Neutral Citation Number: [2009] IEHC 301

THE HIGH COURT

2006 1151 JR

BETWEEN/

M. N.

APPLICANT

AND

DAVID McHUGH (ACTING AS THE REFUGEE APPEALS TRIBUNAL),

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr Justice Cooke delivered on the 1st day of July, 2009.

1. By order of 2nd July, 2008 Birmingham J. granted leave to the applicant to bring the present application for an order of *certiorari* quashing the decision of the first named respondent dated 19th July, 2006, (the "Contested Decision") which rejected an appeal against a report of the Refugee Applications Commissioner dated 30th November, 2005 recommending that the applicant's application for asylum be refused and that he should not be declared to be a refugee.

2. Leave was granted to apply for judicial review of the Contested Decision on the basis of a single ground as follows:

> "The respondent," [that is the Refugee Appeals Tribunal,] "made a basic and fundamental error of fact in applying dated and irrelevant country of origin information in the form of a lecture given by Mohammed Dayri to the applicant's claim while ignoring up to date and relevant country of origin information annexed to the Section 13 report as well as the acknowledgment of such persecution at paragraph 5.2 of the report in stating that "the UPDS members were no longer targeted and persecuted after August 2003 in breach of natural and constitutional justice requirements in failing to make a copy of that lecture of Mr. Dayri available to the applicant and his legal representative".

3. The applicant is from the Democratic Republic of the Congo and he claims to have fled that country in 2005 in fear of persecution for his political activities as a member of the Union for Democracy and Social Progress, (the UDPS). He applied for asylum here on 30th September, 2005.

4. He claims to have been a member of the UDPS since 1991 but it was not until April 2005 that his membership caused him problems. He claims that in April 2005 while discussing with others the organisation of a political march he was arrested and interrogated. He was then released when he denied being a member of the UDPS. Some days later soldiers came for him at his house at night but after warning him to stop the propaganda against the authorities or he would be killed, they left when some neighbours began making noise to drive them away. On 17th and 18th May, 2005 complaints at the lack of electricity for over two weeks led to protests and to the burning of offices of government political parties. Soldiers were then sent, he says, to burn down the UDPS offices and one person was killed. He was amongst those arrested but he was released the following day with a warning after he had been photographed and had his identity card confiscated.

5. When further confrontations with soldiers took place on 21st June he was again arrested and beaten and taken to prison. He escaped with the aid of a guard whom he knew and, after staying with his sister in hiding, he escaped through Zambia and South Africa to Ireland. He says that if returned to the Democratic Republic of Congo he would be tortured and even killed.

6. The report of the Refugee Applications Commissioner rejected the applicant's claim as lacking credibility and paid particular attention to apparent discrepancies between his account of the events in May 2005, (the burning of the party offices *etc*.), and reports of such disturbances and demonstrations as found in the country of origin information. The report found that while some points of his assertions were consistent with some country of origin reports, the authorised officer had doubts as to whether he had actually been present.

7. The Contested Decision also rejects the applicant's claim on grounds of credibility. Specific aspects of his story were considered to be implausible such as, for example, his being released at first arrest upon denial of UDPS membership although he said the authorities knew who he was; and his description of his escape with the help of an old school friend.

8. There is no doubt, however, that one factor appears to have influenced the conclusion of the Tribunal member both as something which went to the credibility of his description of the events in May 2005, and as a possible factor in the continuing well foundedness of the risk to UDPS members. This was the information the Tribunal member appears to have gleaned from a lecture given in Dublin on 14th to 16th June, 2004 by Mohammed Dayri who was a UNHCR protection officer in Kinshasa. Mr. Dayri is recorded as having said that while UDPS members were being targeted and persecuted until August of 2003 this was no longer the case thereafter following the return of the party leader Etienne Tshisekedi.

9. Understandably, this information appears to have been considered important by the Tribunal member not only because it ran counter to the applicant's account of the attacks on the party members in 2005 but because the information, unlike much country of origin information downloaded from a variety of sources on the internet, was given personally in Dublin by a UNHCR official with personal first hand experience of that country of origin.

10. As counsel for the respondent pointed out, the single ground for relief is comprised, in effect, of two limbs. The first limb concerns an alleged error of fact resulting from a reliance on the irrelevant and dated country of origin information, (the Dayri information), in disregard of preferable country of origin information found in the annexes to the Section 13 report. The second limb is directed at a procedural illegality in the alleged use of the Dayri information without its being made available to the applicant as required by principles of natural and constitutional justice and (in an argument not mentioned in the statement of grounds but added in the applicant's legal submissions,) as required by section 16 (8) of the 1996 Act.

