

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2008 /769 J.R.

Between:/

S. Y. (TOGO)

APPLICANT

-AND-

**THE REFUGEE APPEALS TRIBUNAL (Mr Conor Gallagher), THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND
AND THE ATTORNEY GENERAL**

RESPONDENTS

JUDGMENT OF MS JUSTICE M. CLARK, delivered on the 4th day of October 2012.

1. The applicant claims to fear persecution in his native Togo because of his membership of the UFC political party. This decision involves the substantial hearing of an application to quash the decision of the Refugee Appeals Tribunal on the following grounds which were granted by Hogan J. on the 9th February 2012:

1) The Tribunal erred in law and in fact in finding that the Applicant's evidence with respect to government soldiers searching for him on 1st December, 2003, following publication by the Applicant of a critical internet article, and on 22nd December, 2003, when the Applicant prepared to flee, was 'very coincidental' and having 'an air of unreality'. In particular, the Tribunal failed to make an assessment of the Applicant's evidence in the light of the country of origin information.

2) The Tribunal erred in law and in fact in finding that there existed no objective evidence that the publication of an internet article critical of the government regime would lead to an exposure to persecution. Country of origin reports indicated that the government authorities engaged in denial of internet access and censorship.

3) [The applicant did not pursue ground 3.]

4) The Tribunal erred in law and in fact in finding that the Applicant's credibility was undermined by his failure to apply for asylum in Ghana. In particular, the Tribunal failed to consider the explanation provided by the Applicant, which explanation was supported by country of origin information.

5) The Tribunal erred in law and in fact in finding that the Applicant was 'a low profile' member of the UFC'. Further and in the alternative, the Tribunal failed to ask the essential question of whether low level political activists opposed to the government faced a threat of persecution.

2. As can immediately be observed, a large number of issues is contained within those four grounds. The appeal came to the Refugee Appeals Tribunal on the basis of documents only, without an oral hearing, following a finding by the Refugee Applications Commissioner under s. 13(6) (a) of the Refugee Act 1996. The Commissioner essentially found that the applicant had not established any basis for claiming asylum and that he was unable to give a good reason for not applying for asylum in Ghana, the country adjoining Togo where he spent six weeks before coming to Ireland.

3. The essence of the Commissioner's decision dated April 2005 was that if the applicant was a UFC member then at most, he was involved at a low level and would be unlikely to attract government attention as there was no evidence that low level activists were at risk from the authorities. In other words, his asserted fear of persecution was found not to be objectively sustainable when measured against country of origin information (COI). To a lesser extent doubts were expressed on his credibility but it is fair to say that the applicant's claim of involvement with the UFC was not rejected. This determination was upheld by the Tribunal Member on appeal.

4. By way of background, the applicant claims that he came to Ireland in early 2004 and immediately sought asylum at the offices of the Refugee Applications Commissioner (ORAC) as an opposition party political activist. The basis of his claim is that he supported the UFC opposition party in Togo and had done so for 13 years throughout his student years and thereafter. When he left Togo he was a salesman, 37 years old, the father of two teenage boys and a part-time postgraduate student. His activities with the UFC involved distributing leaflets, disseminating information and recruiting young people. In late 2003, he was organising youths in collecting tyres for bonfires as a form of anti-government protest on the anniversary of President Eyadema's coming to power on the following 13th January. In late November 2003 he wrote an article critical of President Eyadema for publication on a Togolese diaspora internet website. These two sequential events brought him to the attention of the authorities causing the leaders of the UFC to advise him to quit Togo for Ghana and then to leave Ghana because it was unsafe for him to remain there. He was told that his bonfire plans had been exposed and that government sources would view his plan as a plot to overthrow the regime. He left immediately for Ghana where he remained in hiding until he was advised to go to Ireland. He did not apply for asylum in Ghana because other people who had fled there were killed or deported back to Togo to be killed or tortured. All the arrangements were made for him including the provision of a false passport which he did not open at any stage. He then came to Ireland.

