

**THE HIGH COURT
JUDICIAL REVIEW**

[2009 No. 69 J.R.]

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED), THE REFUGEE ACT 1996, (AS AMENDED) AND IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

BETWEEN

M.B.

APPLICANT

AND

OLIVE BRENNAN ACTING AS THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 9th day of April, 2013

1. This was an application for leave to seek judicial review pursuant to the Illegal Immigrants (Trafficking) Act 2000 and Order 84 of the Rules of the Superior Courts.

2. The Applicant in this case is seeking, *inter alia*, an order granting leave to apply for judicial review by way of *Certiorari* to quash a decision of the Refugee Appeals Tribunal (the "Tribunal") of 3rd April 2008 affirming the recommendation of the Refugee Appeals Commissioner to refuse the applicant refugee status and an order remitting the matter to the Tribunal for re-evaluation and reconsideration.

Background:

3. The applicant is a national of the Democratic Republic of Congo and entered the State on 13th March 2006 at Dublin Airport. The applicant claimed asylum on the basis of an imputed political opinion and membership of a particular social group, namely as a witness to the kidnapping of her father, a political activist with the Union for Democracy and Social Progress ("UDPS"). The applicant also claims that while she was in Congo in 2000 to visit her aunt and uncle she was raped by five men of Burundian and Rwandan nationality following the outbreak of war. She claims that while her aunt and uncle were killed by the soldiers, her life was spared. She became pregnant from this rape and later gave birth to a child on 13th June 2001. The applicant claims this child is with her mother in the Democratic Republic of Congo and that she does not know anything about him.

4. In February 2006 the applicant claims she went to visit her father in Kinshasa, whereupon soldiers surrounded his house and kidnapped him when he refused to produce important files in his possession regarding the UDPS. The applicant claims she then fled on the advice of a soldier who was a school friend of her brother and who warned her that other soldiers were looking for her as she had witnessed her father's kidnapping. The applicant claims she sought help from a priest who arranged for her to escape the country and come to Ireland.

5. The Office of Refugee Applications Commissioner ("ORAC") made a negative recommendation on the applicant's claim for refugee status in their report, sent by letter dated 24th July 2006. Her claim was recommended for rejection primarily as there were concerns about her credibility. Following this refusal of the applicant's claim for refugee status she appealed to the Tribunal and it is that decision which is sought to be impugned in these proceedings.

Decision of the Tribunal:

6. The Tribunal affirmed the recommendation of ORAC and refused the applicant's claim for refugee status entirely on the basis of the lack of credibility of her story.

7. The Tribunal stated that it reached its decision following the assessment all relevant documentation in connection with the appeal including the Notice of Appeal, the country of origin information, the asylum questionnaire and also the replies given to questions in respect of the s. 13 report.

Submissions on behalf of the Applicant:

8. The applicant states that in support of her appeal to the Tribunal, she submitted particularised country of origin information and several medical reports. She also claims that at the oral hearing on the 13th March 2008, a request was made for an adjournment in a situation where the applicant was facing difficulty in obtaining a medical report from Dr. Farooq, a psychiatrist in St. Davnet's Hospital in Monaghan or alternatively an extension of time to submit same. The applicant also claims to have sought to cross examine the presenting officer of ORAC on a particular contest of fact. These applications were refused by the Tribunal.

9. The applicant submits that the first respondent erred in law and breached natural and constitutional justice by failing to grant an adjournment of the hearing or an extension of time in light of the fact that the applicant's medical report from her consultant psychiatrist was not available and the fact that the applicant was on anti-depressant medication on the day of her hearing. The applicant also submits that the respondents erred in failing to make any reference or assessment of the medical report in her decision.

10. Further, the applicant contends that the first respondent breached constitutional justice and fair procedures in failing to allow cross examination of the presenting officer on the point of whether a meaningful s.8 interview took place and as to what precisely was said at that time. It is submitted on behalf of the applicant that this is of particular importance given the finding in the Tribunal's decision that: "*In the Applicant's Section 8 interview she made no mention of any problems regarding her father ... Given that it is*

the supposed core reason why the Applicant claimed to have left DR Congo it seems unbelievable that she would not have made reference to it at this juncture. "

11. Two particularised country of origin reports were submitted on behalf of the applicant by letter of 26th March 2008 and a report of Dr. Rachael Cullivan, a consultant psychiatrist at St. Davnet's Hospital, was also faxed to the offices of the Tribunal on 3rd April 2008. The applicant submits that this is a notable report as it sets out the details of the applicant's ongoing treatment for Post-Traumatic Stress Disorder and depression.

