

**THE HIGH COURT****JUDICIAL REVIEW****Record No. 2009 / 788 J.R.****Between: /****C. B. (D.R. CONGO)****APPLICANT****-AND-****THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM****RESPONDENTS****JUDGMENT of Ms Justice M. Clark, delivered on the 26th day of June 2012**

1. When she first applied for asylum in Ireland in 2003, the applicant did not disclose that she had applied for asylum in Belgium earlier that year and that she had spent time in Italy before going to Belgium from her native Democratic Republic of the Congo (DRC). This material non-disclosure was the primary reason why the Refugee Applications Commissioner and, in turn, the Refugee Appeals Tribunal (RAT) made negative credibility findings in relation to her narrative. She now seeks leave to apply for an order of *certiorari* quashing the RAT decision of dated 17th June 2009 on the basis that the Tribunal Member failed to apply a forward-looking assessment of risk and gave insufficient consideration to documentary evidence furnished. She also seeks declaratory and injunctive reliefs. The leave application was heard on 17th April 2012. Mr. Michael Lynn BL appeared for the applicant and Ms. Emily Farrell BL appeared for the respondents. The applicant requires a short extension of time which I am prepared to grant in light of the explanation given for the delay involved.

**Background to the negative credibility findings**

2. When she applied for asylum in December 2003 the applicant said that she came from Katana village in Bukavu, which is in the South Kivu province of eastern DR Congo close to the Rwanda / Burundi border. She said that in February 2003 and again in October 2003 she had suffered arrest, detention, beating and rape because of her activities in organising a named small, informal group operating in her village whose purpose was to educate people about rape and to warn against the activities of the RDC militia allied with Rwandan troops who were in occupation in eastern DR Congo. She said that after she escaped from detention in October 2003 she fled to Rwanda with the help of a sympathetic Commander who was friendly with her uncle. That man and her uncle then arranged and paid for her travel to Ireland. Some six months after her arrival, she gave birth to a daughter. It is assumed that the child is an Irish citizen. She said she left her ten year old daughter and her niece and nephew for whom she was responsible in the DR Congo and the last she heard of them was that they were with a priest.

3. The applicant expanded upon her account at her s. 11 interview and she again confirmed she had never claimed asylum before and had never been in the UK, France, Germany, Italy or Belgium. It was then put to her that the ORAC had information that she lived in Belgium and that she applied for asylum in Belgium on the 29th October 2002 having travelled there from Italy which she had entered on a visa. In Belgium she gave a very similar name spelled differently and said she was from the DRC but she gave a different year of birth. Pursuant to a "take back" request, Italy accepted responsibility for determining her asylum claim and on 2nd April 2003 she was directed to leave Belgium and apply for asylum in Italy but there is no record that she left Belgium or returned to Italy. When confronted with this information the applicant admitted that she had lived in Belgium from October 2002 to May 2003. She said she had transited through Italy and didn't know how long she was there, maybe 2 ½ weeks. She said that she returned to the DRC in May 2003 but fled again in November 2003. When it was put to her that her claim that she had been arrested and raped in her village in March 2003 could not have happened as she had been in Belgium at the time she replied, "*All those activities happened but they happened in 2002.*" She clarified that she had been arrested and imprisoned in 2002 and not in 2003 as previously stated and that she left the DRC in October 2003.

4. The s. 13 report which issued in March 2005 rejected her credibility. A negative recommendation issued and she was confined to an appeal on the papers in accordance with s. 13(6) (d) of the Refugee Act 1996 which meant that no oral hearing would take place.

**The Appeal**

5. The lengthy period which has elapsed between the ORAC negative recommendation and the RAT decision dated June 2009 is in part attributable to two previous challenges to the Tribunal decisions in April 2005 and January 2008. By the time the Tribunal came to consider the applicant's appeal afresh for the third time, the Tribunal Member had before her many documents which had not been before the ORAC at first instance together with a large number of country of origin information (COI) reports and lengthy written submissions. The new documents included medical reports, letters and personal documents, and previous RAT decisions relating to similarly situated applicants. The COI reports furnished concentrated heavily on the high incidence of rape in the conflict in the eastern part of the DRC. Further details were provided in relation to her asserted past persecution and it was claimed that when she returned to the DRC in May 2003 she encountered problems with soldiers who came to the village looking for her every day and eventually found her in October 2003 and that she had then been detained for three days on two separate occasions. A continuous flow of reports, newspaper extracts and documents were furnished to the Tribunal Member in the months following the lodgement of the fresh notice of appeal.

