Neutral Citation Number: [2009] IEHC 268

THE HIGH COURT

JUDICIAL REVIEW

2008 639 JR

BETWEEN

F. V.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL (RICARDO DOURADO) AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT OF MS. JUSTICE IRVINE, delivered on the 28th day of May, 2009.

1. This is an application for judicial review of the decision of the Refugee Appeals Tribunal (RAT), dated 10th April, 2008, to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner (ORAC) that the applicant should not be granted a declaration of refugee status. Leave was granted by Birmingham J. on 21st January, 2009, on the following ground:-

> "The Tribunal Member erred in jurisdiction and in law in the conclusion he has reached with respect to the issue of refoulement. The Tribunal Member has erred in jurisdiction and in law in concluding that refoulement is not within the remit of the Tribunal in circumstances where submissions were made on behalf of the Applicant that he would be at risk of persecution if refouled to Togo as a failed asylum seeker."

2. The applicant is seeking an order of *certiorari* quashing the RAT decision and a further order directing that his claim be remitted for rehearing.

Background

3. The applicant claims to be a national of Togo. He says that before coming to Ireland he and his wife lived in Lomé with their two children. Their neighbourhood was a stronghold of the ruling party, the *Rassemblement du Peuple Togolais* (RPT). In 1999 he joined the opposition party, the *Union des Forces de Changement* (UFC). He claims to have became well known in his neighbourhood as a UFC activist and that his role was to distribute propaganda tracts.

4. The applicant claims that his troubles began after elections took place on 1st June, 2005. He acted as a coordinator at a polling station during the election. After the election the UFC suspected that the RPT had committed electoral fraud. The applicant says he was given UFC tracts to distribute, encouraging people to demonstrate if the ruling party was re-elected. Although the details are a little hazy it seems he attended a demonstration on 2nd June and distributed tracts there. The following day (3rd June), he was arrested at his home by four men who seized the remaining UFC tracts and took him to a detention camp. On 4th June it was announced that the RPT had won the election. The applicant says he was interrogated, beaten by various means and subjected to various invidious forms of torture including the burning of his feet with cigarettes, the pouring of water over his naked body, deprivation of food and medicine and the administration of electric shocks to his genitals.

5. The applicant says that he remained at the detention camp until 13th July, 2003, when he was helped to escape by a guard who was a family friend and who was bribed by the applicant's sister. He went to stay with his aunt in Ghana for 15 days. There, he received treatment for his injuries. A priest financed his travel to Ireland with a trafficker. They travelled by plane, with a 20-minute stop-over in Amsterdam. The trafficker gave him documents to get through immigration but he then took them back. The applicant says his wife and two children are in Benin with his sister.

The ORAC stage

6. The applicant applied for asylum upon arrival in Ireland in July, 2003. At all stages of the ORAC process he claimed fear of persecution by reason of his political opinion. He submitted various documents including a UFC membership card and contribution card, a sample UFC tract and a letter from the UFC in France attesting that he is an active UFC member. He also submitted a letter from the Eastern Health Board confirming that he had attended the psychology service on nine occasions and received therapy for stress management.

7. A negative recommendation issued from ORAC on 21st January, 2005. Various negative credibility findings were made with respect to the applicant's account. The authorised ORAC officer found that he was involved at a politically low level in the UFC and was unlikely to be in a position to attract the attention of the Togolese authorities. It was found that his knowledge of the UFC was consistent with that which one might expect of a Togolese national but not at the level one would expect from a political activist. It was noted that the applicant was unfamiliar with a new electoral commission established in 2003 and with the Lomé Framework Agreement and it was stated that it was not unreasonable to suggest that a political activist would have a good knowledge of political structures in their country.

The Appeal

8. The applicant appealed to the RAT and a negative decision issued but was challenged in judicial review proceedings which were compromised and the appeal was remitted for rehearing. Supplementary grounds of appeal were forwarded on

6th July, 2006. Of particular relevance is the following submission:

> "The applicant's fear of persecution arises also by reason of his status if refouled to Togo as a failed asylum seeker and/or a failed asylum seeker who sought asylum abroad on grounds of his political opinion and/or by reason of his status as a failed asylum seeker if refouled who is opposed to the ruling regime."