12. The applicant submits that the Tribunal erred in failing to assess any of the medical reports submitted in a meaningful way, especially in light of the negative credibility findings made against the applicant. The applicant also contends that the respondents erred in law, in particular, by failing to make any assessment of the medical report of Dr. Marian Smyth, dated 9th July 2007, which certified that the applicant was suffering from Post Traumatic Stress Disorder and depression and a further report from Dr. Bello dated 19th June 2007, which certified that the applicant was attending him regularly for psychiatric reviews.

13. The applicant also submits that the respondents erred in failing to state they were in possession of a certificate from Ann Conachy, counsellor with the Rape Crisis and Abuse Centre, Dundalk dated 20th July 2007 to the effect that the applicant was attending there for counselling and further that they erred in failing to make an assessment in respect of this certificate as regards the applicant's credibility. In respect of the claims of rape made by the applicant, the Tribunal decision states that *"there is nothing to substantiate that which occurred to the applicant"*, while the applicant claims the above certificate does confirm she was attending this centre to receive counselling.

14. The applicant refers to the dicta of Gilligan J. in *Khazadi v. Minister for Justice, Equality and Law Reform* (High Court, 19th April 2007) to the effect that it is necessary for the Tribunal to have: *"...considered [and] weighed [the medical evidence] in the balance and a rational explanation given as to why the Tribunal member was making a finding that the applicant was not credible."* The applicant concedes that while a medical report cannot confirm precisely the cause of any physical or mental injury sustained, it can support a claim of the applicant in this regard and further submits that a rational explanation must be given as to why such a report is outweighed by other evidence.

15. The applicant contends that simply listing the titles and conclusions of two of the submitted medical reports and omitting any reference to the certificate of the Rape Crisis and Sexual Abuse Centre and the report of Dr. Rachel Cullivan of 27th March 2008, does not constitute an adequate weighing of the medical evidence in the balance or provide a rational explanation as to why the applicant was found to be not credible.

16. Several extracts from particular country of origin reports are referred to by the applicant in her submissions, including a MONUC report of 27th July 2006 and certain reports from Human Rights Watch in 2005 and 2006. The applicant submits that in light of her claims of grave persecution and the corroborative country of origin reports adduced, it was incumbent on the Tribunal to adequately assess this information and to take it into consideration in reaching its decision. Instead the applicant states that the Tribunal refers to the country of origin information in a simple bald statement that: *"The Tribunal has considered all relevant documentation in connection with this appeal including ...country of origin information ..."*

17. It is also said on behalf of the applicant that her claim is based on the cumulative effect of all the incidences of persecution suffered by her. To this effect the applicant cites paragraph 201 of the UNHCR Handbook that: *"Very frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained Taking isolated incidents out of context may be misleading. The cumulative effect of the applicant's experience must be taken into account. Where no single incident stands out above the others, sometimes a small incident may be 'the last straw'; and although no single incident may be sufficient, all the incidents related by the applicant taken together, could make his fear 'well-founded'".* As such, it is submitted that the Tribunal erred in diminishing the aspect of the applicant's claim based on persecution she suffered in 2000, being raped by five men and witnessing the brutal killing of her aunt and uncle, on the basis that *"as it was some eight years ago it was not the reason why the applicant ultimately left DR Congo to come to Ireland,"*

18. Finally, in respect of the question of an extension of time for the making of an application for leave to seek judicial review, the applicant refers to the case of *G.K. v. Minister for Justice* [2002] 1 ILRM 81 to the effect that the court: *"...in determining the extent to which an applicant should be held vicariously liable for the default of his solicitor it is important to bear in mind the serious consequences which could result from an application failing because of the delay ...where however an applicant is deported the consequences for him may be very serious indeed in that he may be deported to a State in which his fundamental human rights would not be vindicated."* (This decision was affirmed by the Supreme Court.)

19. Further, the applicant refers to the decision of McGuinness J. in *CS v. Minister for Justice, Equality and Law Reform* [2004] 1 I.R. 343 where the learned judge stated in respect of the relative personal blameworthiness of the applicant *"Nor, despite my considerable reservations arising from the various deficiencies of her present solicitors, do I consider that she should be held vicariously liable for their actions."* In this light the applicant submits that delays resulted cumulatively from the inability of the Refugee Legal Service to continue to represent her; the search for a new solicitor to represent her; further delay in respect of the receipt of her papers; illness which rendered the applicant unable to travel to swear an affidavit and finally the relevant papers being filed away in the solicitors' office rather than filed in the Central Office of the High Court. The applicant submits that at all times she intended to judicially review the decision of the Tribunal and that the circumstances which led to the delay were beyond her control. The applicant submits that there is good and sufficient reason for extending the period in which to make the present application.