5. In support of his claim, the applicant furnished identity documents including his student card and his UFC membership card and the article which he wrote titled *La Politique d'Eyadema: "Moi ou le Chaos au Togo"* which was posted on the Diastode website. He later submitted a UFC *Attestation/Confirmation of membership* dated 10th February 2004 which stated that he had courageously taken part in demonstrations and protests against the regime which forced him to leave his country in December 2003. This document suggested that given the climate of political misinformation which exists in Togo, it would be harmful to return him to that State. He

also submitted a medical report dated 29th July 2001 which states that the authors were requested by the applicant to furnish the report to confirm that he had presented with several visible bodily wounds and was treated from 22nd to 27th April 2001.

The Appeal

6. The applicant's Form 2 Notice of Appeal addressed the findings in the Commissioner's section 13 report and pointed out that the applicant had never claimed to be a leader of the UFC and that, as a matter of law, prominence is not a pre-requisite to refugee status based on political opinion. Four reports on Togo were furnished from Amnesty International and the US Department of State dealing with the human rights situation in Togo for the years 2002 and 2003. Two *Convocations* (summonses) dated 16th May 1997 and 19th November 2003 which had not been referred to in the applicant's questionnaire or interview were also furnished. In the first instance, the applicant was required to appear before the Anti-gang Brigade of the Togolese National Police and in the second, before the Judicial Police Central Division. Their relevance was not explained and they added little to the case.

The Tribunal Determination

7. Having considered all the documents before him including COI reports dealing mainly with the events leading up to the presidential election in June 2003, the Tribunal Member accepted that the applicant is a national of Togo and found that on his own evidence, he was a low profile UFC member who was organising a low level protest. He found that the applicant's departure from Togo was because his party wanted him to leave as the applicant had said at interview that he did not fear the authorities even after they came to the family home in search of him after his article was posted on the internet. He found that the applicant's plan to burn tyres could be viewed as a criminal act which would not bring the applicant under a Convention ground. He accepted that there is no requirement for prominence in political life in order to qualify as a refugee but he questioned whether the applicant's standard of involvement was such that he would be viewed by the government as a threat. He made negative findings about the applicant's failure to claim asylum in Ghana and his account of how he travelled to Dublin and his statement that he did not open the passport which had been provided for him and taken away as soon as he cleared immigration. He concluded that while the applicant holds a political opinion different to the Togolese government, there was no objective evidence that the publication of an opinion on the internet would expose him to persecution and he doubted that the writing of the article resulted in soldiers calling to his home and threatening his family. He also had significant doubts about whether tyre-burning constitutes a legitimate expression of political opinion and he also questioned whether the plan to burn tyres exposed him to the RPT as he had claimed. He therefore found that he was not a person of high profile and had no significant difficulty with the Togolese police and upheld the negative recommendation made by the Commissioner. He commented that it was "very coincidental" that soldiers came to find him on the same date as the date of publication of the article and again on the date when he made efforts to leave Togo and this, he said, had an "air of unreality".

The Applicant's Submissions

8. The first and fifth of the applicant's grounds are inter-related. They provide:

***Ground 1.** The Tribunal erred in law and in fact in finding that the Applicant's evidence with respect to government soldiers searching for him on 1st December, 2003, following publication by the Applicant of a critical internet article, and on 22nd December, 2003, when the Applicant prepared to flee, was 'very coincidental' and having 'an air of unreality'. In particular, the Tribunal failed to make an assessment of the Applicant's evidence in the light of the country of origin information.*

***Ground 5.** The Tribunal erred in law and in fact in finding that the Applicant was 'a low profile' member of the UFC'. Further and in the alternative, the Tribunal failed to ask the essential question of whether low level political activists opposed to the government faced a threat of persecution.*

9. Grounds 1 and 5 essentially complain that the Tribunal Member misconstrued the level of the applicant's activism and misinterpreted the COI when he found that there was nothing to suggest that UFC members in the applicant's position would be exposed to persecution. As previously mentioned, these grounds are difficult to advance when the applicant's own appeal documents explained his lack of awareness of some high profile events in March 2003 and June 2003 as being attributable to his busy life as the primary carer to his sons while also a postgraduate student and salesman. Further, on his own evidence, he did not claim to be a leader or a decision maker but claimed he was a very active member of the party engaged in the organisation of a tyre-burning protest in Lomé on 13th January. He did not describe any role or involvement in the election campaign of 2003. Of further significance is the letter which purports to come from the UFC and was written after the applicant came to Ireland. This letter describes his activities as taking part in protests and demonstrations. In those circumstances, it is difficult to see how this finding of his position as a low profile activist can be impugned.

