

**THE HIGH COURT
JUDICIAL REVIEW**

[2009 No. 1143 J.R.]

BETWEEN

J. K.

APPLICANT

AND

BEN GARVEY ACTING AS THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 24th day of October 2013

1. In this telescoped application for judicial review, the applicant complains that the respondent Tribunal Member breached fair procedures by failing to inform him or his lawyers that there was a significant contradiction as to a material fact in his evidence which was tendered in three stages: at an oral hearing (which was adjourned); at a resumed oral hearing and in documents subsequently submitted by the applicant.

2. The applicant is from the Democratic Republic of Congo. He was a member of the Parti National Congolais ("the PNC"). He claims he was a driver for the President of that party and that he was arrested and imprisoned for approximately two months between December 2006 and February 2007. He claims to have been distributing party material when he was arrested on the street, beaten and then incarcerated. During his time in prison, he says he suffered further beatings and harsh conditions. With the assistance of a priest (a close relative, he says) he escaped and eventually sought asylum in Ireland on 19th February 2007. His oral appeal at the Refugee Appeals Tribunal opened on 4th September 2008. At this hearing, he was asked questions concerning the President of the PNC. The Tribunal Member records his evidence about the President of the PNC as follows:

"That the applicant was working as a mechanic at that time and when he joined PNC he became a chauffeur to the President of the party. He was asked if the President was still alive and he replied in the affirmative. He was asked if the President was in Parliament and he replied, 'he was'. He was asked when did he stop being in Parliament and the applicant replied, 'I don't know'. He said the elections were held in 2006, the President of the party was elected as an MP. The applicant said the President went to South Africa in 2006 but never returned. He was asked when did he go to South Africa and he replied, November 2006."

3. Having given other evidence relative to his arrest and detention, the hearing was adjourned to facilitate a medical examination and to obtain a medical report concerning injuries he allegedly received in beatings and torture by State authorities.

4. At the resumed hearing, the applicant was asked questions by the representative of the Office of the Refugee Applications Commissioner (the Presenting Officer). The exchange between the applicant and the Presenting Officer is recorded by the Tribunal Member as follows:

"Between 2004 and when he left in 2007, he was asked if any elections were held and he replied 'Yes, in 2006'. He was asked if anybody in PNC stood for elections and replied, 'PNC didn't contest the elections'. In reply to other questions, the applicant said he drove a car for the leader and his name was Jemadari-Vi-Bee-Kil Kilele."

5. In this account of the evidence, the contradiction is immediately apparent. When the applicant first gave evidence in September 2008, he said that the President of the party was elected as an MP in the elections of 2006. When the hearing resumed in July 2009, the applicant indicated that the party did not contest the elections of 2006.

6. An issue arose at the oral hearing concerning the up-to-date status of the PNC. The Tribunal Member permitted the applicant and his adviser to submit further country of origin information to deal with this issue. One of the documents submitted by the applicant's advisers is an extract from what appears to be an online news service entitled 'African News' and it is dated 30th July 2006. The opening passages of the news article are as follows:

"While millions prepare to cast their votes in the Democratic Republic of Congo's historic elections today, an exiled activist has become embroiled in damning allegations of seeking to overthrow the new Government.

Jemadari Vi-Bee-Kil Kilele, leader of the Parti National Congolais (PNC) was fingered in a coup plot captured on secret video footage.

Kilele, a refugee in South Africa, has confirmed that he was the man shown in footage published in Beeld yesterday. The footage was captured during a meeting with South African security specialists in Johannesburg last year and was one of at least 11 he had held with the men ..."

7. As will be seen, the significance of this document (although submitted in connection with the issue of the status of the PNC) is that it indicates that on the day of the elections in the Democratic Republic of Congo in July 2006, the leader of the PNC was already a refugee in South Africa. This contradicts the evidence originally given by the applicant.

8. The Tribunal Member assesses the relevant parts of the applicant's evidence in the following terms:

"The genesis of his [the applicant's] claim is that because of his association with the PNC party his life is in danger. He

told the Tribunal that he joined the party in 2004 and became a chauffeur for the President, Mr. Kilele. He claims the President was a politician who was elected in 2006, but when asked if he was still a member of the Parliament, the applicant said he didn't know. He was asked the current whereabouts and he stated the President went to South Africa in November 2006 and he, the applicant, was arrested the following month. The Tribunal is in receipt of documentation from the applicant's legal representative, and it contained, *inter alia*, an excerpt from 'African News' dated July 30th 2006. The document stated that Mr. Kilele, leader of the PNC, was fingered in a coup plot, captured on secret video footage and is now a refugee in South Africa. If the applicant was even a member of PNC, he would be aware of when his leader left DR Congo. This article fundamentally undermines the applicant's claim that he was a member of the PNC and chauffeur for the President of PNC."

9. I accept the submission on behalf of the respondent that a protection decision maker is not required to notify a witness/ applicant that he or she has given such contradictory evidence as to undermine the credibility of the testimony.

