

THE HIGH COURT

2008 1367 JR

BETWEEN/

DANIEL MULUGETA BEDANE

APPLICANT

AND

REFUGEE APPEAL TRIBUNAL,

MINISTER FOR JUSTICE AND LAW REFORM, IRELAND AND THE

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on 13th January, 2012

1. This application for leave to apply for judicial review of a decision of the Refugee Appeal Tribunal on 21st October, 2008, rejecting his claim for asylum has certain unusual facts. The case is, in many ways, reminiscent of a Cold War-style defection from a Soviet bloc country and it presents once again the troubling question of what constitutes a refugee *sur place*.

2. The applicant is a highly-educated Ethiopian national of Guarga ethnicity who, immediately prior to his arrival in Ireland, was the mayor of Butajira, a city of some 40,000 people located in the south east of Ethiopia. He is married with four dependent children.

3. In April, 2005 representatives of South Dublin City Council ("SDCC") travelled to Butajira with a view to seeing at first hand the potential development of a partnership with an African local authority. This was not a purely ceremonial connection, as Council staff were later to travel to Ethiopia to carry out drainage and sewerage works. Other projects relating to urban planning, solar energy and internet access were also contemplated.

4. With this in mind, on 26th October, 2005, Mr. Jacob of SDCC sent a report entitled "SDCC/Ethiopian Friendship/Development Project 2006-2009" to a number of interested parties, including the applicant. Among the steps that were proposed for 2006 was the hosting of a conference by SDCC in Dublin "of key local authority leaders from the two Ethiopian local authorities on the subject of corporate governance".

5. Representatives from the Council visited Butajira again in early 2006 and shortly afterwards on 15th February, 2006, the Council extended an invitation to the applicant and three other colleagues to visit Dublin for a conference between 21st March, 2006 and 27th March, 2006. Towards the end of their stay, the four absconded and sought asylum. One of the four has, it appears, already been granted asylum.

6. The applicant claimed that he was a member of Ethiopian People's Revolutionary Democratic Front ("EPRDF"). This is the ruling coalition government which agreed to hold elections in May 2005, the results of which were disputed. There is no doubt but that Ethiopia's human rights record is extremely poor. Thus, in the words of a UNHRC report for 2006, the "government's human rights record remained poor and worsened in some areas", although it conceded that there had been some improvements. The report nonetheless noted that in the aftermath of the election:

"authorities arbitrarily detained, beat and killed opposition members, ethnic minorities, NGO workers and members of the press."

7. The applicant's claim may be regarded as falling into two separate categories. First, is he entitled to asylum by reason of his actions and conduct in Ethiopia prior to coming to Ireland? Second, irrespective of the answer to the first question, is he nonetheless entitled to be regarded as a refugee *sur place*?

Is the applicant entitled to asylum by reason of his actions and conduct in Ethiopia prior to coming to Ireland?

8. So far as the first question is concerned, the applicant contends that his position as mayor was under scrutiny and he himself came under surveillance following the results of the disputed elections in June, 2005. In effect, the applicant maintains that he sought to mitigate the oppressiveness of the regime in his local area to the point where he came under scrutiny and he was being suspected of secretly working for the opposition. The Tribunal member concluded that the applicant's contention that "the authorities harassed him, followed him and searched his house, but yet continued to pay him as Mayor does not seem plausible".

9. The applicant further contended that he kept the trip to Ireland secret from the authorities, save for a few close confidants. The Tribunal did not find this plausible either, as the proposed visit had been known for a few weeks prior to that date and the planning for the trip could not have been kept secret. Nor did the Tribunal member think it was plausible that the authorities would have issued him with a passport if his position and, indeed, loyalty to the regime was under suspicion, even though the applicant maintained at his s. 11 interview that his problem was with the *regional government* and that as the central government would not have been aware of this, this did not constitute an impediment to the issue of a passport.

10. With regard to this aspect of the claim, I will merely say that these were findings which the Tribunal member was fully entitled to reach on the evidence before me and there is no basis upon which I can interfere with such findings. We can now proceed to examine the more significant feature of the case, namely, the question of whether the applicant can be regarded as a refugee *sur place*.

Whether the applicant is entitled to be regarded as a refugee *sur place*?

11. Addressing the question of whether the applicant was entitled to be regarded as a refugee *sur place*, the Tribunal member stated that the applicant had given inconsistent evidence to the effect that:

"...the reason he could not resign as Mayor even though he was under scrutiny and suspicion was because it would impact on his wife and family, yet the applicant abandoned his family and came here to seek asylum which allegedly puts his wife at risk. The Tribunal refers to [the statement] of Mr. Don Sexton of the Irish Embassy in Addis Ababa when he stated, *inter alia*, that 'the applicant and his colleagues hold influential and senior positions in their regional authorities and all would be associated with the ruling party. As far as he is concerned, the applicant would have no reason to fear mistreatment or human rights abuse by the authorities in Ethiopia and it appears that his motivation was probably economic and opportunistic.'"