6. In March 2009 the Tribunal wrote to the applicant's solicitors seeking submissions on the alleged risk on the basis of the applicant's *sex simpliciter* and asking them to pinpoint how the submitted COI reports support the assertion that the applicant faced persecution on the grounds of political opinion and on account of her gender or indeed any other grounds. No submissions were made in response to the Tribunal's request.

**The Decision under Challenge**

7. In the impugned decision the Tribunal Member expressly referred to certain of the documents furnished by the applicant and noted

the volume of COI submitted. She summarised the submissions made on the applicant's behalf and specifically noted the submission that she faces persecution because of her membership of a particular social group namely women in east Kivu. She also noted that the applicant had submitted up-to-date COI relating to the conflict there and the extent of rape of women. In her analysis of the claim the Tribunal Member noted that the applicant had lied in respect of a number of different aspects of her account and she found that the applicant's explanation for changing the date of those events from 2003 to 2002 was not reasonable and called into question whether the events had occurred at all. The absence of any documentary support for the asserted return to the DRC from Belgium and her alleged travel again from the DRC to Ireland was noted and the many letters and statements furnished by the applicant were deemed to be self serving. Further the Tribunal Member stated that she was not in a position to verify the authenticity of those statements and she referred to "*recent media reports of the fabrication of affidavits by supposedly esteemed members of the communities in other countries*" which, she said, casts a "healthy dose of doubt" over documents presented as evidence of the truth of the facts asserted therein. She found:

*"In essence I am left with a claim by someone who is allegedly from the eastern part of the DRC, she is alleged to have been part of a political group, she is not in a position to prove any other aspect of her claim. I do not accept the bald assertion or contention that the Applicant will face persecution simply on account of the fact that she is a woman".*

8. The "failure or refusal" of the applicant's solicitors to reply to the Tribunal's letter seeking more focussed submissions was noted. Having criticised various aspects of the applicant's claim and the lack of supporting evidence she found that there was nothing objective to support the claim relating to her involvement with the group in her village so she was "*left simply with a claim that she is someone from the eastern part of DRC and is liable to be persecuted for whatever reason.*" Ultimately, she found she was not in a position to conclude that there was a reasonable likelihood that the applicant would be persecuted for a Convention reason if returned to the DRC.

### **The Applicant's Submissions**

9. The applicant's primary argument is that the Tribunal Member failed to grapple in any substantial way with her submission that she fears persecution by reason of her membership of a particular social group, namely women in eastern DRC. In so doing, the Tribunal Member erred in law in failing to apply a forward-looking test. Contrary to the view expressed by the Tribunal Member, the submission made was not merely a "bare assertion"; it was made repeatedly in correspondence with the Tribunal and was supported by independent and objective COI which was highlighted in the submissions and furnished in full to the Tribunal. It was argued on behalf of the applicant that the Tribunal Member accepted that this is a woman from eastern DRC and so, irrespective of whether or not the remainder of her narrative was a fiction, the Tribunal Member ought to have applied a forward-looking assessment of risk to the applicant based on her membership of the particular social group comprising women in eastern DRC. The applicant relies inter alia on the decisions of Cooke J. in *Q.F.C. and others v Refugee Appeals Tribunal & Others* [2012] IEHC 4 (12th January 2012) and *M.A.M.A. v Refugee Appeals Tribunal* [2011] IEHC 147 (8th April 2011).

10. The applicant also contends that the Tribunal Member failed to have sufficient regard to the documentation submitted on her behalf and in particular, gave insufficient weight to a UNHCR tracing document and to three documents submitted from medical personnel.

