Neutral Citation: [2014] IEHC 494

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 86 J.R.]

BETWEEN

H. O.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered on the 2nd day of October 2014

Background

1. The applicant's claim for asylum is based on a stated fear of persecution in Mauritius for reasons of his membership of a particular social group, that group being persons who were granted State protection in exchange for testifying in criminal trials against former associates and/or accomplices and whose State protection was subsequently withdrawn.

2. In 1992, Cehl Meeah founded the Hezbollah Political Party in Mauritius to represent the island's Muslim minority. In 1994, the applicant joined the Hezbollah and worked as a personal driver for Cehl Meeah. He also acted as a driver for the criminal element of the party, L'Equip de Force. On the eve of the island's parliamentary elections in 1996, three junior activists of the Opposition Labour Party were shot and murdered as they hung up posters in Rue Gorah-Issac. The leader of the Labour Party, Paul Raymond Berenger, believed and publicly accused Cehl Meeah of being responsible for the shootings, which became known as the "Gorah-Issac" murders.

3. However, it was not until December 2000, when the applicant made a statement to the police confessing to his involvement in the "Gorah-Issac" murders, that the Hezbollah leader was arrested and charged with commissioning his Party supporters to murder the three Opposition activists. In exchange for the Government's assurance of State protection, the applicant agreed to become a witness for the Prosecution in the trial of Cehl Meeah, and in a number of other high profile trials of Hezbollah Party members. The applicant states that he was told by the then DPP that when the trial of Cehl Meeah was over, he would be put on a plane and be given political asylum abroad. In the meantime, the applicant's family were given an apartment in a high security Special Mobile Force (SMF) compound at Vacous, where the families of the Mauritian State Security Forces resided.

4. While the applicant was granted immunity from prosecution for his involvement in the Gorah-Issac murders, he was convicted and sentenced in July 2001 to eight years for being the driver during the commission of crimes, such as stealing cars, theft and dangerous driving. The applicant served his sentence in the Segregation Unit at Beaubassin Prison where he was protected from other prisoners. During his time in prison, the applicant gave evidence in prosecutions against members of the Hezbollah and at the trial of Cehl Meeah. In February 2003, the Magistrate referred Cehl Meeah to the Assizes Court, on the allegations of the applicant, but in October 2003, the DPP withdrew all charges against him. In 2004, the Hezbollah Muslim Political Party was disbanded and Cehl Meeah founded the Mauritian Solidarity Front (SMF) political party.

5. The applicant was granted early release in 2005 and returned to live with his family at the SMF compound. In December of that year, following a change in Government, the applicant and his family were given notice to evacuate the compound at the SMF headquarters and his personal security guards were withdrawn. In a letter to the Prime Minister, the applicant petitioned to have his secure accommodation maintained and/or that arrangements be made for him to have political settlement in a foreign country. Following this petition, the applicant's accommodation was not withdrawn and his security guards were reinstated. However, the applicant was informed that there were no laws in place in Mauritius for arranging settlement abroad. The applicant was then informed by the DPP that he would be required to testify against a Hezbollah General and a member of the Hezbollah Central Committee in a prosecution for arson offences. This case, the *Damaree* case, did not come to trial until 2009. From the time of the applicant's release from prison, he received regular death threats.

6. In and around 2007 to 2008, the applicant's personal security was withdrawn again but reinstated following further petitions. At all times, the applicant and his family were protected within the safety of the SMF compound.

7. In January 2009, the applicant was verbally informed that he would have to leave the compound; however, he was not forced to do so, and in fact, he remained there with his family until the end of July 2009. When the applicant was summoned by the Intermediate Court to testify against the Hezbollah General and a member of the Hezbollah Central Committee in the *Damaree* trial, the applicant decided, in light of ongoing death threats and the fact of the impending withdrawal of his safety at the compound, not to testify against the defendants and the State's case collapsed. By this time, those who had promised to protect the applicant in 2000, the Prime Minister, the Head of the Crime Investigation Team, the DPP and the Police Superintendent had all been removed from power.

8. At the conclusion of the *Damaree* trial on 30th July 2009, the applicant, in fear for his life and given the changed circumstances concerning his security, went into hiding for a number of weeks, staying in a storeroom owned by his friend in Vacous. He returned to the SMF compound in August 2009. However, shortly thereafter, on 21st September 2009, he came to Ireland via France.