9. In that regard the Tribunal Member's attention was drawn to two appended country of origin information (COI) reports - a UNHCR *Position on the Treatment of Asylum Seekers from Togo* (2005) and an Amnesty International (AI) report entitled *"Togo: Will History Repeat Itself?"* (2005). Also appended were a further AI report on Togo of 25th May, 2005 and an IRIN report dated April, 2006, entitled *"Benin-Togo: A year on, only a handful of refugees have returned."* Receipt of these documents was acknowledged by the RAT. I will return to the relevant portions of these documents in due course.

10. In June, 2007 the applicant submitted ten previous RAT decisions relating to Togolese applicants and two further relating to applicants from Cameroon and Albania. He also furnished updated COI including a Swiss Refugee Council (SCR) report of September, 2006 entitled *"Togo – Danger for returning Exiles who were involved in Oppositional Activities"*. In June, 2007 the applicant furnished a SPIRASI report which records that he has scars "typical of" cigarette burns on his feet, other non-specific scars "consistent with" the abuses that he attributes them to, and an episode of haematuria which "consistent with" having sustained trauma to the abdomen. The report found that his psychological assessment would be "consistent with" a post-traumatic state such as would follow his alleged experiences in prison.

11. On the morning of his fresh oral hearing the applicant furnished the Tribunal Member with a previous RAT decision dealing with an applicant from Zimbabwe who claimed, *inter alia,* that her life would be at risk from members of the Zanu-PF party if returned to Zimbabwe. The Tribunal Member in that case expressed some doubts about the applicant's story but accepted that she was a national of Zimbabwe and found as follows:-

> "Having regard to country background information it is clear that returned asylum seekers are liable to face persecution on their return to Zimbabwe (UK Home Office report October 2005 re treatment of returned failed asylum seekers) […]. Having regard to the above I believe I should be giving the Applicant the benefit of any doubt I have in respect of her. It seems reasonably likely that if the Applicant was returned to Zimbabwe she could be persecuted for a Convention reason."

12. In Mr. V.'s case, a fresh oral hearing finally took place in June, 2007 at which he was legally represented. The hearing was adjourned owing to interpretation difficulties and was completed in November, 2007. No attendance note of what was said at the hearing is before the court but the RAT decision gives a detailed summary of the evidence given. Of note is that the applicant is recorded as saying that he was an active UFC member and that he had heard people speak about the election commission and the Lomé Agreement but he was not interested and it was not important to acquaint himself with the aims of the election commission to enable him to carry out his tasks. It was also recorded that counsel for the applicant submitted that failed asylum seekers risk being detained and persecuted whereas the Presenting Officer submitted that refoulement is for another forum.

The Impugned Decision

13. A negative RAT decision issued on 10th April, 2008. The Tribunal Member made numerous adverse credibility findings with respect to the applicant's account. He rejected the credibility of the applicant's claim that he was an active member and supporter of the UFC and that he was involved in the 2003 elections. He also expressed disbelief about the applicant's account of his detention and ill-treatment, his escape and his travel to and entry into Ireland. He found that the documents submitted could not be authenticated and that the SPIRASI report did not corroborate the applicant's evidence. He also stated that he had considered the previous RAT decisions submitted and found that they were not of sufficient relevance to warrant a conclusion that the ORAC recommendation be overturned.

14. Of particular note is the Tribunal Member's finding as follows:-

> "[Counsel for the applicant] *submitted that the Applicant is in fear of persecution if he is refouled. Under paragraph 5 of the Refugee Act 1996 as amended, refoulement is not within the remit of the RAT".*

15. The Tribunal Member made some very forceful comments about the applicant – he concluded that the applicant had contrived a story and that his failure to tell the truth during his appeal was exposed in cross-examination. He found the applicant to be "hesitant, facetious, evasive, disingenuous and contradictory in his evidence as to its contents and presentation" and he found the applicant's story to be "inconsistent, contradictory, implausible, and wholly lacking in credibility". He also found the applicant to be "deliberately evasive, vague and uncooperative." He affirmed the ORAC recommendation that the applicant not be declared a refugee.