Submissions made on behalf of the Respondents:

20. With regard to the application for an extension of time in respect of taking these proceedings, counsel for the respondents submitted that it appeared from the first affidavit of Ms. Sarah Ryan, solicitor, that the applicant did not contact her current solicitors until June 2008, while the decision of the Tribunal issued in April 2008. As such, the respondents submit that the applicant has not demonstrated that she formed the intention to challenge the decision of the Tribunal within the 14 day time period and further that the onus is on the applicant to take an active role in her case and ensure proceedings are issued in a timely fashion.

21. The respondents reject the applicant's contention that the principles of natural and constitutional justice were breached regarding consideration of the medical report of Dr. Cullivan dated 27th March 2008. They submit that the report of Dr. Cullivan was not received until after the Tribunal member had made her decision, in circumstances where the applicant had ample time in which to obtain a report from Dr. Cullivan. Indeed the only correspondence, they say, between the lodgement of the Form 1 in 2006 and the scheduling of the hearing in 2008 was to request a particular interpreter, update the applicant's address and submit general country of origin information. The respondents contend that no proper explanation is given as to why the report from Dr. Cullivan could not be obtained prior to the hearing or why a report from Dr. Farooq could not be obtained.

22. It is also contended by the respondents that Dr. Cullivan's report in fact stated that the applicant's mood had improved, that she no longer suffered depression and that she didn't have any symptoms of Post Traumatic Stress Disorder. Further, the earlier medical reports of Dr. Smyth (9th July 2007) and Dr. Bello (19th June 2007) were more favourable to the applicant's case in that they were more negative in their prognosis. As such, the respondents claim the applicant has not demonstrated any significant prejudice in this regard.

23. The respondents submit that the decision of the Tribunal in this case turned on the credibility of the applicant and that the country of origin information which was submitted on her behalf was general in nature. The applicant was not mentioned in the information provided and the Tribunal Member expressly stated in her decision that she considered all the information provided. The respondents refer to case law to support the contention that the fact that only certain documents are quoted in a decision does not and cannot lead to the conclusion that all of the documents were not considered, nor is there an obligation to refer to every document in its written decision. The respondents quote Hardiman J. in *G.K. v. The Minister for Justice* [2002] 2 I.R. 418 to the effect that: *"A person claiming that a decision making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case."*

24. The respondents state that there is no evidence before the court that there was in fact any refusal of a specific request to give the applicant's legal representatives an opportunity to cross examine the Presenting Officer aside from the statement at paragraph 23 of the applicant's affidavit asserting same. Further, the respondents state that case law confirms that the refusal of permission to call a witness whose evidence did not appear to be relevant to the issues before the Tribunal was not in breach of procedures. Clark J. in *Emmanuel (O.H.E.) v. The Refugee Appeals Tribunal* (Unreported, High Court, Clark J., 7th July 2009) stating:

"The extent to which the Tribunal Member allows questioning must be a matter left to each Tribunal Member to ensure that order is maintained, that fairness and justice are applied and that the object of the appeal is achieved. The Tribunal is entitled to refuse irrelevant or repetitive questioning or, as occurred in this case, an attempt to cross examine a person who was not a witness. The Court is of the view that the Tribunal Member was, as the decision maker in charge of the conduct of the appeal, quite within his powers to refuse the cross examination of someone who had not been listed as a possible witness or directed by the Tribunal to attend as a witness in accordance with the Regulations of 2003. A fortiori in this case, he was perfectly within his powers to refuse to permit cross examination of the Presenting Officer who represented the Commissioner, who did not give evidence at the hearing and who in any event was simply not a witness."

25. The respondents submit that the Court in Emmanuel noted that the Presenting Officer's function was to ensure that the Tribunal Member was fully aware of the Commissioner's reasons for recommending that an applicant should not be granted refugee status. As such, the Presenting Officer was representing the Commissioner at the hearing and was in effect a *legitimus contradictor* and therefore it would not have been appropriate for her to give direct evidence or be cross examined, according to the respondents.