9. He entered Ireland on foot of a six-month student visa on his passport. He claimed asylum on arrival in the State. The applicant states that he fears that he will be targeted and killed by members of L'Equipe de Force and Hezbollah if he were to return to Mauritius.

10. The applicant filled out a questionnaire and was interviewed by a member of the staff of the Office of the Refugee Applications

Commissioner in the usual way. In a report dated 31st November 2009, the Refugee Applications Commissioner recommended that the applicant should not be granted refugee status. The applicant appealed to the Refugee Appeals Tribunal (hereinafter RAT), and in a decision dated 9th November, 2010, the RAT affirmed the recommendation of the Refugee Applications Commissioner made in accordance with s. 13 of the Refugee Act 1996 (as amended).

The Credibility Findings

11. The applicant has a number of complaints concerning the credibility findings made by the Tribunal Member in the course of his decision. The first complaint concerned the following finding:

> *"The applicant was found to be inconsistent and vague in relation to when State protection was withdrawn."*

12. The applicant submitted that his evidence on this aspect was clear. In 2005, when the applicant was requested to vacate the SMF compound, he wrote to the Prime Minister. In 2006, when the applicant's personal security guards were withdrawn, he wrote to the President seeking their reinstatement, as his son was to attend school outside the compound.

13. The applicant also stated at his interview that at some stage in 2008, his personal protection had been withdrawn. He went to the Vice Prime Minister and the security was put back in place. He also stated that at the beginning of 2009, he was told that after the 'Damaree' trial that he would have to leave the compound. However, he did not do so. He stated that after the trial, he found that his personal protection had been withdrawn. He took refuge in a storeroom owned by a friend of his in Vacoas. He then returned to the compound briefly in August 2009, and then fled to Ireland on 21st September 2009.

14. The applicant submits that to hold against him on the basis that he could not recall the precise date in 2008 when his personal security was withdrawn was unfair. The applicant argued that setting aside the effects of trauma and stress affecting accuracy of recollection, it is common cause that a refugee claim should not be decided on the basis of a memory test, because if it were, such test conditions would be strikingly unfair.

15. In response, the respondent stated that the Commissioner had noted that there was a significant contrast in consistency in the applicant's testimony regarding the criminal events in the late 1990s and the associated court cases, when compared with the account of the withdrawal of his security. It was submitted that this finding was borne out by the material before the Tribunal. The respondent submitted that while the applicant took issue with the finding of the Commissioner regarding dates in his notice of appeal, he did not specify which dates he was relying on as being correct. The respondent submitted that this finding was made within jurisdiction.

16. I am satisfied that while the finding that the applicant was inconsistent and vague in relation to when the State protection was withdrawn was quite a harsh finding, it was nevertheless made on the basis of evidence before the Tribunal. It was a finding that the Tribunal Member was entitled to make. Accordingly, it was a finding that was made within jurisdiction.

17. The second issue concerns the following finding:

> *"The fact that the applicant's family continued to live in the SMF compound up to the present date contradicts his earlier assertion that he had been evicted therefrom by the Mauritian State."*

18. The applicant submitted that he never asserted that he was evicted from the SMF compound. His evidence was that in 2005, he was given notice to evacuate the compound by the new Government authorities but that this was rescinded. Again, in January 2009, he was verbally warned that he would have to leave the compound at the conclusion of the *Damaree* trial but that he stayed on until the end of July 2009. Furthermore, as the motives of the Mauritian authorities for continuing to provide accommodation for the applicant's wife and children at the SMF compound are not known, this fact should not have negatively impacted on the applicant's claim.

19. The respondent submits that the applicant stated that he was ordered to leave the compound on a number of occasions. This was supported by correspondence furnished by the applicant. In fact, there is one letter dated 28th December 2005, which relates to the fact that the applicant was ordered to leave the compound. There does not appear to be any letter concerning the direction to leave the compound which was allegedly made in January 2009. The letter of 2009 refers to giving the applicant protection when giving evidence at the *Damaree* trial.