16. The Minister accepted the negative recommendation and a proposal to deport the applicant issued on 26th May, 2008.

THE SUBMISSIONS

17. Counsel for the applicant argued that by stating that under s. 5(1) of the Refugee Act 1996 *"refoulement is not within the remit of the RAT",* the Tribunal Member effectively declined jurisdiction to consider the applicant's fear of being returned to Togo as a failed asylum seeker. It was submitted that the Tribunal Member did, in fact, have a duty and a jurisdiction to adjudicate upon that element of the applicant's asserted fear. It was argued that the *raison d'être* of the RAT is to determine whether a person is a refugee using a forward-looking test, which involves considering what would occur if the applicant was returned to his country of origin.

18. Reliance was placed on *Gidey v. The Refugee Appeals Tribunal* (Unreported, High Court, Clark J., 26th February, 2008), the judgment of the Federal Court of Australia in *W124 v. The Minister for Immigration and Multicultural Affairs* [2001] F.C.A. 1387, and the judgment of the Federal Court of Canada in *Ali v. Minister of Citizenship and Immigration* [2008] F.C. 448.

19. The court's attention was drawn to certain documents furnished to the RAT which, it was submitted, support the applicant's claim that he would be at risk of persecution as a failed asylum seeker if returned to Togo. Particular reference was made to the UNHCR's *Position on the Treatment of Asylum Seekers from Togo* (2005); an Amnesty International (AI) report entitled *"Togo: Will History Repeat Itself?"* (2005); a further AI report on Togo of 25th May, 2005; and the previous RAT decision submitted on the morning of the appeal hearing, dealing with an applicant from Zimbabwe. Counsel submitted that the Tribunal Member erred by failing to consider those documents and explain why they could not enable the applicant to succeed in his application.

Consideration of all elements of the claim
20. It was also contended that having made the distinct claim that he feared persecution on the basis of his status as a failed asylum seeker, the applicant was entitled to have that claim assessed by the Tribunal Member. Reliance was placed on the decision of Finlay Geoghegan J. in *S.I. v. The Refugee Appeals Tribunal* [2008] I.E.H.C. 165 and *Egharevba v. The Refugee Applications Commissioner* (Unreported, High Court, Clark J., 19th February, 2008).

THE RESPONDENTS' SUBMISSIONS
21. The respondents submit that the findings made by the Tribunal Member with respect to refoulement must be viewed in the light of the very serious credibility findings that were made in respect of the applicant in the s. 13 report and in the course of the RAT decision. Counsel for the respondents submitted that it was quite simply not believed that the applicant had been an active member of the opposition in Togo and counsel pointed out that the applicant was refused leave to challenge any of the credibility findings made by the Tribunal.

22. The respondents contend that the applicant's complaints in this regard are founded on an incorrect interpretation of the definition of "refugee" in s. 2 of the Act of 1996. It was submitted that there is no evidence that the applicant cannot return voluntarily to Togo without being subjected to a risk of persecution and that in those circumstances, he cannot fall within the s. 2 definition. Reliance was placed on the judgment of the English Court of Appeal in *A.A. v. Secretary of State for the Home Department* [2007] 1 W.L.R. 3134, where it was held that if a person can voluntarily return to his or her country of origin, he or she cannot be a "refugee", even if their forced removal (that is, following a refusal to return voluntarily) would result in their persecution.

23. Counsel for the respondents further submitted that even if the applicant was found to fear persecution as a failed asylum seeker, he would not be a person who was outside of his country of origin "owing to" that fear; rather, he would remain outside of his country of origin for other reasons and now claims to fear persecution if returned. Reliance is placed on the judgment of Lord Bingham in *Januzi v. Secretary of State for the Home Department* [2006] 2 A.C. 426.

24. In the alternative, it is contended that the applicant failed to discharge the burden of establishing on an evidential basis that he would be at risk of persecution as a failed asylum seeker if returned; reliance is placed in that regard on *Zada v. The Refugee Appeals Tribunal* (Unreported, High Court, Clark J., 7th November, 2008). It was submitted that the COI submitted by the applicant indicates only that those who are opposition activists and supporters and who have been forcibly deported are at risk of persecution. It is contended that because the applicant's claim to be an opposition activist was found to be not credible, it follows that his claim that he faces persecution as a failed asylum seeker who is an opposition activist also failed.

