

THE HIGH COURT

2006 No. 902 J.R.

BETWEEN

L.L.M.

APPLICANT

AND
**MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM
 REFUGEE APPEALS TRIBUNAL**

RESPONDENTS

Judgment of Mr. Justice McMahon delivered on the 9th day of December, 2008

Introduction

1. The applicant is from Democratic Republic of Congo. He arrived in the State on 6th September, 2005 and applied for asylum. His application for refugee status was refused by the Refugee Applications Commissioner (hereafter the "RAC") on 30th December, 2005. A notice of appeal dated 9th January, 2006 was lodged and an appeal hearing took place on 8th March, 2006. The appeal from the negative findings of the RAC was rejected by the Refugee Appeals Tribunal (hereafter the "RAT") by decision dated 30th June, 2006. The applicant has brought judicial review proceedings to quash this decision of the RAT on three grounds:- a fundamental error of fact, a lack of credibility finding, and delay.

2. The delay issue was not pressed by counsel for the applicant at the hearing before this court in light of the fact that an affidavit explaining the reasons for the delay was filed shortly before the hearing in this court. The other two grounds will be addressed hereunder.

3. The relevant background is set out in the respondent's outline of legal submissions and it is adopted here as a general statement of the applicant's history before he came to this country, although some of the matters are disputed and these will become apparent later in this judgment.

"The applicant claims to be a school teacher. He is married with three children but they are still in Democratic Republic of Congo ("DRC"). He is a member of a teacher's trade union and participated in a school strike in February, 2005. He is also a member and active in organisations associated with the Catholic Church. On 30th June, 2005 he took part in a public demonstration in the capital Kinshasa organised by the political opposition (UDPS) though he is not a member of that or any other political party. The Government sent troops to the demonstration and the applicant fled but says that the military spotted him going home. The following day, while he was away, two men in civilian clothes, but who he thinks were associated with the military, came to his house inquiring about him. He fled Kinshasa for Bas Congo where he stayed for ten days. During this period his uncle, who had the same name and profession as him was arrested by the authorities and held for two days. He was accused of being in the union and supporting the opposition but when he pointed out that they had the wrong man they let him go. This convinced the applicant that he must leave DRC. Some priests arranged his flight to Ireland (including providing him with a false passport) via Congo Brazzaville and France and one of them accompanied him to Dublin Airport where he retrieved the false passport"

4. The RAT rejected the applicant's appeal on the grounds of a negative credibility finding. I set out hereunder the operative part of the decision with which the applicant takes issue:-

"I have carefully considered all the matters required to be considered for the purposes of this appeal. After carefully considering these matters I am satisfied the applicant is not a refugee within the meaning of s. 2 of the Refugee Act 1996.

In the first instance the Tribunal put to the applicant that country of origin information showed the Teacher's Union strike in the DRC had been settled and that the senior figures who had been arrested were released within a number of days. In this regard I do not consider it in any way plausible that the applicant would be targeted over and above other members of his union especially when the strike was settled and the senior figures involved had been released. This to my mind undermines the applicant's credibility with regard to his claim.

It was put to the applicant by the presenting officer that if he was so well known by the security forces, why was his uncle, who had the same name and qualifications, arrested instead. The applicant stated maybe they were not well informed. The applicant was then asked that if he had such a high profile why did they make this mistake and the applicant stated that they had made the mistake. Having considered the matter I do not consider it plausible that if the applicant was known to the security forces and was targeted by them, they would have arrested the wrong person. This further undermines the applicant's credibility with regard to his claim.

I have heard the applicant's evidence with regard to his travel and the organisation of same. In this regard, I am entitled to have regard under s. 11(b) of the Refugee Act 1996 (as amended) that the applicant stated that the person who organised his journey to Ireland was a friend. The friend was assisted by a priest from Bas Congo who arranged for another priest to come to Ireland with the applicant. The applicant travelled through various countries on a false French passport with the aid of this priest. In this regard I find it completely implausible that the applicant would have been able to travel through the various countries on a false passport in the manner he has described.