20. The respondent submits that answers given by the applicant at his interview were open to the interpretation reached by the Tribunal. In particular, the respondent drew attention to the following answer which was given at the interview:

> *"They asked me to leave the SMF at the beginning of 2009, they only told me once, it was only a verbal, I waited until 30th July 2009 when I asked as a witness and then the action was taken and everything was removed."*

21. He was then asked where he and his family lived after this and he replied:

> *"After the court ruling on 30th July . . . I left the SMF. I ran away to Aslam Ragain Cartin Vacous. I was hiding in a storeroom, since then I have not heard from my family. On 21st August I returned to the SMF, it was Ramadan."*

22. In the course of the questionnaire, the applicant had stated that the police withdrew "*all of the security*" in December 2005, and approximately 18 months later, "*they withdrew all of the protection from my family again*".

23. I am of the view that there was not sufficient evidence for the Tribunal Member to reach this finding. When the applicant referred to the withdrawal of protection, it was clear that he was referring there to the removal of his personal security guards. The applicant never stated that he and his family had been actually evicted from the compound. Accordingly, it was irrational for the Tribunal Member to reach the conclusion that the fact that the applicant's family continued to live in the compound contradicted any assertion by the applicant that he had been evicted from the compound. This credibility finding cannot stand.

24. The applicant also takes issue with the following finding:

> *"His contention that State protection ceased completely because of a change of Government in 2005, is contradicted by himself. He said elsewhere that after it ceased in 2005, he petitioned the new Government who reinstated the protection on at least two separate occasions thereafter."*

25. The applicant submits that this statement is pedantic, unreasonable and irrational. He states that the Tribunal afforded the word 'completely' an inappropriate meaning. The applicant submitted that his narrative to the effect that "*State protection ceased completely*" clearly referred to the nature of the cessation of the protection at the time, and was not his statement that it ceased forever.

26. The respondent submitted that the applicant's account that the protection ceased completely because of a change in Government was contradicted by the respondent's own narrative, which was to the effect that he petitioned the new Government and the protection was reinstated.

27. It may be that the word 'completely' can be interpreted in a number of ways. However, I am of the view that there was evidence on which the Tribunal could reach the conclusion that it did. Accordingly, this finding in the decision should not be disturbed.

28. The applicant took issue with the following finding:

> *"The applicant, in an interview given to 'Le Dimanche' on 5th February 2006 . . . states, inter alia, that . . . 'I helped the State dismantle the 'Force' team and cast light on many unclear matters'. As it is, this very 'Force' team which he contends are those persecuting him, his contention that they have been dismantled is at odds with his alleged fear of them since. His statements are not internally consistent in this respect."*

29. The applicant submits that as a result of this evidence against Hezbollah members, the 'Force' was dismantled. However, Cehl Meeah subsequently returned to politics, changed the name of his political party to Front de Solidarite Mauricienne and was elected as an MP in 2010, the fact of which was before the Tribunal. The applicant stated that he not only fears retribution from this now powerful man, but also from former members of the Hezbollah and friends and relatives of those who either committed suicide or served prison sentences based on his testimony. He claimed that it was irrational and unreasonable for the Tribunal to find the applicant's statements to be "*not internally consistent in this respect*".

30. The respondent submitted that the Tribunal was entitled to find that as the applicant claimed that the force had been dismantled by the State with the applicant's assistance, that this was at odds with his claim to have a continuing fear of the Force.

31. I am satisfied that the applicant's objection in relation to this credibility finding is well-founded. While the Force might have been dismantled as an entity, there would be previous members and relatives of those imprisoned, or those who had committed suicide, who would not have been well disposed towards the applicant. It was entirely reasonable that he should have a continuing fear of them. The finding of the Tribunal on this aspect was irrational and cannot stand.

32. The applicant takes issue with the following finding:

> *"The applicant's failure to try to remove his family from such an allegedly dangerous situation and his apparent equanimity in the face thereof, also strikes the Tribunal as incongruous with the claim for asylum as advanced by him."*

33. The applicant submitted that he could not afford to take his family out of Mauritius. Furthermore, as he was the one who had given evidence in the criminal trials, it was he who was the prime target for those who he had helped imprison. The applicant submitted that his powerlessness to bring his wife and family out of Mauritius should not have been used to undermine his claim, particularly as he was aware that his wife remained safe within the protection of the SMF compound.