25. As a further point, counsel for the respondents argued that the applicant's claim to fear persecution as a failed asylum seeker was made prematurely insofar as he was not yet a failed asylum seeker. Counsel pointed out that even if the applicant was refused a declaration of refugee status, the option of making an application for subsidiary protection remained open to him. In that regard he relied on the decision of Clark J. in *Lema (L.C.L.) v. The Refugee Appeals Tribunal* [2009] I.E.H.C. 26. He also pointed out that the applicant could apply to be re-admitted to the asylum system under s. 17(7) of the Refugee Act 1996, on the basis that a supervening factor had arisen. He submitted that the number of applicants who would establish such a supervening factor on the basis of their status as a failed asylum seeker would be very low.

26. Finally, it is submitted that even if it is the case that the Tribunal erred by failing to go further in this regard, the decision should be assessed as a whole and ought not to be quashed. Reliance is placed on the post-leave judgment in *Imafu v. The Refugee Appeals Tribunal* [2005] I.E.H.C. 416.

THE COURT'S ASSESSMENT
27. In brief, the applicant's case is that the Tribunal Member erred by failing to assess the applicant's asserted fear of persecution as a failed asylum seeker and by stating that it had been submitted that the applicant is in fear of persecution if he is refouled and that *"Under paragraph 5 of the Refugee Act 1996 as amended, refoulement is not within the remit of the RAT".*

28. It is my view that in the abstract, the impugned statement represents something of a misconstruction of the jurisdiction of the Refugee Appeals Tribunal. It is now very well established that the matters that are to be considered by the Minister under s. 5 of the Act of 1996 (the prohibition of refoulement in domestic law) are virtually identical to the matters to be considered by a Tribunal Member when determining whether an applicant's asserted fear of persecution is something which could bring him within the definition of a "refugee" provided by s. 2 of the Act of 1996, as is the role of the Tribunal Member pursuant to s. 16 of the Act. The distinction is that s. 5 (in contrast to Article 33 of the Geneva Convention) affords protection as a matter of general immigration law - its application is not limited to applicants for refugee status but rather extends to proposed deportees who have not made an application for asylum or subsidiary protection.

29. What is significant is that the High Court has now held on very many occasions that the Minister's role when assessing whether a proposed deportation would breach s. 5 is limited where the proposed deportee has been through the asylum process and has presented no new or special facts or circumstances in his or her representations seeking leave to remain. This is because the Minister is entitled to assume that absent new or special facts or circumstances, all of the matters that might bring the deportation within the remit of s. 5 have already been considered during the asylum process and found not to be present. It follows that it generally falls within the remit of the RAT to consider all of the matters that would later be relevant to the question of 'refoulement'. Thus, the Tribunal Member's statement is not an accurate reflection of the general jurisdiction of the RAT.

30. The question then for this Court is whether, in the circumstances of the applicant's case, his asserted fear of

persecution as a failed asylum seeker was one which – if found to be credible – could bring him within the definition of a "refugee" of s. 2 of the Act of 1996 and whether it was therefore a matter that required consideration by the RAT or whether the asserted fear would more properly be a matter to be raised in an application for subsidiary protection and/or an application for leave to remain temporarily in the State. It is useful to recall that the primary difference between a "refugee" and a person who is entitled to subsidiary protection is that there is no requirement for the latter to show a Convention nexus – that is, the risk of the applicant suffering serious harm need not be linked to his or her race, religion, nationality, membership of a particular social group or political opinion.

31. In support of their opposing contentions as to the potential for an asserted fear of persecution as a failed asylum seeker coming within a s. 2 definition of a "refugee", the parties have relied on a number of decisions from the Federal Courts of Australia and Canada and the English Court of Appeal. I must admit that I have not found the authorities cited by the parties to be helpful. No evidence was adduced as to how the immigration systems in Canada and Australia function and for that reason the court does not find the authorities from those jurisdictions to be persuasive. Furthermore, it is not clear from the judgments of the Federal Courts of those jurisdictions that there was any debate as to whether a fear of persecution by virtue of one's status as a failed asylum seeker could, in fact, bring a person within the meaning of Article 1A(2) of the Geneva Convention or an equivalent provision of domestic law or whether that was accepted on the facts of the case for the purpose of the argument.