10. The applicant further argues that having found that he was a low profile UFC activist, the Tribunal Member erred in failing to consider whether such persons are exposed to a risk of persecution. It is perhaps unnecessary to state that such an argument would be bound to succeed if the Tribunal Member had ignored objective evidence supportive of the claim that the holding of an opinion contrary to that of the government has the consequence of exposing rank and file supporters of opposition parties to persecution. While it is unnecessary for any individual facing or fearing persecution to play a significant role or have a prominent position in the cause of the persecution, such an individual must still establish that there is a reasonable likelihood that he would be persecuted. The reality is that no such evidence was contained in any of the four objective COI reports put before the Tribunal and the applicant has been unable to point to anything in those reports which supports his claim that low level activists like him are exposed to persecution. Grounds 1 and 5 are therefore not established.

Ground 2

11. The second ground on which leave was granted is as follows:

***"Ground 2:** The Tribunal erred in law and in fact in finding that there existed no objective evidence that the publication of an internet article critical of the government regime would lead to an exposure to persecution. Country of origin reports indicated that the government authorities engaged in denial of internet access and censorship.*

12. There is abundant evidence to support the Tribunal Member's finding and there is nothing in the COI reports to support the claim made under this ground. There were certainly several references in the COI furnished supporting the difficulties for journalists and opposition leaders. For instance, the first Amnesty International report on Togo published on 26th May 2004 describes that the president of a group which distributed a report on the human rights situation in Togo to the European Parliament had been accused of publishing defamatory articles and threatened with legal proceedings. It also stated that journalists were summoned by the government to explain their articles; that one journalist had been detained in a cyber cafe in Lomé while preparing a piece on election violence and that two other journalists had been arrested and tried for criminal libel. One journalist was convicted and the other acquitted.

13. The second Amnesty report entitled Togo- an election tainted by escalating violence was published on 5th June 2003, immediately after the controversial election. It addressed several issues including the intimidation of the media and it records that in the months coming up to the 2003 elections, journalists were intimidated, newspaper editions were seized and radio stations were closed. Journalists were pressurised into not publishing information hostile to the government and media figures and journalists including the director of a weekly paper were told to publish only the official election estimates and results and to avoid commenting on the holding of the elections themselves. However, a pro-government newspaper was able to publish opinion polls favourable to the President. Of relevance to the applicant's claim were the reports which stated that *"the authorities informed an internet cafe owner that internet access would be cut during the hours immediately after the election"* and that the authorities had for some months prevented access to some internet sites in Togo, particularly after the publication in 2002 of an interview with a high profile politician in exile who was critical of the Eyadema government. Access to other websites including the UFC website was also blocked during the post-election period.

14. The US Department of State *Country Report- Togo* published in 2004 stated that during 2003, print media journalists suffered repeated harassment and intimidation and faced criminal libel prosecutions. Newspapers vendors were occasionally harassed, and advertisers were intimidated. Independent newspapers were permitted to circulate outside of the capital and journalists practised self-censorship but pro-opposition newspapers were not permitted to operate in most towns. There was, however, a lively independent press most of which was heavily politicised and some of which was highly critical of the President. More than 15 privately-owned newspapers published with regularity and only the daily newspaper was government-owned and controlled. Journalists were frequently threatened, arrested and detained without charge. Three named journalists who were researching security force brutality were arrested, detained and beaten in June 2003 and were tried. Two were found not guilty of the charges while one was convicted of attempting to publish false information. The US Department of State report continued:

"The Government did not restrict access to the approximately 15 Internet service providers in the country. Most Internet users were businesses rather than households. Access to the Internet and fax machines also was available in many small stores and cafes in Lome and other cities. "

15. Against this background the Court observes that the applicant is not a journalist or broadcaster. He lived in Lomé where internet access was available except for the immediate post election period. Residents of Lomé had access to many independent newspapers which regularly published articles highly critical of the government. At the time when he says he wrote the article, he was a postgraduate student who worked part time as a salesman of car and motorbike parts. His article was not published before, during or immediately after the elections. It was written well after the results were confirmed by the Togo Constitutional Court and could not have influenced voters. It contains no information which was not already in the public domain and it is difficult to see how it could have any repercussions for the regime. The "Diastode" website on which it was published appears to be targeted at people living outside of Togo and has its headquarters in Canada. There is no evidence that it was censored by the regime or that it was monitored to the extent that a blogger could be identified and the security forces directed to go to his home to seek him out within hours of the posting. The internet censorship highlighted in the COO and on which the applicant relies relates almost exclusively to the lead-up to the 2003 elections and it refers only to a temporary restriction of internet. It is apparent that the Tribunal Member's remarks on coincidence and unreality derive from the question that if the applicant feared the government's reaction to such an article then the obvious question was why, as the principal carer of his two sons, did he write it and why on a diaspora website? Was it because he sought to create a reason to claim a fear persecution? For those reasons the Court cannot accept that the Tribunal Member's finding was in error as outlined in ground 2.

Ground 4

16. The fourth of the grounds on which leave was granted is as follows:

"Ground 4. The Tribunal erred in law and in fact in finding that the Applicant's credibility was undermined by his failure to apply for asylum in Ghana. In particular, the Tribunal failed to consider the explanation provided by the Applicant, which explanation was supported by country of origin information. "

17. The applicant says he spent six weeks in Ghana and travelled through Holland en route to Ireland but he did not apply for asylum in either of those countries, choosing to wait until he arrived in Dublin. It is well established that failure to apply in the first safe country is not per se a valid basis for recommending that an applicant should be refused refugee status. However, an applicant's inability to provide a reasonable explanation for not applying in the first safe country when he had an opportunity to do so may affect his credibility. Section 11B(b) of the Refugee Act 1996 as inserted by s. 7(f) of the Immigration Act 2003 requires the Commissioner and Tribunal Member, when assessing credibility, to have regard to *"whether the applicant has provided a reasonable explanation to substantiate his or her claim that the State is the first safe country in which he or she has arrived since departing from his or her country of origin or habitual residence"*.

18. The applicant's explanation for choosing to wait until arriving in Ireland to apply for asylum was that he was aware that previous applicants in Ghana had been killed or tortured or deported to Togo where they were tortured and killed. He did not explain his decision not to apply in Holland. He relies on a passage from the Amnesty report published in May 2004 which he furnished to the Tribunal which states that *"Seven out of a group of nine refugees arrested in Ghana in December 1997 and handed over to the Togolese authorities remained in detention. They had not been charged or tried, and reports suggested that no investigating magistrate had interrogated them."* This report evidently refers back to an incident in 1997; it does not address the situation in December 2003 and January 2004 when the applicant claims to have been in Ghana and it provides no context or background to the arrest and handing over of Togolese refugees. Meanwhile the June 2003 Amnesty report (also furnished by the applicant) states:-

"Refugees and displaced persons

The escalating violence experienced by Togo in the last few weeks has led to an unknown number of people, especially in Lomé, to flee the country to find refuge in Ghana, which is only a few kilometres away from the Togolese capital. Amnesty International has received reports that some people have sent their families to Ghana for safety. The United Nations High Commissioner for Refugees (UNHCR), sent an evaluation mission to the Ghana border to evaluate the number of Togolese refugees. "