12. The Tribunal member went on to say that the Geneva Convention "should be interpreted as requiring implicitly 'good faith' on the part of the asylum seeker". He concluded by noting that:

"At all times, the Tribunal's determination must be made on whether there is a genuine fear of persecution and whether that fear is well-founded. It should be borne in mind that opportunistic post-flight activities will not necessarily create a real risk of persecution in the applicant's home country either because they will not come to the attention of the authorities of their country or because the opportunistic nature of such activities will be apparent to all, including those authorities."

13. One might comment on this analysis by observing that the Tribunal member was entitled to reach the conclusion on the available evidence that the applicant was not in any need of international protection prior to his decision to claim asylum. It may also be accepted that the applicant's decision to claim asylum was opportunistic and prompted by economic considerations. But this does not mean that the applicant cannot be regarded as a refugee *sur place*.

14. In the first place I would reject the argument that the Geneva Convention impliedly contains a good faith exception for all the reasons advanced by me in my judgment in *HM v. Minister for Justice, Equality and Law Reform* [2011] IEHC 16. To this I would add the comments of Elias L.J. in *TM (Zimbabwe) v. Home Secretary* [2010] EWCA Civ. 916:-

"The fact that someone may have deliberately and without any conviction (or, indeed, in bad faith) engaged in political activity in order to bolster his or her case for asylum is not of itself a bar to that activity founding a *sur place* claim, although it is likely to prove harder for such persons to make good their claim."

15. Second, there are historically all too many examples of individuals who were prominently associated with an oppressive regime who took the difficult decision to abscond and seek asylum abroad, often to the amazement and consternation of their erstwhile friends and colleagues. Prominent examples here include Svetlana Stalin (daughter of the Soviet leader) and Friedelind Wagner (granddaughter of the composer and close family friend of Hitler) who both gave up positions of comfort, power and influence and travelled to the United States in order to denounce the barbarism of the Soviet Russia of her (by then) deceased father and that of Nazi Germany respectively. Neither of these historical figures were in need of international protection prior to leaving their country of origin. But all of this changed once they claimed asylum, as their conduct in seeking asylum abroad was regarded as treacherous. Had either of them been returned to their country of origin only their family name and family connections would have saved them from the gulag and the concentration camp.

16. There were, moreover, hundreds of examples during the Cold War period of cases of politicians, diplomats, scientists, writers, artists and athletes who gave up a privileged existence in an oppressive society in order to seek asylum in the West, often to the utter dismay of their parents, spouses, children, wider family and friends who were left behind. Prominent historical examples include Ferenc Puskas (ranking with Pele, Cruyff and Messi as among the greatest of all footballers), Martina Navratilova (regarded by many as the greatest female tennis player of all time) and Maxim Shostakovich (the famous conductor and son of the composer).

17. Why did such persons give up a life of privilege to seek asylum, not least when they must have known that the fate facing their remaining family at home was often an uncertain one? Perhaps in some cases they could not live with their own conscience, as they were not prepared to suppress the cry of freedom in order to live in a gilded cage. Others were doubtless swayed by economic factors, since they felt sure that with their talents they could easily build a new and better life in the West.

18. In many respects, however, it is almost irrelevant to seek to ascribe a motive to those who defected in this manner. One might as well as ask the reason why those brave souls who endeavoured to escape over the Berlin Wall risked everything to make good their escape. For most, the motives were probably mixed and, in a few cases at least, the actual motive was purely economic. Nevertheless, irrespective of motive, in virtually all of these historical cases the defectors would have to have been regarded as refugees *sur place*, since the very act of claiming asylum was enough to make them instantly enemies of the regime.

19. Here, then, is the critical test: would the fact that the applicant claimed asylum in itself be a fact which would be likely to ground a well founded fear of persecution in Ethiopia in the future, irrespective of the opportunistic nature of the asylum claim or the fact that the applicant previously held a (relatively low level) of power and privilege in the regime or, indeed, that the claim was also prompted by economic factors or even the fact that the assessment of the claim to date appears to have been tinged by sublimated moral disapproval of the applicant's conduct? To my mind, in view of what is known about the Ethiopian Government from the country of origin information, the Tribunal could not reasonably have answered this question other than in the affirmative. As Elias L.J. observed in *TM (Zimbabwe)*:

"A further issue with respect to *sur place* activities is whether they are likely to be known to the authorities in the home state. It is not necessary, and indeed would usually be impossible, for the claimant to produce direct evidence that the authorities have such knowledge. It may depend upon the rigour with which the state seeks to police and stamp out dissident or opposition conduct."