32. Likewise, I do not think that the *A.A.* decision of the English Court of Appeal is entirely on point. What was under appeal in that case was the finding of the U.K. Asylum and Immigration Tribunal that the manner of forced removal of failed asylum seekers to Zimbabwe drew the attention of the authorities and led to a risk of persecution. It appears the voluntary return of Zimbabweans from abroad did not have the same effect. The decision of the Court of Appeal appears to me to be specific to the facts of the case, in the sense that it addressed the difficulties associated with forced return to Zimbabwe. It does not, in my view, exclude the possibility that in the appropriate circumstances a person might come within the definition of a "refugee" by virtue of his or her status as a failed asylum seeker.

33. A return to basic principles reveals that in order to come within the definition a "refugee" under s. 2, an asylum seeker must show a well-founded fear of persecution for a Convention reason, that is by reason of his or her race, religion, nationality, membership of a particular social group or political opinion. The court is not satisfied that failed asylum seekers *per se* are members of a particular social group or that they necessarily hold any particular political opinions. It seems to this Court, however, that where a clear Convention nexus is shown, a person's fear of persecution by virtue of his or her status as a failed asylum seeker might be capable of bringing him or her within the s. 2 definition.

34. A clear example of such a situation arose in *Gidey v. The Refugee Appeals Tribunal* (Unreported, High Court, Clark J., 26th February, 2008). Leave to apply for judicial review was granted in that case on the basis that the RAT decision did not appear to address the question of whether, having regard to country of origin information (COI) furnished to him, the applicant had a genuine fear of persecution if returned to Eritrea because of the prevalent persecution of returned asylum seekers as such. The Tribunal Member had before him cogent COI to the effect that if men of military age left Eritrea to seek asylum elsewhere they were regarded on return as having evaded military service and were, for that reason, imprisoned on return. Thus, their status as failed asylum seekers meant that a particular political opinion was imputed to them which meant that a Convention nexus was present.

35. A further example of a situation where a person's status as a failed asylum seeker meant that a particular political situation was imputed to him was seen in the previous RAT decision dealing with a national of Zimbabwe which the applicant obtained and furnished to the Tribunal Member. The court notes that the Tribunal Member's decision in that case mirrors the decision of the U.K. Asylum and Immigration Tribunal (A.I.T.) *in RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083 (19th November, 2008). In that case the A.I.T. referred to up-to-date COI which indicates that failed asylum seekers returned to the airport at Harare may be at risk of serious harm or persecution simply because they are unable to show support for or loyalty to the ruling Zanu-PF party. In the circumstances it was accepted that there was a real risk that the appellant, a teacher from Zimbabwe, would be assumed to be an opposition supporter if returned, particularly because she had spent some time in the U.K., even though she admitted that she had no personal political opinion or involvement in politics. The A.I.T. stated at para. 232 that:-

> "[…] regardless of the political opinion or associations of the individual, or the absence of any at all, the persecution involved in the infliction of such ill-treatment will be for a reason recognised by the Convention. This is because it is inflicted on the basis of imputed political opinion."

36. Ultimately the A.I.T. found that the appellant had established a well founded fear that she would be persecuted for a reason that is recognised by the Geneva Convention (see para. 269).

37. This Court adopts the reasoning of the A.I.T in *RN (Returnees*). It is relevant, however, that the credibility of the appellant in that case was not impugned and that she was open and honest about the lack of any political involvement on her part. The court is conscious that there is scope for asylum seekers to abuse the statutory asylum process by making an initial unfounded application for asylum and subsequently claiming a fear of persecution as a failed asylum seeker. The making of a self-serving, unfounded initial claim must, of course, not exclude any person from the protection of the Refugee Act 1996, but it seems reasonable that it be taken into account and accorded some weight by the decision-makers when credibility is being assessed. Indeed such a person might properly be called upon to explain why they deliberately exposed themselves to a risk of persecution by creating the conditions that would make them a failed asylum seeker. Moreover, given the scope for abuse of the asylum process, the court is satisfied that cogent, authoritative and objective COI that failed asylum seekers were targeted for persecution in the person's country of origin and demonstrating a Convention nexus would have to be shown.

Application to the applicant's case

38. As noted above, the applicant claimed in his supplementary submissions to the RAT that in addition to his fear of persecution by reason of his political opinion, he feared persecution *"by reason of his status if refouled to Togo as a failed asylum seeker and/or a failed asylum seeker who sought asylum abroad on grounds of his political opinion and/or by reason of his status as a failed asylum seeker if refouled who is opposed to the ruling regime"*. The applicant now complains that the Tribunal Member failed to assess that element of his claim.

