

**THE HIGH COURT**  
**JUDICIAL REVIEW**

2008 6 JR

**BETWEEN****L.D.E.****APPLICANT****AND****BEN GARVEY ACTING AS THE REFUGEE APPEALS TRIBUNAL****RESPONDENT****AND****MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND IRELAND AND ATTORNEY GENERAL****NOTICE PARTIES****JUDGMENT of Mr. Justice Cooke delivered the 16th day of March, 2010.**

1. The applicant seeks leave to apply for judicial review of an appeal decision by the Refugee Appeals Tribunal dated 21st September, 2007 which affirmed a section 13 report and negative recommendation of the Refugee Applications Commissioner made on 6th November, 2006. In the appeal decision the Tribunal member rejects the claim and reaches the same conclusion as the authorised officer in the section 13 report effectively upon grounds of lack of credibility in the account given by the applicant as his reason for fleeing his country of origin.

2. The basis upon which the applicant claimed asylum can be summarised as follows. He was born in Luanda, Angola in 1970 to parents who were, he says, from Cabinda. (Cabinda is an exclave province of Angola separated from it by part of the territory of the Democratic Republic of Congo and its status has been the subject of controversy and of separatist demands in recent years notably by the FLEC Movement – Front for the Liberation of the Enclave of Cabinda).

3. The applicant says that he had twelve years education in Luanda and continued to live and earn his living as a trader there until 2004. He said he had a wife or partner named M.J. who died of malaria according to a death certificate put in evidence. He claimed to have two dependent children in Angola although from another relationship.

4. The events said to form the basis of his fear of persecution if returned to Angola were as follows. His father, as a native of Cabinda, had been a supporter of FLEC. In 1998 after the death of the applicant's mother, the father finished work in Luanda and returned to live in Cabinda. There he became an active official of FLEC and meetings were held in his house.

5. The applicant remained living and working in Luanda until 2004 but then decided to move to Cabinda to be with his father as his father was the only person close to him.

6. Although he never attended the FLEC meetings held in the house or discussed the movement with his father, one day he criticised the Angolan authorities to some work colleagues and expressed the view that Cabinda would be better off if independent. Two days later the police came to his house, took him away, detained him, beat him badly and then transferred him to prison in Luanda where he remained for over a year. While in prison he claimed to have learned from a truck driver employed by his father that his father had been killed by the authorities. The driver bribed the prison authorities to obtain the applicant's release. Having sold the father's truck he used the money to flee via Namibia and South Africa to France and thence to Ireland with the help of an agent to whom he paid \$6,500.

7. As mentioned, the Contested Decision turns entirely upon findings of lack of credibility in the applicant's above account of his personal history and reasons for leaving his country of origin. Compared with other Tribunal decisions, the s. 6 analysis of that claim in this instance is relatively detailed – it runs to over four pages – and identifies a series of specific points as being implausible. As a starting point, however, it accepts that persons who are perceived to be supporters of FLEC by the Angolan authorities can be detained and assaulted according to the country of origin information submitted to the Tribunal.

8. Although mentioned at the end of the s. 6 analysis, the Tribunal member makes two findings by reference to the statutory indices of credibility in s. 11B of the Refugee Act 1996 (As Amended). He found that the applicant had not provided a full and true explanation as to how he had arrived in the State and also that his failure to seek asylum when travelling through South Africa and France was not consistent with an intention to flee from persecution with a view to obtaining refuge.

9. Amongst the particular points identified as being implausible are the following:

- The applicant's assertion that he left Luanda to be close to his father as he was not close to anyone else when he was at the time in a relationship and about to become a father;
- The fact that he would leave Luanda where he had a source of income and go to Cabinda when he found the situation there unacceptable and the subject of his complaints;

- The fact that he would move to Cabinda after 34 years of a peaceful life in Luanda and when he had continued to live and work there for six years following his father's departure;
- The fact that he disputed the contents of the death certificate in respect of his late partner;
- The fact that he was arrested and detained in his father's house in October, 2004 when his father, as a FLEC activist, was not questioned or his house searched;
- The fact that during a lengthy interrogation he was never questioned about FLEC documents found in the family home; and that he did not know anything about the documents being found until March 2006;
- The fact that although he had lived with his parents all his life, he was unable to say when they had originally left Cabinda;
- The fact that he would openly criticise the government's attitude to Cabindan fellow workers whom he claimed not to know very well when he had claimed to have warned his father of the dangers of political involvement.

The Tribunal member makes the general observation:

"It is difficult to substantiate in any real or meaningful way if the events that the applicant stated occurred in Angola actually took place or not given the inherent subjective nature of his claim."

10. In the face of those detailed findings of lack of credibility, the issue before the court is whether any substantial ground has been raised upon this application which would justify the grant of leave having regard to the fundamental legal criterion that the decision on assessment of credibility in these cases is that of the administrative decision maker. The High Court will not substitute its own assessment of credibility and is only concerned to ensure that the process by which the conclusion to that effect has been reached is free of any material defect of law or fact.