Overall, I found the applicant to lack credibility with regard to his claim." (At p. 9 – 10 on the decision)

5. The principles which the court should bear in mind when it is assessing credibility in refugee adjudications have been succinctly set out by Clarke J. in the case of *Imafu v. Minister for Justice, Equality and Law Reform and Refugee Applications Commissioner* (Unreported, High Court, 27th May, 2005) and may profitably be quoted at this juncture:-

" (i) The assessment by the RAT of the credibility of an appellant and his/her story forms part of the decision making power conferred by the Refugee Act, 1996 and therefore, in accordance with the principles set out in *East Donegal Cooperative Limited v. The Attorney General* [1970] I.R. 317 such assessment must also be carried out in accordance with the principles of constitutional justice: *Traore v. The Refugee Appeals Tribunal and Anor.* (Unreported, Finlay Geoghegan J., 14th May, 2004).

(ii) Where the assessment of the credibility of an appellant places reliance upon a significant error of fact in a manner adverse to the applicant such error renders the decision invalid; *Traore*.

(iii) While the assessment of credibility is a difficult and unenviable task it is not permissible to place reliance "on what one firmly believes is a correct instinct or gut feeling that the truth is not being told". Such a process is an insufficient tool for use by an administrative body such as the Refugee Appeals Tribunal. Conclusions must be based on correct findings of fact.

Da Silveria v. The Refugee Appeals Tribunal and Others (Unreported, High Court, 9th July, 2004, Peart J.)

(iv) A specific adverse finding as to the appellant's credibility must be based upon reasons which bear a legitimate nexus to the adverse finding. *Kramarenko v. Refugee Appeals Tribunal and Anor.* (Unreported, High Court, 2nd April 2004, Finlay Geoghegan J.) placing reliance on the decision of the United States Court of Appeals for the Ninth Circuit in *Aguilera-Cota v. INS* 914 F. 2d 1375, (9th Cir. 1990).

(v) A finding of lack of credibility must be based on a rational analysis which explains why, in the view of the deciding officer, the truth has not been told. *Zhuchkova v. Minister for Justice, Equality and Law Reform and Anor.* (Unreported, High Court, 26th November 2004, Clarke J.)." (At pp. 6/7 of the unreported judgment)

6. Counsel for the applicant states that credibility and persecutory risk must be assessed in context and when the Tribunal member is approaching the problem it must do so by considering all available country information and prevailing country conditions. (See paras. 42 and 43 of the UNHCR Handbook.) He also cites *Kramarenko v. Refugee Appeals Tribunal & Ors* (Unreported, High Court, Finlay Geoghegan J., 2nd April, 2004) and *Traore v. Refugee Appeals Tribunal* (Unreported, High Court, Finlay Geoghegan J., 14th May, 2004).

Errors of Fact

7. In the second paragraph of the relevant part of the RAT decision I reproduce again what the Tribunal member stated:-

"In first instance the Tribunal put to the applicant that country of origin information showed the Teacher's Union strike in the DRC had been settled that the senior figures who had been arrested were released within a matter of days. In this regard I do not consider it in any way plausible that the applicant would be targeted over and above other members of his union especially when the strike was settled and the senior figures involved had been released. This to my mind undermines the applicant's credibility with regard to his claim."

8. The applicant has three complaints about this conclusion by the Tribunal member. First, it is based on an erroneous interpretation of the relevant country of origin information and is factually incorrect. Second, the applicant claims that this was never put to him at the Tribunal hearing. Third, the applicant argues that in rejecting that the applicant would be targeted over and above other members of his union the member of the Tribunal did not consider the entirety of the applicant's activities while domiciled in the DRC and moreover the conclusion of the Tribunal member in this matter is erroneous in law. In relation to this last matter the applicant relies on the *R. v. Secretary of State, Ex Parte Adan* [1998] 2 ALL E.R. 453 where Lord Lloyd stated:-

"It is now accepted that generalised oppressions may indeed give rise to refugee status, as Professor Hathaway makes clear. It is not necessary for a claimant to show that he is more at risk than anyone else in his group, if the group as a whole is subject to oppression. This is clearly right." (At p. 462)

9. I will now address each of these points in turn.

(i) The piece of country of origin information on which the Tribunal member relies for the fact that the teacher's strike had come to an end (the MONUC Report) makes no reference whatsoever to the fact that "when the strike was settled and the senior figures involved had been released". In fact, the Tribunal member confused another piece of country of origin information which referred to a political demonstration after which some persons were arrested but were released within two days. This was a fundamental error of fact which if it was not available to the Tribunal member would cause the conclusion to which he came to be seriously open to question.