26. It is also submitted by the respondents that the Presenting Officer at the oral hearing in this case was not the same person as the authorised ORAC officer who conducted the s. 11 interview or compiled the s. 13 report and as such it was difficult to see what information, over and above that which was already before the Tribunal, she could have provided.

27. Finally, the respondents address the applicant's claim in her grounding affidavit that she was never interviewed for the purposes of s. 8 of the Refugee Act 1996. The respondents submit that this averment is incorrect and that what transpired was clarified in a replying affidavit filed on behalf of the respondents which exhibits the record of the s. 8 interview together with the ASY 1 Form which discloses further information obtained in the course of that interview. In this regard, paragraphs 3 and 4 of the replying affidavit aver that the applicant was refused leave to land in Dublin Airport on the 10th March 2006 having arrived at Pier C with no documents, no tickets and no baggage and thereafter applied for asylum.

Conclusions:

28. The Tribunal Member has, in my view, correctly identified the core claim sought to be advanced by the applicant. The Tribunal Member says:

"It is the Applicant's core claim that as a result of her father's involvement with the UDPS and having witnessed his kidnapping she is at risk should she be returned to DR Congo."

29. My understanding of the Tribunal Member's decision in this case is that the credibility of the applicant's core claim is rejected. This is apparent from the Tribunal Member's comment on the: applicant's account of what happened following the abduction of her father. The Tribunal Member says:

"Given that the Applicant was still in the place where he [sic] father was allegedly abducted with the door broken down and access and egress from easily made it seems highly improbable and impossible that it was the intention of the soldiers to come looking for the Applicant they knew full well where she was." [sic]

30. This sentence is difficult to understand but one gets the general sense that the Tribunal Member is discounting the credibility of the applicant's account, though it is not at all clear why her account is disbelieved or what improbability or impossibility is associated with what was said of the soldiers and the circumstances in which they might return to the applicant's father's house to seek her out.

31. In other commentary which apparently underpins the Tribunal Member's finding of a want of credibility in the applicant's core claim, the Tribunal Member says:

"In the Applicant's Section 8 interview she made no mention of any problems regarding her father. The Applicant simply stated there was a war in DR Congo. The Applicant told the Tribunal that she was told that at that interview it was not the place to tell everything that there was another place. Given that it is the supposed core reason why the Applicant claimed to have left DR Congo, it seems unbelievable that she would not have made reference to this fact at this juncture."

32. My view is that this alleged failure to make early reference to her core claim is at the heart of the credibility findings in this case. It appears (at this stage of the proceeding) that the applicant made adequate and early reference to her core claim in her application for asylum and in the s. 11 interview conducted by ORAC. The respondent has exhibited the 'record of interview' in connection with a section 8 application for asylum that being an application made at an entry port. The exhibited record is in the form of questions and recorded answers. At no stage was the applicant asked to set out the basis of her asylum claim and thus she can hardly be faulted for not having explained the claim at this early stage. A substantial argument has been made that at least part of the credibility

findings are based on error, or misconception, of fact. It seems to me that a substantial argument has been made that the Tribunal Member failed to have adequate regard to the nature and extent of the applicant's references to her core claim at relevant stages in the processing of her application for asylum status. The Tribunal Member seems not to attach significance to the fact that the applicant was not asked during the section 8 interview what the basis of her claim was.

33. I have not been able to discern any inherent implausibility or impossibility in the account of the core claim presented by the applicant, and insofar as such implausibility or impossibility form the basis of the Tribunal Member's findings on credibility, it appears to me that the applicant has mounted sufficient criticism of these findings to warrant a grant of leave to pursue this point by way of judicial review. It may be that at the full hearing the balancing exercise, which is sometimes apparent in the Tribunal Member's decision, where the applicant's reluctance to answer questions is also referred to as a reason not to accept her credibility, will reveal a correct and lawful approach to credibility, but at this stage, my view is that sufficient argument is raised to permit an inquiry into this matter. In respect of these matters, I grant the applicant leave to seek judicial review reliefs on the basis of section E, paragraphs 11, 12, 13 and 14 of her Statement Grounding an Application for Judicial Review.

34. I attach no significance to the refusal by the Tribunal member to permit cross examination of the presenting officer during the oral hearing. This would not have elicited evidence as to what had occurred at the section 8 interview.