34. The respondent submitted that the Tribunal relied, not only on the fact that the applicant left without his family, but also on his apparent composure in that regard. The applicant stated in the s. 11 interview that he was the main character or main target and that the Force were looking for him first. When informed that the authorised officer failed to understand why he left his family there at risk, he replied "just to look after my life". The applicant also stated that if he had stayed it would have been worse, that he would have been killed in front of his own children. When asked directly whether his family were at risk while he was in the State, the applicant replied "*I don't have any idea*".

35. The respondent submitted, therefore, that the Tribunal was at least arguably entitled to have formed the conclusion that the applicant's failure to try to remove his family and his equanimity thereto was incongruous with his claim. In his affidavit, the applicant had stated that his family were safe and remained in the SMF compound.

36. While this was far from being a central finding on credibility, there was evidence that while the applicant had feared revenge attacks at the hands of those who he had helped to imprison and/or their relatives, he was nonetheless prepared to leave his family in Mauritius. The Tribunal was entitled to make the finding that leaving the family behind in Mauritius served to undermine his claim that he and his family were under threat from the former Hezbollah members. The Tribunal was entitled to reach this somewhat peripheral finding on credibility.

State Protection

37. The applicant has argued that the Tribunal failed to take into account relevant considerations. The Tribunal did not accept the applicant's claim that he would be at real risk of persecution for a Convention reason were he to return to Mauritius on the basis that the accused, against whom he had testified, would kill or seriously injure him or his family.

38. The applicant made the case that on any appraisal of all of the newspaper articles submitted by him, it was clear that the applicant would have many enemies intent on revenge, yet the Tribunal ignored the significant probative evidence supporting the applicant's fear of persecution if returned to Mauritius, and concluded that the applicant would not be at risk. In the circumstances, it was submitted that the Tribunal failed to take into account relevant considerations.

39. The applicant argues that while he was given State protection in 2005, those against whom he testified have not gone away and remain a threat to his life and safety. However, he maintains that the guarantee of State protection has not continued. It is submitted that in the assessment of his claim, the Tribunal, in error, has failed to recognise that these facts bring the applicant within the Convention definition of a refugee, that being a person who, owing to a well-founded fear of being persecuted for a Convention reason, is unable to avail himself of the protection of his country.

40. The respondent argues that the onus rested on the applicant to prove that State protection is inadequate for him. The respondent relies on the following statement of principle given by La Forest J. in *Canada (A.G.) v. Ward* [1993] 2 SCR 689:

> *"Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens.*

Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus . . . it should be assumed that the state is capable of protecting a claimant."

41. In *GOB v. Minister for Justice, Equality and Law Reform* [2008] IEHC 229, Birmingham J. endorsed this approach in the following terms:

"I feel I must also have regard to the principle, accepted both domestically and internationally, that absent clear and convincing proof to the contrary, a State is to be presumed capable of protecting its citizens. This was established in the seminal case of Canada (A.G.) v. Ward [1993] 2 SCR 689, which has been approved in a number of Irish cases including the judgments of Hedigan J. in PLO v. Refugee Appeals Tribunal & Anor. [2007] IEHC 299, and Feeney J. in OAA v. Minister for Justice, Equality and Law Reform [2007] IEHC 169."

42. The respondents argue that it is clear from the authorities that State protection is not required to be absolute or perfect. In *TO v. Refugee Appeals Tribunal & Anor.* [2013] IEHC 258, Mac Eochaidh J. noted that the Tribunal Member had:

". . . assessed all of the evidence and while accepting that there can be problems within the Nigerian Police Force she makes the finding that state protection would have been available to the applicant. I find no legal fault with this finding of the Tribunal. It is clear that in making the finding the Tribunal Member took cognisance of the dicta of Lord Hope in Horvath v. Secretary of State for the Home Department [2000] 3 WLR 379 to the effect that:

'The primary duty to provide the protection lies with the home state. It is its duty to establish and to operate a system of protection against the persecution of its own nationals. If that system is lacking, the protection of the international community is available as a substitute. But the application of the surrogacy principle rests upon the assumption that, just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected of the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather, it is a practical standard, which takes proper account of the duty which the state owes to all its own nationals…under reference to Professor Hathaway's observation in his book, at p. 105, it is axiomatic that we live in an imperfect world. Certain levels of ill-treatment may still occur even if steps to prevent this are taken by the state to which we look for our protection'."