(ii) The applicant states in his affidavit dated 24th July 2006 grounding his application for judicial review that:-

"At the hearing of my appeal, the Tribunal member did not put specifically to me or as (*sic*) me to address or respond to the MONUC Press Release or to any issue regarding it." (At para. 17)

This statement has not been contradicted in any affidavit before this court by or on behalf of the respondents. In these circumstances the court must proceed on the basis of the undisputed affidavit evidence which is before it. I refer in this regard to the decision of this court in the following asylum judicial review cases: *Olatunji v. Refugee Appeals Tribunal & Ors* (Unreported, High Court, Finlay Geoghegan J., 7th April, 2006); *Ayaya v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Finlay Geoghegan J., 2nd May, 2003); *Vidrashku v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Finlay Geoghegan J., 17th October, 2002) and *Keagnene v. Refugee Appeals Tribunal & Ors* (Unreported, High Court, Herbert J., 31st January, 2007).

(iii) Given my findings in the previous two paragraphs I do not need to address the argument which the applicant advances on a point of law. In my view the argument is already won on this issue.

It is worth repeating in this context what Clarke J. said in *Imoh v. Refugee Appeals Tribunal* (Unreported, High Court, Clarke J., 24th June, 2005) where the court considered a similar situation where there had been a factual error made by the Tribunal member in that case in relation to country of origin information, Clarke J. when granting leave stated:-

"It is at least arguable that a similar situation applies where there is an error in relation to country of origin information which appears, on the face of the decision of the RAT, to have been of some significance in reaching conclusions adverse to the applicant." (At p. 12 of unreported judgment)

Again in *Keagnene v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Herbert J., 31st January, 2007) held where again there was a dispute as to whether a matter had been put to the applicant at the appeal hearing as well as a factual error on the part of the Tribunal member who misunderstood or misconstrued the evidence of the applicant as to how he obtained entry to the State, Herbert J. held that:-

"the conclusions of the Member of the Refugee Appeals Tribunal at reason five of his decision are based upon a mistake of fact and, were therefore arrived at by the application of unfair procedures." (At p. 18 of unreported judgment)

Lack of Plausibility

10. The second reason why the Tribunal member had doubts about the credibility of the applicant related to the lack of plausibility, given that the applicant was known to the security forces and was targeted by them, that they would have arrested the wrong person i.e. his uncle who had the same name and qualifications. The court acknowledges that the Tribunal member in determining credibility has an advantage over this court, insofar as it has had an opportunity of witnessing the evidence of the applicant and the demeanour and the way he has given his evidence to the Tribunal. Nevertheless, having apparently accepted that the uncle who was arrested bears the same name and is also a teacher with the same qualifications, the possibility of a mistake should have been more closely examined and considered. The applicant had explained that the officials may not have known his physical appearance although they might have been aware of his name, and there was also the possibility that the persons who came for him were not well informed. He also advanced the explanation that within the security forces in the DRC, their systems might not be up to date and that mistakes regarding identity were frequently made. Finally, the applicant indicated that the arrest of his uncle took place in Bas Congo and that his own activities were conducted in Kinshasa and it was there he was known to the authorities. To my mind these were reasonable and plausible explanations which deserved proper and more careful consideration and if they were to be rejected more detailed reasons were warranted. In any event, when the Tribunal member concludes in relation to this matter that "this further undermines the applicant's credibility with regard to his claim" it would suggest that it was not the main cause of doubt in the Tribunal member's mind but a subsidiary and supporting conclusion.

11. It is my view that in failing to address these matters in greater detail and where the Tribunal member entertained serious doubts about the applicant's account of the mistaken identity issue, his reservations should have been put more explicitly to the applicant to give him the opportunity to convince the member, before reaching his conclusion. Because of this and the significant errors of fact already proven, the decision of the Tribunal is unsafe.

12. Grant leave.