11. The Court considers that the ground advanced in the first limb is not well founded. The Court is satisfied that the Tribunal member does appear to have considered generally the country of origin information that had been put before the Tribunal in and with the Section 13 report and there is no obvious basis for implying that the consideration was selective or one sided even if it is undoubtedly true that particular attention was paid to the Dayri information. On page 10 of the Contested Decision, under the heading "General", the Tribunal refers generally to having noted the country of origin information but it is also clear from the summary of the exchanges that took place at the appeal hearing on pages 2 to 5 of the Contested Decision that other parts of the country of origin information were discussed and were put to the applicant. In particular, on page 3 specific reference is made to a "Swiss country information source" on the UDPS which appears to be corroborative of the Dayri information to the effect that the position of the UDPS party had altered following the return of Mr. Tshisekedi in 2003. This source appears to be the "Swiss Info" Report of 9th July, 2005 entitled "Congo opposition holds rally under heavy security" and which reports on a rally in Kinshasa attended by 20,000 activists and addressed by Mr. Tshisekedi who demanded the resignation of the transitional government.

12. It is correct, of course, that the country of origin material includes data on continuing incidents and abuses of human rights such as those identified in the applicant's submissions. However, the issue with which the Tribunal member was concerned was that of the claimed continuing persecution of the entire UDPS membership as such. The Tribunal member says expressly at page 11 of the Contested Decision where he gives his reasons:

> "Having considered country of origin information supplied by the applicant I am satisfied that these incidents are isolated incidents and do not point to a change by the translational DRC government to systemically target and persecute UDPS members. Such incidents do not, to my mind, displace the assessment of Mr. Dayri to the UNHCR heretofore."

In the Court's judgment there appears to have been ample and sound basis for that conclusion in the material before the Tribunal and no obvious error has been made in the appraisal of the applicant's story in that respect.

13. Slightly more difficult is the issue raised by the second limb of the single ground because it may well be that there was a technical non compliance with the requirement of section 16 (8) of the 1996 Act. Even that, however, is by no means certain because, for one thing, it is by no means clear what form the Dayri information may have taken.

14. It is first mentioned in the Contested Decision at page 3 where the Tribunal member records

> "It was put to the applicant is it not the case that the UDPS was a legal party in the DR Congo and that they were actively participating in politics and were preparing for the next election. The applicant stated that the situation was complicated with regard to the politics of the situation in the DR Congo. The Tribunal put to the applicant that country of origin information to wit Mr. Mohammed Dayri a lecturer 14th June, 2004 at Dublin stated the UPDS while being persecuted up until August 2003, were no longer persecuted after the return of their leader Etienne Tshisekedi and that accordingly from that date UDPS members were no longer targeted because of their membership. The applicant stated that he had been targeted because of his involvement in the UDPS as given in his evidence."

15. The information is then mentioned again in the "Decision and Reasons" section where the date is mistakenly given as June 2005:-

> "It was put to the applicant concerning country of origin information that Mr. Mohammed Dayri, UNHCR protection officer at Kinshasa, in his lecture to the ORAC and the Refugee Appeals Tribunal on 14th to 16th June, 2005 stated in Dublin that while it was the case that the UDPS members were being targeted and persecuted up until August 2003 this was no longer the case with effect from August 2003 with the return of Etienne Tshisekedi, the UPDS leader."

16. It is clear, therefore, that Mr. Dayri gave a lecture on that date to that audience. However, it seems to be agreed that no text of that lecture was produced at the appeal hearing when the information was put to the applicant and it is not disputed that no such text was ever furnished by the Tribunal in accordance with Section 16 (8) since the hearing.

17. In dealing with this point counsel for the respondents emphasised that no request had been made on behalf of the applicant either at the appeal hearing or at any time since for the production of the lecture and it was submitted that there was no obligation on the Tribunal under Section 16 (8) to furnish it in the absence of such a request. Although it is not directly material to the present judgment the Court would observe in passing that it does not accept that submission. Section 16 (8) provides:

> "(8) The Tribunal shall furnish the applicant concerned and his or her solicitor (if known) and the High Commissioner whenever so requested by him or her with copies of any reports, observations or representations in writing or any other document, furnished to the Tribunal by the Commissioner copies of which have not been previously furnished to the applicant or, as the case may be, the High Commissioner pursuant to section 11(6) and an indication in writing of the nature and source of any other information relating to the appeal which has come to the notice of the Tribunal in the course of an appeal under this section."