39. It is significant in the context of that complaint that the Tribunal Member rejected the credibility of the applicant's

claim that he was an active member of the opposition party in Togo, that he was involved in the elections in 2003, that he was arrested because he was distributing opposition propaganda and detained and tortured as a result. At its height – and I am affording considerable benefit of the doubt to the applicant – I would characterise the Tribunal Member as having accepted that the applicant is a low-level opposition supporter from Togo. In the circumstances, in order for the applicant to have shown a well-founded fear of persecution as a failed asylum seeker which merited express consideration by the Tribunal Member in his decision, he would have to have put before the RAT objective and cogent COI to the effect that all failed asylum seekers returned to Togo are at a real risk of being persecuted for a Convention reason.

40. I turn now to assess the cogency of the COI furnished to the Tribunal. The court accepts that a number of relevant COI reports were before the Tribunal Member. The UNHCR's *Position on the Treatment of Asylum Seekers from Togo* (2005) detailed the situation of generalised violence and persecutory acts prevailing after presidential elections in 2005 which saw Faure Gnassingbé, son of the late President, elected. It was recorded that 16,000 Togolese within Togo had been internally displaced and roughly 40,000 opposition supporters and militants had sought asylum in Benin and Ghana on the basis of their fear of persecution at the hands of government militia and the army. Those people were, the UNHCR noted, particularly politicised and vocal against the new regime which was, meanwhile, attempting to portray a state of good will for reconciliation and was calling for the return of the refugees. The UNHCR noted that a High Commission for Repatriation and Reinsertion (HCRR) had been created to prepare for the repatriation and reintegration of Togolese refugees, and efforts had been made to restore normalcy. It recommended however that neighbouring countries grant refugee status or complementary forms of protection to Togolese asylum seekers, given that the security and political situation remained precarious and that there were continuing human rights violations on ethnic and political grounds. It further recommended:-

> "UNHCR advocates for a moratorium on forced removals of rejected asylum-seekers to Togo until further notice. The violent repression of opposition supporters by the State apparatus – army and militias - did not distinguish between high and low profile activity/support for the opposition. While this position is mostly relevant to situations arising as of February 2005, it would at least be advisable, for the cases adjudicated prior to the recent events in Togo, to conduct a case by case screening with a view to adjudicating every case based on its own merits, for the purposes of possible forced return."

41. Also before the RAT was an Amnesty International (AI) report entitled *"Togo: Will History Repeat Itself?"* (2005) which details eyewitness accounts of human rights abuses during the election period in 2005, gathered from those in refugee camps in Benin. Of note is that the report records:-

> *"Several reports indicate that some people who fled to Benin were arrested on return to Togo, after being recognised as opposition supporters*. This was what happened to a motorcycle taxi driver, Lawson Late, who returned to the country after Whitsuntide and was arrested as he crossed the border. The Togolese refugees in Benin told [AI]: *"he had been informed on because he wore yellow clothes and he carried a palm tree symbol on his bike during the electoral campaign. No one knows where he is.""*

42. Among various other recommendations the report calls on the international community to ensure that asylum seekers are not forcibly repatriated to Togo if they risk being victims of grave human rights violations.

43. Also furnished to the Tribunal member was a further AI report on Togo of 25th May, 2005, covering the year 2004. At the hearing of the within application the applicant sought to place particular emphasis on the following passage from that report, which stated:-

> "Arrest of returned asylum seekers. *There were reports that security forces arrested returned asylum seekers on their arrival in Togo. Some were released after a few days while others remained in unlawful detention for several weeks."*

44. An IRIN report dated April, 2006, entitled *"Benin-Togo: A year on, only a handful of refugees have returned"* was also before the Tribunal Member. That report stated that a year after political trouble, Togo sent 25,000 people to Benin, some 19,870 remained, fearing political reprisal should they return. It stated that incentives backed by the Togolese authorities had seen the return of some older and more vulnerable people. A UNHCR representative said he was happy about those returned and hoped to see more such decisions.