It is important to point out that the Tribunal Member rejects the applicant's credibility principally because he gave evidence that the President of the PNC went to South Africa in November 2006, which evidence is contradicted by subsequently submitted documents indicating that the President had become a refugee in South Africa by July 2006. Rationally, the Tribunal Member found that if the applicant, an active party member, was, as he claimed, the President's chauffeur, he would know when he the Democratic Republic of Congo for South Africa. The applicant does not strenuously deny that he said that the President went to South Africa in November 2006. His averment in his grounding affidavit is as follows:

"... the Respondent again records that my evidence was that the President of the PNC was elected in 2006. I say that this is not a correct record and is a material error of fact in the Respondent's record of my evidence on 9th July 2009. I say that the Respondent also records that I gave evidence that the President of the PNC went to South Africa in November 2006. I say that I certainly did not give this evidence during my oral hearing on 9th July 2009. I say that I do not believe that I gave that evidence on 4th September 2008. I say that I believe it is not a correct record of my evidence from either date of my oral appeals. I say that because of the lapse of time since the 4th September 2008 that I cannot recall the proceedings or the evidence I gave on 4th September 2008 with any clarity. I say that I do not believe I gave such evidence to the respondent on either date."

10. The applicant was represented by Counsel and the Refugee Legal Service during the asylum application process. Neither the applicant nor his lawyers have submitted any written note of the applicant's evidence at the oral hearings. If such were available to support the applicant's version of events, I imagine it would have been put in evidence. As the applicant himself says, because of the lapse of time, he cannot recall the proceedings or the evidence he gave with any clarity. In circumstances where the applicant says that he does not believe he gave certain evidence, and where he also says he cannot recall with any clarity what evidence he gave, his averment that he did not say that the President was elected in 2006 is not sufficient to overcome the record of his evidence contained in the decision of the RAT.

11. From the tone of the averments in the applicant's grounding affidavit, and having heard Counsel (who also represented the applicant during the asylum process) it is apparent that on the resumption of the oral hearing by the RAT in July 2009, the applicant's lawyers were not alive to the fact that it was a resumed hearing. The Tribunal Member knew that it was a resumed hearing and he was entitled to assume that the applicant's lawyers, having been present at the first outing, knew this and he was also entitled to assume that they were aware of differences between evidence given at the first hearing and evidence given at the second resumed hearing. In particular, the Tribunal Member was entitled to assume that the applicant's lawyers knew that the applicant originally stated that the President of the party had been elected in the elections of 2006, and that at the resumed hearing, he said that the party did not contest the elections. In documents subsequently submitted on behalf of the applicant by his lawyers, the position taken at the second hearing was corroborated by a document which indicated that the President of the party was in exile in South Africa on the date of the elections in 2006.

12. In *Idiakheua v. The Minister for Justice, Equality and Law Reform* [2005] IEHC 150, Clarke J., said, at p. 9:

"If a matter is likely to be important to the determination of the RAT then that matter must be fairly put to the applicant so that the applicant would have an opportunity to answer it. If that means the matter being put by the Tribunal itself, then an obligation so to do rests upon the Tribunal. Even if, subsequent to a hearing, while the Tribunal Member is considering his or her determination an issue which was not raised, or raised to any significant extent, or sufficient at the hearing appears to the Tribunal Member to be of significant importance to the determination of the Tribunal, then there remains an obligation on the part of the Tribunal to bring that matter to the attention of the applicant so as to afford the applicant an opportunity to deal with it. This remains the case whether the issue is one concerning facts given in evidence by the applicant, questions concerning country of origin information which might be addressed either by the applicant or by the applicant's advisers, or indeed, legal issues which might be likely only to be addressed by the applicant's advisers.

In setting out the above, I would wish to make clear that the obligation to fairly draw the attention of the applicant or the applicant's advisers to issues which may be of concern to the Tribunal arises only in respect of matters which are of substance and significance in relation to the Tribunal's determination."

13. Subsequently, in a decision entitled *Imoh & Ors. v. The Refugee Appeals Tribunal* [2005] IEHC 220, Clarke J. commented on his earlier judgment in *Idiakheua* and said:

"As I indicated in that judgment compliance with the principles of constitutional justice requires that a person conducting an inquisitorial process such as that involved in refugee applications may be required to bring to the attention of any person whose rights may be effected by a decision of such a body any matter of substance or importance which that inquisitorial body may regard as having the potential to effect its judgment. However, it is clear from p. 9 of that judgment that the underlying principle is 'that whatever process or procedures may be engaged in by an inquisitorial body, they must be such as afford any person who may be affected by the decision of such body a reasonable opportunity to know the matters which may be likely to effect the judgment of that body against their interests'."