11. The grounds upon which it is proposed to rely to challenge the legality of this appeal decision can be summarised as follows:

- (a) The Tribunal member erred in the manner in which credibility was assessed in that, having accepted that perceived supporters of FLEC could be detained and assaulted, he failed to consider whether the applicant's account was believable when it was consistent with that information;
- (b) The Tribunal member failed to make any assessment of the applicant's political opinion or imputed political opinion and to make any finding as to whether the applicant was, as he claimed, a supporter or sympathiser of FLEC.
- (c) It is submitted that the Tribunal member erred in failing to take account of the significance and effect of a number of medical reports which confirmed that the applicant had been significantly traumatised by the experiences he described having had and which had resulted in his suffering from post traumatic stress and depression.
- (d) With regard to the findings under s. 11B as to the applicant's travel to Ireland and arrival it is submitted that the Tribunal member failed to have regard to the whole picture and, in effect, allowed these findings to diminish the serious significance of the events described by the applicant in his personal history.

12. The court is satisfied that none of these grounds gives rise to a substantial issue such as would justify the court interfering in the assessment of credibility made in this Contested Decision. In the primary submission made on behalf of the applicant, reliance is placed upon a passage in the judgment of Kelly J. of 26th July, 2000 in *Camara v. M.J.E.L.R.* as follows:

"Simply considered, there are just two issues. First, could the applicant's story have happened or could his apprehension come to pass on their own terms, given what we know from available country of origin information? Secondly, is the applicant personally believable? If the story is consistent, with what is known about the country of origin, then the basis for the right inference has been laid."

13. The essential point being made on behalf of the applicant is that his personal history of the events in Luanda and Cabinda which led to his flight from Angola is consistent with the circumstances described in the country of origin information available to the Tribunal member and was accepted as such by him. That being so it is submitted that the Tribunal member erred by failing to make specific findings as to whether the detailed ingredients of the events described by the applicant did or did not take place.

14. Having regard to the basis upon which the Tribunal member reached his conclusion, this submission on the part of the applicant is, in the court's judgment, misconceived and unfounded. The Tribunal member has, in effect, answered in the negative the second question posed by Kelly J.: "Secondly, is the applicant personally believable?"

15. For all of the specific reasons identified in the decision including the particular items listed in para. 9 of this judgment, the Tribunal member has clearly found that the applicant was not to be believed.

16. The fallacy in the submission thus made is that the mere consistency of the story told with circumstances or conditions described in country of origin information does not make the story true. A carefully crafted personal history which is largely invented can always be made consistent with known country of origin information. That is the classic dilemma frequently faced by decision makers in making an appraisal of an application for asylum.

17. The numerous discrepancies, inconsistencies and implausibilities identified by the Tribunal member in the history recounted by the applicant clearly demonstrate that the Tribunal member had come to the conclusion that the account was not true.

18. In accordance with s. 11B of the Act of 1996, the Tribunal member was entitled and required when credibility was seriously in issue to have regard to the indices of credibility listed in that section. The Tribunal member points out that the applicant had described how, with the aid of an agent, he had travelled to this country without ever having handled a passport or even a boarding pass. He had no idea of the nationality of the passport used and believed that it did not contain his own photograph. Having regard to the stringent security checks that are in place in all international airports in the last ten years, it is clear that the Tribunal member was entitled if not indeed compelled to find that description as incredible when the applicant's travel involved passing through three

such airports.

19. The significance of the indices of credibility listed in s. 11B is that they are, for the most part, matters which lend themselves to more direct verification by reference to facts or information available to the decision maker and not dependent solely upon the word of the applicant. By contrast, the applicant's account of going to Cabinda to be with his father and of the circumstances of his arrest and detention and subsequent imprisonment are matters which are entirely dependent upon the believability of the applicant. In such cases, country of origin information can assist the decision maker if it indicates conditions in a country of origin inconsistent with the events described in which case the account will not be believed. The corollary, however, does not follow, namely that events not inconsistent with country of origin information must be believed.

20. Nor, in the court's judgment, is this assessment altered by the reliance placed in the proposed grounds upon the contents of the medical reports. These reports including, in particular, that of Dr. Donal O'Donovan of 25th July, 2007, and of Dr. Patrick O'Sullivan of 26th April, 2007 record the history given by the applicant as to the injuries he claims to have received as a result of his beating and mistreatment when detained and imprisoned in Angola. Thus, for example, the report of Dr. O'Sullivan observes four lesions on the scalp; the skin over the wrists appearing to be discoloured; linear scars on the right thigh and below the left knee together with various non-specific marks on both lower legs. Dr. O'Sullivan says:

"On examination Mr. L. had various marks on his body, on his scalp and legs which would be consistent with the injuries and physical abuse he reports sustaining. He appears to have suffered significantly psychologically as a result of his experiences before he came to Ireland and is currently depressed and anxious. Mr. L. claims to feel hopeless and has had recurrent thoughts of self-harm."