45. The report by the Swiss Refugee Council (SCR) of September, 2006 entitled *"Togo – Danger for returning Exiles who were involved in Oppositional Activities"* indicated that it can be assumed that the Togolese authorities take an interest in the oppositional political activities of Togolese exiles living in Germany (it being statistically the most significant host of Togolese asylum seekers in Europe). It noted that the UNHCR had stated in 1999 that it could be assumed that there was a threat, if only a regional one, with regard to the oppositional activities of an asylum seeker while in exile. The SCR noted that it was generally agreed that the situation in Togo had improved but there were ongoing problems for members of the opposition including incarceration, forced disappearances and torture. Most significantly, the SCR cited the AI report of 25th May, 2005 with respect to the arrest of asylum seekers at the airport, but stated that *"the number of these incidents has significantly decreased".* It was recorded that the most recent case in which the authorities were suspected of persecuting a returnee dated from the beginning of February, 2006. That incident involved a returnee who had been involved in political opposition while in exile. He was released after the Togolese Human Rights League intervened. No warnings had been received from within the ECRAN network with respect to the Togolese authorities subjecting returnees to repression. AI had indicated that there were no reports of returnees being prosecuted by the authorities upon arrival in Togo in recent times. The German Foreign Office reported that the Togolese authorities had generally set out to treat returnees properly, in order to avoid criticism. The SCR stated:-

> "The organisations named regard the degree of political activity as crucial to possible threats. Membership of a political party or exile organisation is not a decisive factor after this, but rather actual involvement in a party (for example, taking part in member assemblies and demonstrations, awareness of inner-party activities), whereby the degree to which the party is known plays an important role. The extent to which the activities of a person could damage the image of the Togolese government in the eyes of the German public is also significant."

46. The SCR again noted that there was evidence that the position of dissidents had improved since Gnassingbé was elected, and that returnees are not harassed immediately, as was often the case under the Eyadéma régime.

47. Having carefully considered the COI that was before the Tribunal Member, this Court is not satisfied that there was sufficiently cogent evidence that persons in the situation of the applicant – that is, failed asylum seekers who are not known, active opposition supporters – are at a real risk of persecution if returned to Togo for a Convention reason. The most up-to-date report suggests that while there was a time when persons returned to Togo were routinely arrested at the airport, there is no evidence that such practices continue and there is evidence that the situation even for active opposition activists has improved.

Conclusion

48. As is clear from the above, the court is satisfied that the Tribunal Member made a technical error as to jurisdiction when he stated *"Counsel submitted that the Applicant is in fear of persecution if he is refouled. Under paragraph 5 of the Refugee Act 1996 as amended, refoulement is not within the remit of the RAT".* An order of certiorari may therefore be granted but the court retains a discretion in all the circumstances of the case as to whether such an order should issue. The final question for the court is, therefore, whether it should exercise its discretion to grant orders quashing the RAT decision and remitting the appeal for rehearing.

49. In this case, although the Tribunal Member made a technical error in his decision as to his jurisdiction, he received all of the documentation upon which the applicant wished to rely and he heard all of the submissions presented by counsel in the course of the oral hearing in support of the applicant's appeal, including all of the information pertinent to the applicant's asserted fear of persecution as a failed asylum seeker. The Tribunal Member did not abridge the oral hearing or make any preliminary ruling which might have led to the exclusion of material or documentation which might have been made material to an assessment of the well-foundedness of that asserted fear.

50. This Court has had sight of all the material upon which this element of the applicant's asserted fear of persecution would have been determined had the Tribunal Member engaged in a consideration of the issue. The court is satisfied that even if the Tribunal Member had engaged in such a consideration, it would not have made any difference to the outcome: the applicant could not have succeeded as the evidence before the Tribunal Member was nowhere near as cogent as would be required to show a well-founded fear of persecution as a failed asylum seeker such as to bring the applicant within the definition of a "refugee" contained in s. 2 of the Refugee Act 1996. The court is also mindful of the many negative credibility findings drawn with respect to the applicant's account, which also grounded his asserted fear of persecution as a failed asylum seeker.

51. It is now well established that among the matters that may be weighed in the balance is the utility or otherwise of the relief sought: the court is entitled in its discretion to refuse to make an order of *certiorari* in a case where it is clear that the applicant can derive no benefit from it or where it would serve no useful purpose. In this case, the court is not satisfied that anything flows from the Tribunal Member's technical error as to jurisdiction: the applicant has not suffered any prejudice or injustice and it does not appear that the grant of an order of *certiorari* would have any beneficial effect. In the circumstances, the court refuses the reliefs sought.