### **The Respondents' Submissions**

11. The respondents distinguish the situation of this applicant from those very special facts pertaining to the cases which were considered by Cooke J. in *Q.T.C.* and in *M.A.M.A.* where no clear finding had been made as to whether the applicants actually came from. The respondents also contend that women in eastern DRC are in a very different position to the women in Pakistan who were found to constitute members of a particular social group in *R v. Secretary of State ex parte Islam & Shah* [1999] 2 AC 629. Unlike women in Pakistan, men and women are at risk of harm and the fact of being a male in the eastern DRC does not exclude him from risk of violence. This differentiates this case from *Shah*. There is no dispute that there is a high incidence of sexual violence in the DRC but that is a facet of the indiscriminate violence which is also experienced by men and boys albeit that women suffer different forms of violence to men. As the violence is indiscriminate, there is no Convention nexus so this is a matter to be put forward at the subsidiary protection stage.

12. The respondents highlight numerous discrepancies in the documents submitted casting doubt as to their authenticity and they further contend that none of the documents answer any of the questions surrounding the applicant's credibility. The psychiatric report which is the only medical document of any real relevance does not go any distance towards explaining the untruths told to the ORAC. The medical reports had no corroborative potential. The applicant's depressive illness does not explain her inability to give a coherent and truthful account of her past. As this was an applicant entirely lacking in any credibility there was no point in going on to consider a forward looking test. The narrative of activism, detention, rape, beatings and escape were found to be fanciful.

### **Analysis**

13. The Court can identify no flaw in the Tribunal Member's assessment and consideration of the documentation furnished by the applicant. The personal documents which were before the Tribunal Member included an *Attestation de Perte des Pièces d'Identité* dated June 2003; a baptismal certificate dated March 2005; a death certificate dated February 2004; a handwritten letter dated March 2005 and signed by four women from the group she had helped to found in her village; her daughter's birth certificate from Kinshasa and her Irish-born child's birth certificate; an undated, handwritten letter from Abbé Bujiriri of Bukavu Archdiocese bearing a Rwandan telephone number and saying her daughter, niece and nephew were with his sister in Ibanda; and an email dated August 2004 from UNHCR Dublin stating that the UNHCR office in Bukavu had located Fr Bujiriri who said the children were with his brother in Bukavu. Also furnished were an *extrait du casier judiciaire* dated 2000 confirming that she had no criminal record and giving Kinshasa as her place of residence; an *APINOP certificat de réussite* dated June 1997 confirming completion of a computer course in her village; and a *certificat de participation* dated June 2002 confirming that she attended a conference in her village.

14. The Tribunal Member expressly referred to many of these documents including her daughter's birth cert, her father's death cert, her own baptismal cert, her certificate of lost national ID, the letter from the organisation in her village and the Fr Bujiriri letter, and the tracing email from UNCHR. The Court has no difficulty with the finding that the statements were self-serving and incapable of verification. Even on a quick glance, there are difficulties with the content of the documents: the village organisation which could not be found among the various NGOs operating in the area and which was described as one which did not hold public meetings and had just one officeholder now used headed paper. Several of the documents inexplicably emanate from Kinshasa, some 1000 miles from South Kivu. Further, the UNHCR tracing email of August 2004 refers to the applicant's children being with Fr Bujiriri's older brother in Bukavu while the undated handwritten letter from Fr Bujiriri says that the children are with his sister in Ibanda. The Tribunal decision indicates that the documents were considered and little weight attributed to them. The internal contradictions and inconsistencies in the various versions of the applicant's claim confirm the reasonableness of that assessment.

15. Similarly no flaw is identified in the Tribunal's assessment of the medical reports which were written by a clinical psychologist and

a consultant psychiatrist. The documents put forward a diagnosis of PTSD, depression of significant severity and psychological trauma partly attributable to her separation from her family and friends in the DRC. A later report from 2007 furnishes a history obtained from the applicant which includes involvement with a militant organisation as a secretary, which does not accord with the details of her claim. While it would have been preferable for the Tribunal Member to refer to the medical documents giving reasons for the rejection of their evidential value, as they neither add nor subtract from her narrative and may in fact contradict the accounts which she gave to the asylum authorities, the Court is not prepared to consider that this omission constitutes a substantial ground in this case.