20. Elias L.J. went on to quote from the judgment of Sedley L.J. in *YB (Eritrea)* [2008] EWCA Civ. 360, a case where the *sur place* activity was said to have arisen by reason of protests outside the Eritrean Embassy in London:

"As has been seen, the tribunal, while accepting that the appellant's political activity in this country was genuine, were not prepared to accept in the absence of positive evidence that the Eritrean authorities had 'the means and the inclination' to monitor such activities as a demonstration outside their embassy, or that they would be able to identify the appellant from photographs of the demonstration. In my judgment, and without disrespect to what is a specialist tribunal, this is a finding which risks losing contact with reality. Where, as here, the tribunal has objective evidence which 'paints a bleak picture of the suppression of political opponents' by a named government, it requires little or no evidence or speculation to arrive at a strong possibility – and perhaps more – that its foreign legations not only film or photograph their nationals who demonstrate in public against the regime but have informers among

expatriate oppositionist organisations who can name the people who are filmed or photographed. Similarly it does not require affirmative evidence to establish a probability that the intelligence services of such states monitor the internet for information about oppositionist groups. The real question in most cases will be what follows for the individual claimant. If, for example, any information reaching the embassy is likely to be that the claimant identified in a photograph is a hanger-on with no real commitment to the oppositionist cause, that will go directly to the issue flagged."

21. This was also the issue before the English Court of Appeal in *SS (Iran) v. Home Secretary* [2008] EWCA Civ. 310 where the Court doubted whether the fact that the applicant had joined a dissident Iranian political party in the UK and protested outside the Iranian Embassy in London would be enough *in itself* to make the applicant automatically a refugee *sur place*. In the words of Lord Neuberger:

"There must be a limit as to how far an applicant for asylum is entitled to rely upon publicity about his activities in the UK against the government of the country to which he is liable to be returned. It seems to me that it is not enough for such an applicant simply to establish, as here, that he was involved in activities which were relatively limited in duration and importance, without producing any evidence that the authorities would be concerned about them, or even that they were or would be aware of them. As Longmore LJ put it, when refusing permission to appeal on paper, "Is every person present at Komala Party activities in the UK to be entitled to asylum by providing a photograph of himself during those activities?"

22. The comments of both Elias L.J. in *TM* and Sedley L.J. in *YB* nevertheless clearly apply to the present case. While accepting that the applicant's position was a relatively low level one, by applying for asylum in the manner which he did, he clearly embarrassed the Ethiopian regime, since it could have jeopardised future contacts between Ireland and Ethiopia and, indeed, the provision of development aid or other forms of practical assistance to the Butajira region by SDCC. Nor is this merely a case - as in *SS (Iran)* - of assessing the risk that foreign intelligence services would photograph otherwise largely anonymous demonstrators outside an embassy, since this particular application for asylum generated considerable press comment, both here and in east Africa. Moreover, some of the commentary drew attention to the unpleasant features of the Ethiopian regime and questioning the continued provision by Ireland of development aid to that country. Perhaps more to the point, both the Ethiopian Embassy in Dublin and the Minister of State at the Department of Foreign Affairs with responsibility for development aid both issued public statements on the issue.

23. Again, unlike *SS (Iran)*, the Ethiopian authorities are fully aware of the applicant's case and it would be foolish to think that they were not obviously concerned about his actions in seeking asylum and the embarrassment which this caused. Everything that we know about Ethiopian regime from the relevant country of origin information suggests that it would view a defector of this kind in much the same light as a former Soviet bloc country would have done. A regime that was (and is) prepared to jail, arbitrarily detain and even kill its opponents would be more than likely to mete out a severe punishment to a defector who had publicly embarrassed the regime by applying for asylum in a donor country in the public manner in which he did. With all due respect to a very experienced and distinguished Tribunal member, it is simply naïve to suggest otherwise. All of this clearly points to the fact the applicant should be regarded as falling with the classic category of a refugee *sur place*, since he clearly has a well founded fear of persecution.

Conclusions

24. In conclusion, therefore, since the Tribunal was entitled to reach the findings which it did regarding the applicant's pre-flight conduct, I would refuse leave on this ground. It is plainly otherwise so far as the *sur place* issue is concerned and I would accordingly grant leave on that ground. I will discuss with counsel the precise form of order granting leave pursuant to s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000.