regard was sufficiently flawed by reason of the view taken of the wife's testimony as to require that the appeal decision be quashed. In this regard it goes without saying that the Court will be slow to interfere with a decision which is based upon an assessment of credibility made by the administrative decision maker following a

detailed face-to-face questioning of the applicant. Furthermore, the Court must be wary not to ignore the need to read an appeal a decision of this kind as a whole. It must avoid slipping into the error of dissecting individual parts and findings, so as to lose sight of the overall assessment which the decision maker has made based upon the cumulative effect of the answers which the asylum seeker has given both during the s.11 interview and, more importantly, at the appeal hearing.

9. The analysis set out in Part 6 of the Tribunal member's contested decision turns entirely on credibility. It begins by acknowledging that "the applicant's fundamental claim is that on July 22nd in 2002 he participated in a protest organised by BDK which resulted in many deaths, beatings and arrests. He claims that he was among those arrested, taken to a military camp where he was beaten and afterward to Makala until he became ill and was transferred to the hospital whereupon his family bribed the doctors and he escaped".

10. The analysis then identifies a number of specific points as the basis for regarding the applicant as lacking credibility:-

(a) The fact that during the appeal the applicant claimed to have been raped while in custody, although "no mention of this was made in his questionnaire, two interviews, two Spirasi Reports of the other medical reports".

(b) The circumstances of his joining the BDK as described by him were at variance with those described by his wife.

(c) He claimed to have taken part in a protest march in July 2002, which went from a church to a market place where he was arrested with others. Country of origin information confirmed that the march did take place but that it went from an old temple to a new one. When this was put to him he replied: "I do not disagree with the report but it is my opinion." The Tribunal member says "this is a non satisfactory answer to a basic fact concerning this demonstration which would be in the domain (sic) of any member of that organisation".

(d) He claimed to have been detained because of his involvement with BDK between 2002 and 2004 but, according to the Tribunal member, reliable country of origin information as put to him indicated that he would not have been detained over such a period of time. BDK members arrested following the events of July 2002 were released within two weeks apart from 40, who were transferred to prison to await trial.

(e) An amnesty was granted to all BDK members in April 2003, a factor which undermined the credibility of his claim that he was in custody during that period.

(f) He says that his brother knew that he had been transferred from the prison to the hospital but he was unaware whether his wife had been told. The Tribunal member did not find it credible that she would not have been told.

11. There is no doubt that in one respect the Tribunal member made an error. The decision states, as quoted above, that no mention of the fact that the applicant had been raped while detained was made in the asylum questionnaire. In fact, at question 21 "Why did you leave your country of origin?" this had been referred to where the applicant says: "During the march we were beaten up, arrested, there were killings, tortures, shootings and massacres, me I was arrested alongside other friends, we were taken to Mbanza camp, there I was tortured, beaten up and raped". It does appear to be correct, on the other hand, that this fact was not mentioned at the s. 11 interview nor is it adverted to in the s. 13 report where his detention at the military camp at Mbanza is referred to. It is also the case that when this was put to the applicant at the appeal hearing, he did not correct the Tribunal member by referring to the questionnaire but excused his apparent omission by saying that he had been ashamed about it, but had been advised by counsel to disclose it.

12. While this omission is only one of a number of factors identified it the first of the factors referred to in the list of issues giving rise to the doubt as to credibility. Furthermore the Tribunal member goes so far as to say: "the Tribunal was taken by surprise at this development and when the applicant was asked why he delayed in making this allegation, he replied that he was advised to disclose it. The claim made is difficult for the applicant to substantiate or for the Tribunal to accept or reject with any certainty". Clearly therefore the Tribunal member set some store by this factor but is it enough by itself to vitiate the evaluation of credibility as a whole?

13. Obviously, it must be considered in the context of the reliance placed by the Tribunal member on the other factors. In the next following paragraph the Tribunal member refers to the applicant's claim as having its main thrust in his association with BDK. He then says: "There are a number of problematic inconsistencies in relation to his association with this organisation which tend to question his credibility. He told the Tribunal that he was a Catholic but changed to BDK in or around October, November 1998". No specific comment is made in relation to the change of religion and it is not clear from the decision whether it is to be taken as one of the "problematic inconsistencies" relied upon or merely as a lead-in to the point made at item (b) above, namely the discrepancy between the two accounts of how the applicant joined the BDK. There was an obvious discrepancy between the two descriptions given by the applicant and his wife. She says she explained the BDK to him (she being already a member,) and he joined. He, on the other hand, describes having gone through a nine month period of study or training before being formally accepted into it. The Tribunal member comments: "While this is not fatal to his application, it nonetheless puts a question mark over whether in fact he was ever in BDK". There is no doubt, in the view of the Court, that this was something the Tribunal member was entitled to regard as significant. Both husband and wife claimed to have been members of BDK and the applicant claimed to have been particularly active in organising propaganda and distributing leaflets. It was thus entirely logical that the Tribunal member should find it difficult to believe that each would not be fully familiar with the involvement of the other in the organisation and thus that the wife was unlikely not to have known how he came to join it, if it involved a nine month period of training.