21. Dr. O'Donovan gives a similar description of the scars but expresses the opinion that the scars on the scalp are "consistent with a blow like a hard object, like the butt of a gun". The scars on the leg are described as "consistent with kicks inflicted by hard kicks by persons wearing tough boots such as military boots causing lacerations of the skin". The scars present on the right wrist and forearm are said to be "consistent with the burns caused by excessively tight cuffing of the wrists with coarse rope".

22. In the Contested Decision the Tribunal member confirms having carefully considered the medical reports and to have done so "in conjunction with the Istanbul Protocol in the light of the *Khazadi* decision". (This is a reference to the judgment of Gilligan J. of 19th April, 2007 in *Khazadi v. M.J.E.L.R.* to the effect that medical evidence before the Tribunal must be "considered, weighed in the balance and a rational explanation given as to why the Tribunal member was making a finding that the applicant was not credible".

23. The court is satisfied that the contents of these two medical reports together with the others that were made available to the Tribunal, are not such as vitiate the assessment of credibility made by the Tribunal member in this case. In each instance the doctor describes the scars and other marks and says they are "consistent" with the particular forms of mistreatment the applicant described to them. Viewed objectively, however, it is clear that the particular scars and marks are equally capable of being attributed to other accidents or other causes. The fact that a scar is consistent with a blow from a hard object does not mean that the hard object in the particular case was the butt of a gun. The fact that a scar is consistent with being kicked by someone wearing heavy boots does not mean that the wearer was a soldier or that the boots were military boots. The medical evidence does not have any probative force as such in establishing the credibility of the account given by the applicant.

24. As this Court has pointed out in other cases, medical evidence can be of probative value in assessing credibility where it can be related to a specific cause or event. Thus, where a scar or mark can be shown by reference to its age, its location on the body and other particular characteristics to be explicable only or in all probability as having been inflicted by some third party in a particular way or with a particular instrument, it may amount to a cogent proof of torture if that is what is claimed. (See, for example, the judgment of the court in *Pamba* of 19th May, 2009 (Unreported, High Court, Cooke J., 19th May, 2009). That, however, is not the case in this instance.

25. The court should also make it clear that it does not regard the judgment of Gilligan J. in the *Khazadi* case as having the intention or effect of creating any authoritative precedent as to the probative value to be attributed generally to medical reports in cases of this kind. In the first place, the judgment appears to be available only in the form of an unapproved transcript without any indication of the full circumstances or evidence considered by the court in that case. Secondly, it is clear that the case turned on its own very special facts and particularly upon one feature of the medical reports namely that the three doctors involved all "specifically indicated that they would be grateful if the content of these reports would be considered" when the matter (presumably the asylum application) was being dealt with. One doctor in particular had said "he would strongly hope that the various factors to which he referred in the report would be taken into consideration in any appeal".

26. In effect, the learned High Court judge identified the error that had been made by the Tribunal in that case as that of having come to a conclusion on credibility by reference to two or more of five non-medical factors and that it was only after reaching the conclusion that the Tribunal member had paid regard to the medical evidence. Having regard to the particular nature of the medical evidence in that case, Gilligan J. held that it ought to have been weighed in the balance in reaching the assessment of credibility. As already indicated, the present case cannot be similarly characterised.

27. For all of these reasons the court is satisfied that no ground of any substance has been raised as to the existence of any defect in the process by which the assessment of credibility in this case was made. Quite apart from the two statutory findings for the purposes of s. 11B, the Tribunal member has identified a series of factors which render implausible the entire factual account upon which the claim to a fear of persecution rests. In the course of argument counsel for the applicant has sought to impugn the assessment made by the Tribunal member by submitting that it was based upon speculation and conjecture and that the Tribunal member had failed to "engage" as he put it with particular parts of the evidence such as, for example, the applicants ability to speak the Fiole language of Cabinda.

28. To the extent that the Tribunal member does, for example, express scepticism as to the applicant's explanation for leaving Luanda to go to Cabinda at the age of 34 years, that is not speculation or conjecture but the expression of a query based on common sense.

29. Finally, in the Statement of Grounds as originally formulated but not pursued in detail at the hearing, it was sought to be suggested that the Tribunal member had made a series of "basic, fundamental and significant" errors of fact by "failing to state" in the decision particular items of evidence given by the applicant at the appeal hearing. In a decision of this kind, it is not necessarily a defect that the Tribunal member fails to record in the body of the decision every single item of evidence, fact or event which has been referred to in evidence. In this case the court is satisfied from the summary of the case made by the applicant as summarised in slightly more than two pages of section 3 of the decision under the heading "The applicant's claim" together with the further details set out in the analysis at s. 6, that the Tribunal member was conscious of the substantive detail of that claim and fully addressed it in

all its material ingredients in making the appraisal of credibility.

30. For all of these reasons, the court is satisfied that no substantial ground has been raised in this case which would justify the grant of leave. The application must therefore be refused.