14. I do not read either statement by the learned Clarke J. as amounting to a rule whereby a decision maker must put a contradiction in evidence to a refugee applicant. But in this case, as is apparent from the passage from the Tribunal decision quoted above, it was not so much the contradiction relating to whether the President had been elected that counted against the applicant. The part of the applicant's testimony which undermined his credibility was the fact that he did not know the date of the President's departure for South Africa, notwithstanding the assertion that he was the President's driver. The Tribunal asked the applicant, at the hearing in

September 2006, when did the President go to South Africa. Though the applicant does not believe he replied in the manner recorded by the Tribunal Member, he does not deny that the matter was raised with him. The lack of knowledge about the President of the party counted against the applicant's credibility. In my view, the state of the applicant's knowledge about the President, the party's participation in the elections of 2006 and the circumstances of the President's departure from the DRC were adequately explored with the applicant at the Tribunal. The Tribunal Member was entitled to weigh the applicant's evidence on these issues and to come to conclusions on the applicant's credibility. In my view, no breach of fair procedures occurred. I therefore reject this ground of challenge to the decision of the Tribunal.

The SPIRASI Report

15. Counsel for the applicant contends that the Tribunal Member failed to consider, or failed to consider adequately, the SPIRASI report submitted on behalf of the applicant. The examining physician at the Centre for the Care of Survivors of Torture, having examined the applicant, concluded as follows:

"Mr. K. has several physical findings that are highly consistent with his allegations of being brutally beaten by the DRC authorities. For example, examination of his teeth and face demonstrated a missing tooth and scars on the left side which are highly consistent with the allegation of being struck in the left side of his face. The scar on his right wrist and absent digit on the right index finger are consistent with his allegation of being cut by a soldier's knife during the scuffle on the street. These latter findings are highly consistent with defensive injuries."

The Tribunal Member referred to this evidence and said:

"With regard to the medical evidence, the Tribunal accepts the author has given a professional opinion relating to the marks and scars on the applicant's body however it is the function of the Tribunal to assess such a report in the light of the entire evidence accumulated during the course of the applicant's application. The Tribunal recognises the marks on the applicant's body are present but does not accept they were inflicted in the manner described by him."

16. The Tribunal Member had rejected the credibility of the applicant for a number of stated reasons unconnected with the medical report. In my opinion, the approach of the Tribunal Member to the medical evidence was correct. It should be recalled that the medical opinion merely records that the markings and scars are consistent with the applicant's allegations as to how they were inflicted by certain persons. The Tribunal Member quite correctly accepts that the applicant has suffered physical injury, but having rejected his credibility as to his general narrative of political involvement, the Tribunal Member is acting consistently with this finding by also rejecting the claim that the injuries were inflicted by soldiers in connection with his political activities. As to the correct approach to be taken in the assessment of medical opinion compiled in accordance with the Istanbul Protocol see the decision of Clark J. in *R.M.K [DRC] v. Refugee Appeals Tribunal* [2010] IEHC 367, where the learned judge noted: "Medical evidence is not determinative of a fear of persecution for a Convention reason and must be viewed in the round with those preliminary circumstances but does not by itself neutralise negative credibility findings. To take an extreme example, an applicant may present with scars and old injuries which suggest that the bearer suffered greatly in the past but his narrative of being from a particular conflict zone where resort to torture is well known might be found to be simply not credible. This may be, for example, because he displays no knowledge of specific geographical features of the area, is unaware of well known local customs or historical events, or is unable to speak the local language. If the primary finding is that he is not from that area, then the probative effect of injuries consistent with torture for the purpose of assessing whether he has a well founded fear of persecution for the reasons alleged is regrettably nil."

Other Credibility Findings

17. Complaint was made by Counsel for the applicant in respect of other credibility findings made by the Tribunal Member. At the relevant part, the Tribunal Member held as follows:

"[the applicant] told the Tribunal that he was arrested on 19th December and escaped from the military camp on 11h February when he was in a working party and ran away into the forest. He appears to have stated on his questionnaire that he left his country of origin on 15th February. He claims he went to Tanzania and spent a few days there before travelling here via France and arriving here on 18th February. The Tribunal does not find the account of his escape and travel arrangements to be credible. Further, it does not find it credible a priest in third world country would have the authority or the money to finance the applicant and an agent to travel to Europe in the manner described."

18. The applicant does not deny that he told the Tribunal that he escaped from the military camp on 11h February 2007 and arrived in Ireland on 18th February 2007 which appears to contradict his claim that he spent a few days in Tanzania before travelling from Tanzania via France to Ireland. The Tribunal Member refers to the fact that in his questionnaire he indicates that he left his country of origin on 15th February, 2007. The complaint maintained by the applicant is that in his questionnaire, he indicated that he left prison on 12th February 2007 and not on the 15th February as recorded by the Tribunal.

19. I accept that had the Tribunal Member noted the date given at interview and in the questionnaire (12th February) as the date of escape from prison, he might not have come to the same conclusions regarding the lack of credibility of the account of the applicant's travel to Ireland. I also accept that the Tribunal Member engaged in speculation when he found it not to be credible that a priest in a Third World country would have the resources to finance the applicant's escape. However, these criticisms are directed at peripheral findings in respect of the applicant, and even if upheld, could not have the effect of undermining the rejection of the applicant's credibility as to his political activities and connection with the President of the PNC. I therefore find that these complaints do not aid the applicant and cannot ground any relief for him. I reject the application for leave to seek judicial review.