14. There can be no doubt either but that the Tribunal member had an independent and objective basis for querying the applicant's credibility when the "fundamental claim" was assessed by reference to well documented country of origin information relating to the events of July 2002. Although the question raised as to whether the route of the protest march in question was from a church to a market place or from an old temple to a new one might be considered a somewhat peripheral issue given that there may be no linguistic difference between church and temple in the language the applicant was speaking and that there could well be a market in the same area as the temple, the more substantial areas of doubt lie in what is claimed to have happened to the applicant subsequently. The country of origin information and independent reports considered reliable by the Tribunal member, confirmed that while such a protest march did take place, its immediate consequences were recorded. All but forty of those arrested were released and the forty were sent for trial. The applicant's claim to have been taken to a military camp and detained for seventeen months is clearly at variance with that information. It is also at variance with the independently verified fact that the DRC President granted an amnesty to all BDK members in April 2003. If that so, why was the applicant still detained in 2004?

15. In this case as in most other cases where credibility is being assessed, the second-stage decision maker conducting an oral appeal hearing has a two-fold task. Where a claim to have suffered persecution is based upon particular events such as the break up

of a political meeting, an attack upon members of a religious minority by an opposing group or ethnic violence between two opposed communities, the first task is to verify by reference to independent information as to the circumstances and conditions in the area in question, whether what is claimed could possibly have happened. If such information confirms that events of the kind have taken place or that conflict of the type exists in the area, then the asylum claim may have a basis. The second part of the exercise is the more difficult namely, that of deciding whether the asylum seeker is to be believed when he or she claims that particular attacks of violence or other events occurred and that asylum seeker was personally involved in the manner described. This variably depends upon the plausibility, consistency and coherence of the story told; on the absence of other factors such as false evidence as to travel arrangements or the destruction of documents; but perhaps primarily on the demeanour of the applicant and the impression made when making the claim in interview and at an oral hearing. The decision maker must be alive to the possibility that a claimant is making use of events or information known to be verifiable to create the impression that he or she was present and involved when the claim is actually untrue. Thus differing accounts given by members of the same family of matters of which they might have expected to have the same knowledge, may well weigh significantly in the assessment of the credibility of the claim being advanced.

16. In this case there is no doubt but that the Tribunal member was "influenced" by the lack of credibility in the wife's testimony in the sense contemplated by the leave ground but understandably so. There were clear discrepancies in the account each gave of events they claimed to have experienced in common. It is also the case that the Tribunal member made a mistake in relation to the absence of mention of the rape claim in the questionnaire. Nevertheless, it is equally clear that the analysis set out over the three pages contained in part 6 of the decision addresses squarely the "fundamental claim" and finds it lacking in credibility not only upon the basis of the discrepancy between the applicant and his wife in relation to BDK membership but first and foremost upon the basis that the seventeen month period of detention in the military camp is inconsistent with the recorded consequences of the march in July 2002, and with the subsequent amnesty in April 2003.

17. Accordingly, the Court cannot conclude that the Tribunal member's analysis and conclusion is "disproportionately influenced" by the lack of credibility in the wife's claim. Even if the mistake in relation to the rape claim had not been made, it is sufficiently clear that the Tribunal member would have reached and would have been entitled to reach, the same conclusion on credibility. The Tribunal member was aware that the applicant was claiming to have been detained, beaten, tortured and stabbed in the leg but rejects those facts in their entirety. It seems to the Court highly improbable that the Tribunal member's conclusion would be otherwise had the additional claim to have been raped had been averted to or responded to differently, particularly when no mention had been made of it or emphasis put upon it in the s.11 interview.

18. In the judgment of the Court the first leave ground has not been made out and this is not therefore an instance in which the Court would be justified in intervening to set aside a finding on credibility on the basis claimed.

19. It follows, in effect, that the second ground could not be upheld either. The report of Dr. O'Sullivan dated 22nd November 2005, having listed the various scars and marks presented by the applicant, expresses its only opinion in the following sentence: "The scars and the marks have the random appearance of repeated physical abuse which could be consistent with the story that he gives". Clearly, this is an opinion at the lowest end of the consistency scale. In the absence of any expression of view to the effect that the scars and marks could only have been inflicted by another person as an act of violence, the corroborative value of the medical report in these circumstances was negligible in so far as the claim was based upon the mistreatment described in the military camp. The Tribunal member did not reject the medical evidence as being unreliable as such, but because, having disbelieved the applicant's claim to have been detained and mistreated as he described, the medical evidence as it stood did not weigh in the balance to make the account credible.

20. Accordingly the application for judicial review is refused.