#### **Forward looking test**

16. The applicant is without doubt a person shorn of credibility. The sole objective document before the Tribunal was the UNHCR email which indicates that her children are in the eastern DRC. The only aspect of her assertions which was not specifically rejected was her gender and asserted nationality and possibly that she is from eastern DRC. If that is so, then it is arguable that given the well documented prolonged violent conflict in that region, the Tribunal Member ought to have gone on to apply a forward-looking assessment of risk based on those basic elements. In *M.A.M.A. (Abdullah)*, Cooke J. adopted the findings made by Peart J. in *Da Silva* and continued:

*"17. [...] The sole fact that particular facts or events relied upon as evidence of past persecution have been disbelieved will not necessarily relieve the administrative decision-maker of the obligation to consider whether, nevertheless, there is a risk of future persecution of the type alleged in the event of repatriation. In practical terms, however, the precise impact of the finding of lack of credibility in that regard upon the evaluation of the risk of future persecution must necessarily depend upon the nature and extent of the findings which reject the credibility of the first stage. This is because the obligation to consider the risk of future persecution must have a basis in some elements of the applicant's story which can be accepted as possibly being true. The obligation to consider the need for "reasonable speculation" is not an invitation or for gratuitous speculation: it must have some basis in, and connection to, the apparent circumstances of the applicant.*

*18. It must be borne in mind that in making an asylum claim there is a basic onus of establishing the fundamental elements of a claim which rests with the applicant even if the examination of the claim is strongly investigative in character on the part of the asylum authority and is to be carried out in cooperation with the applicant. Furthermore, one of the crucial elements in the definition of "refugee" as stated in s. 2 of the Act of 1996 based upon Article 1A of the Geneva Convention, is that the asylum seeker "is outside the country of his or her nationality" owing to a well founded fear of persecution for one of the Convention reasons. The assessment of the fear claimed thus involves identifying a country of origin. Accordingly, if the finding on credibility goes so far as to reject a claim that the asylum seeker has a particular nationality or ethnicity or that he or she comes from a particular region or place in which the source of the claimed persecution is said to exist, there may be no obligation upon the decision-maker to engage in "reasonable speculation" as to the risk of repatriation in the case. On the other hand, if the decision-maker concludes that the asylum seeker is opportunistically seeking to place himself in the context of verifiable events in a particular place but decides that while such events did occur, the asylum seeker was not involved in them, the risk of future persecution may still require to be examined if there are elements (the language spoken or obvious familiarity with the locality for example,) which establish a connection with that place. Thus, opportunistic lying about participation in events involving previous persecution will not necessarily foreclose or obviate the need to consider the risk of future persecution provided there are some elements which furnish a basis for making that assessment."*

17. The Court considers that in this case, the Tribunal Member's finding that the applicant was a woman from South Kivu provides some foundation for a prospective risk assessment. There is strong support in the COI reports which were before the Tribunal Member that particularly egregious gender-based persecution takes place in South Kivu in addition to generalised and indiscriminate violence. Forward-looking submissions were made to the Tribunal on her behalf which urged an alternative basis for refugee status in the event that her narrative was disbelieved, grounded on that gender-based persecution. The Tribunal Member appears not to have addressed this claim. For this reason, leave will be granted to argue that a forward-looking test should have been applied in the circumstances.

18. Further it is at least arguable on the basis of the COI before the Tribunal Member that in the case of eastern DRC, gender is a relevant contributory reason for the rape and sexual violence suffered and that female victims of sexual violence suffer doubly as they are rejected by their husbands, family and community if it is known that they have been raped. As a very large amount of COI was furnished to the Tribunal to support the claim that violence in the DRC has a differential impact on women, the Court is prepared to grant leave to argue that the assessment of this part of the applicant's claim was conducted in error as the Tribunal Member failed to investigate or assess the possible risk to the applicant as a member of a particular social group. Instead she dismissed this aspect of her claim as a "bare assertion".

#### **Decision**

19. In the light of the foregoing I am satisfied that the applicant has established substantial grounds for the contention that the impugned decision ought to be quashed. Leave will be granted on the following grounds which reflect grounds (ii) and (vii) of the applicant's statement of grounds:

- a. The Tribunal Member failed to properly consider the submissions and country of origin information that were made by the applicant's solicitor that the applicant was at risk of persecution by reason of her membership of a particular social group as a woman; and
- b. Given that her gender and nationality were not specifically rejected, the Tribunal Member erred in law in failing to carry out any forward-looking assessment of the risk faced by the applicant on return to the Democratic Republic of the Congo, including whether she was at risk as a woman.