18. The Court considers that the words "whenever requested by him or her" in the earlier part of that sub-section refer

only to the furnishing of reports, observations and representations to the High Commissioner and not to the duty owed to the applicant and/or the applicant's solicitor. It is to be noted that section 16 (8) in this regard contrasts with section 13 (10) which deals with the corresponding obligation of the Commissioner in relation to documents and information arising in the investigative stage of the process. Because that stage is investigative in character and is not final where the recommendation is negative, the duty is to furnish documents and information with or after the report and not necessarily before it. (See the judgments of this Court in *RLA v. The Minister for Justice, Equality and Law Reform* (Unreported, 30th April, 2009, paras. 10 to 12) and in *P.S. (a minor) v. RAC and The Minister for Justice, Equality and Law Reform* (Unreported, 18th June, 2009, at para. 22).

19. Section 16 (8) on the other hand is concerned with a second and adversarial phase of the process culminating in a final ruling on which the Minister will base his decision to grant or refuse the declaration of refugee status. For that reason the subsection provides - in the Court's reading of it - that in compliance with the requirement for a fair procedure, documents and information not already given to the applicant at the earlier stage, are to be furnished by the Tribunal before the final decision is adopted.

20. In the case of the Dayri lecture it is by no means clear to the Court, and neither party is in a position to confirm it either way, whether the particular point put to the applicant was derived from a written text or from something Mr. Dayri said on the occasion of the lecture. Counsel for the respondent drew attention to the judgment of Clark J. in the case of *Mongenda v. The Minister for Justice, Equality and Law Reform* (Unreported, 29th November, 2007), where the Dayri lecture of 14th to 16th June, 2004 was also mentioned. Clark J. refers, however, to "the extract of the report of" that meeting which she then says indicates "that when Mr. Dayri was being questioned regarding current information on the political situation in the DRC and in particular information relating to the present treatment of the UPDS he advised an improved situation".

21. This seems to suggest that the particular pronouncement on the UDPS came orally during a question and answer session on the occasion of that lecture and may not have taken the form of a written text of the lecture. The report referred to by Clark J. may be a newspaper report for all we know.

22. However that may be, there is no doubt but that the Tribunal member did make use of the information to that effect at the hearing and if he derived it from a lecture or newspaper report in his possession it came within the first part of s. 16 (8) - documents to be furnished. If he was simply relying on his recollection of what he heard Mr. Dayri say orally it came within the second part, - information the nature and source of which should have been the subject of a written indication. In that sense there may well have been a technical non compliance with the requirement even in the absence of a request by the applicant.

23. Nevertheless, the Court is satisfied that even if there has been a non compliance with the strict terms of the statutory requirement it has been a technical defect which would not justify the quashing of the appeal decision on that ground alone.

24. In the first place, it is clear that there was no substantive violation of the principle of natural or constitutional justice which s. 16 (8) reflects because the information was openly disclosed and put to the applicant at the hearing. The applicant, therefore, had the possibility of disputing it or of demanding an opportunity of examining its source and context with a view to rebutting it after the hearing and before the decision was adopted.

25. Secondly, the item of information did not stand alone. The point being made, - the change of position of the UDPS and its members since 2003, - was confirmed elsewhere in the country of origin information as already indicated above.

26. Finally, the quashing of this decision on this ground would not in any event be warranted by a procedural defect in respect of such an item of evidence when the decision turns upon a broader negative finding of credibility based upon a number of facets of the applicant's story unrelated to the Dayri information including; the absence of any documentation of the applicant's UPDS membership; the absence of any apparent difficulty for the applicant from 1991 to 2003 when members of the UPDS were indeed being targeted; the implausibility of his arrest and release on denial of membership and the implausibility of his account of his escape from prison.

27. The Court, therefore, finds that the Contested Decision has not been shown to have been vitiated by error of fact nor rendered sufficiently flawed by procedural defect in the form of non compliance with s.16 (8) of the 1996 Act as to require it to be quashed as unlawful. The application for relief will, therefore, be refused.