19. The 2002 US Department of State furnished by the applicant states that there were 800 Togolese refugees living in Ghana and *"There were no reports of the forced return of persons to a country where they feared persecution."* On the applicant's own evidence he remained in Ghana for six weeks at the house of a UFC affiliate without encountering any difficulties, albeit that he says he stayed in hiding but maintained contact with the UFC while there. The general thrust of the COI furnished by the applicant suggests that those fleeing persecution were able to find safety in Ghana in the relevant period, and in that context the Court can find no irrationality, unfairness or unreasonableness in the finding that he had not given a reasonable explanation for his decision not

to apply for asylum until arriving in Dublin. In addition, the applicant is a well educated French speaker without family in Ireland and it has to be recalled that the recommendation for refugee status was not withheld because he failed to apply in the first or subsequent safe country. The appeal failed because of the absence of evidence that a person in the applicant's stated position would have been exposed to persecution and because of a high degree of scepticism relating to the repercussions claimed from the internet article and the bonfire plans.

Generally

20. From the arguments advanced at the substantive hearing it is clear that this is not a case about the misapplication of law by the Tribunal Member in his assessment of the claim made. It is almost exclusively focussed upon the reasonableness of conclusions reached when set against the four reports prepared by Amnesty International and the US Department of State, which were furnished by the applicant to the decision makers. In the view of the Court, the appeal was conducted with full regard to every aspect of the applicant's claim and to his appeal submissions and following a careful analysis of the COI reports. The applicant quite simply overstated his involvement with the UFC and was unable to establish a well founded fear of persecution.

21. The Court has found difficulty in ignoring a very unusual feature of the applicant's evidence in that there is a complete lack of reference to any difficulties or experiences suffered by him as an opposition activist during the election campaign of the earlier part of 2003. The reports previously outlined which were furnished by the applicant refer extensively to tensions before and after the elections and outline the significant difficulties endured by prominent journalists and opposition party leaders who were subjected to high levels of harassment during that period. The reports all refer to and describe several incidents of election violence leading to the deaths of an activist who challenged the stuffing of ballot boxes and two school children who were caught in gunfire, and the reports portray the lack of meaningful investigation into those and other offences committed by the security forces. They describe complaints of ballot rigging, difficulties in obtaining voting cards, the blocking of certain candidates from participating in the election and widespread protests and the fear of escalating violence following the deeply unpopular and probably invalid results of the vote. The applicant's evidence is singularly silent on any aspect of the elections and he was unaware of the details of any of the incidents of violence when they were put to him by the interviewer on behalf of the Commissioner. Notwithstanding the detailed serious harassment of high profile journalists and opposition leaders and contrary to the applicant's assertions, the reports refer to the availability of internet access, of a large number of opposition newspapers and of lawfully established political parties. There is no reference to the targeting of low level opposition activists *per se* although there is ample criticism of the government's poor human rights record, the poor conditions in overcrowded prisons, the lack of real independence in the judiciary and the length of pre-trial custody. While not minimising the tolerance of a climate of impunity on the part of security forces in Togo, it remains the fact that it was not possible to find support for the applicant's claim that he was or would be specifically targeted for what in effect was an internet blog and for preparing bonfire protests. The Court notes that the applicant's letter was published with his name and city of address on an internet site which expressly states that articles will be accepted from writers who wish to remain anonymous and further that they will protect all persons' personal details. Although this was not the subject of a specific finding, it must have contributed to the finding that the letter added to the coincidence and unreality of the action in the applicant's decision to flee.

22. Although the applicant failed in his appeal, the Court discerns that the Tribunal Member had a certain sympathy for him. It is very possible that in the extraordinary number of years which have passed since the applicant first applied for asylum in 2004, events may have occurred in Togo which would place even a low level political activist in danger. He will be in a position to address the implications of those changes for him should the Minister refuse him a declaration and should he choose to apply for subsidiary protection and I or humanitarian leave to remain. Changes in his country of origin might also ground an application for re-admission to the asylum system should a declaration be refused.

Decision

23. As no illegality has been identified in any of the grounds on which leave was granted whether by way of error, unfairness, irrationality, unconstitutionality, mistake of law or unreasonableness, this application fails and the reliefs sought are refused.