35. I am not persuaded that substantial grounds have been advanced in connection with the complaints related to medical reports and an alleged refusal of an application for an adjournment of the appeal. In particular, it seems to me that the alleged illegalities attached to the desire to introduce a medical report by Dr. Farooq from St. Davnet's Hospital in Monaghan do not withstand scrutiny. No explanation was provided by the applicant for the great delay in securing a report from Dr. Farooq, even though approximately 18 months elapsed between the date of the notice of appeal and the date of the hearing of the appeal (this delay was caused by factors outside the control parties). In addition, even though many years have elapsed since the decision of the respondent, the medical report in question has not been produced and the applicant has not been able to say what difference the views of Dr. Farooq would have made, if any, to the claim she sought to present.

36. In respect of the late introduction of the medical report of Dr. Cullivan, I accept the case advanced by the respondent that the medical report by another doctor which was considered by the Tribunal was more favourable to the to the applicant's claim than Dr Cullivan's report. If any illegality attached to the failure to receive or to refer to Dr. Cullivan's report, I cannot detect any prejudice to the applicant. In any event, it seems to me that it was incumbent upon the applicant to make such a report available in the long time that elapsed between the date of the notice of appeal and the date of the hearing of the appeal and no explanation has been given for such delay.

37. I also accept the argument made by the respondent that during that period of time, only one letter was addressed to the respondent with respect to the applicant's circumstances and that dealt with a request for a translator. It was never suggested to the respondent that there was a desire to introduce medical evidence but that there were difficulties in obtaining reports nor was it suggested to the respondent that the applicant was receiving or taking medication which may have an effect on her ability to give her evidence. Although complaint is sought to be made in these proceedings that an application for an adjournment was made because the applicant's use of medication on that day, this complaint has not been substantiated by any medical report and it would appear that she gave perfectly coherent evidence in relation to her core claim and was not distracted by the effects of medication in this respect.

38. Complaint was also made about the manner in which the applicant's reference to violent attack and gang rape were addressed by the Tribunal Member. The horrific incidents described happened many years before the applicant's core claim arose and no serious attempt was made by the applicant to establish difficulties in the intervening years. It seems to me that in so far as the Tribunal Member discounted the horrors which took place in 2000 when the applicant witnessed the death of her uncle and aunt and endured rape, she was entitled so to do as these events were not seriously advanced as grounding the asylum claim. These events did not cause the applicant to flee. She remained in her country for many years after the brutalities and endured no burden such as to cause her to seek international protection until her claim arose in 2006. As submitted by the respondent, historic acts of persecution can form part of an asylum claim but it would appear that there must be some link between historic and recent events. In this case the events of 2000 are not said to be related in any way to the events of 2006 when she visited her father in Kinshasa and which are said by the applicant to be the direct cause of her fear of persecution. Leave is refused on this ground.

39. Finally, in relation to the question of delay and the extension of time sought by the applicant for bringing these proceedings, in addition to the decisions in *CS* and *GK* mentioned in paragraphs 18 and 19 of this judgment, I have considered the dicta of Irvine J. in *A. v. Minister for Justice Equality and Law Reform* [2009] IEHC 281 and the factors she specified in *A. & Anor v. Refugee Applications Commissioner* [2008] IEHC 440:

"In considering whether or not the Court should extend the time for leave in the present case, the Court considers the following matters to be of significance, namely:-

(1) The relevant statutory time limit and the extent of the delay by the applicants in the commencement of the within proceedings.

(2) Whether or not the applicants were in receipt of legal advice over all or any part of the period in respect of which the extension of time is sought and whether such legal advice was available in respect of the decisions which it is hoped to impugn.

(3) The reasons for the delay advanced.

(4) The strength of the potential claims to be brought by each applicant should the extension of time to maintain the proceedings be permitted.

(5) The extent of which an injustice might be perpetrated by failing to grant the extension of time."

40. This case involved an initial delay of some two months between the Tribunal decision in April 2008 and retention of the applicant's current solicitor in June 2008. This delay resulted from the decision of the Refugee Legal Service not to represent the applicant after the RAT process and the need to find new solicitors. Thereafter proceedings, though drafted, were not instituted until 23rd January 2009, resulting in an overall delay of roughly ten months following the expiration of the two week time limit.. Delay was caused by the time taken to transfer the files from the former solicitors; illness rendered the applicant unable to travel to swear an affidavit caused delay; and finally, the relevant papers were inadvertently filed in the solicitors' office rather than being filed in the Central Office of

the High Court. On this basis, and by reference to the principles in the decisions mentioned I accept that good and sufficient reason has been advanced by the applicant for extending the period within which the application can be made. The applicant cannot be blamed for the delay and it is in the interests of justice to grant an extension of time in this case.