43. The respondents also referred to the decision *in OAA v. Refugee Appeals Tribunal* [2007] IEHC 169, where Feeney J. stated as follows:

"As pointed out by the High Court (Herbert J.) in Kvaratskhelia v. Refugee Appeals Tribunal [2006] IEHC 132 (Unreported, High Court, Herbert J. 5th May 2006, it is the function of the Refugee Appeals Tribunal and, not this court in a judicial review application to determine the weight, (if any) to be attached to country of origin information and other evidence proffered by and on behalf of an Applicant. The Tribunal member correctly identified that the obligation was on the Applicant to provide clear and convincing evidence of the State's inability to protect. This was not a situation of a complete breakdown of law and order and therefore the correct approach was that it must be presumed that the State was capable of protecting its citizens. It was recognised that such presumption could be rebutted but that such rebuttal required clear and convincing evidence."

44. The respondents submitted that the finding of the Tribunal in relation to State protection was entirely reasonable and was made *intra vires*. They maintained that the applicant had not proffered sufficient evidence to rebut the presumption in *Canada (A.G.) v. Ward* [1993] 2 SCR 689 and in the *GOB* cases.

45. I am satisfied that the applicant has not provided sufficient evidence that the State in Mauritius is not capable of protecting him. The State looked after him and his family from 2000 to 2009. They have continued to protect his family from 2009 to the present time. The applicant accepts that they are safe within the SMF compound. In the circumstances, the applicant has not rebutted the presumption that a State is presumed to be capable of protecting its own citizens.

The Exclusion Clauses

46. The Tribunal decision concludes in the following manner:

"Lest the Tribunal be wrong in relation to the finding that he (the applicant) would not be at a risk of persecution for a Convention reason, it finds, on a subsidiary basis, that the 'Exclusion Clause' applies in this case."

47. The applicant complains that the statement "lest the Tribunal be wrong . . ." betrays uncertainty. It is submitted that natural justice requires that a decision of such importance should be definitive and that the person negatively affected by it should at last know that it was reached with conviction.

48. I do not accept this criticism as well-founded. In *SIA (Sudan) v. RAT* [2012] IEHC 488, Clark J. had the following to say about subsidiary findings:

"18. The experience of the Court is that there is a tendency among protection decision makers to consider the availability of internal relocation even when the applicant's narrative is found implausible. In general, such abundance of caution, which emanates from the ECs (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) and Regulation 7(1) thereof, only works if the decision maker also adds words to the effect 'Even if I am wrong about my assessment and what the applicant says could be true, then moving to another area to escape her persecutors would be an option rather than seeking international protection' or 'even if I had not made adverse credibility findings and I accepted all that she says …' Without words to that effect, the exercise is illogical in a claim which has been rejected on credibility grounds. No such qualifying words were used in this case."

The Tribunal member cannot be faulted for the manner in which he introduced the subsidiary finding on the applicability of the exclusion clauses.

49. The applicant argues that the exclusion provided for in s. 2(c)(ii) of the Refugee Act 1996 (as amended) should not be invoked in this case because the applicant had served his sentence in Mauritius in respect of the charges brought against him. He received an immunity in respect of the remaining charges. It was submitted that to invoke the exclusion provision would run contrary to the generally accepted principle of penal law that a person who has been punished for an offence should suffer no further prejudice on

account of the offence committed.

50. The applicant cited the following from the UNHCR:

> "*As with any exception to human rights guarantees, and given the possible serious consequences for the individual, the Exclusion Clauses enumerated in Article 1F should always be interpreted in a restrictive manner and applied with utmost caution, and in the light of the overriding humanitarian character of the 1951 Convention*". (UNHCR statement on Article 1F of the 1951 Convention).

51. The applicant also submitted that the Tribunal must have regard to the proportionality test:

> *"The proportionality test must therefore involve determining the degree and likelihood of persecution feared and measuring these against the seriousness of the acts committed. If the applicant is likely to face severe persecution, the crime in question must be very serious in order to exclude the applicant. This would be the case where the offence in question constitutes a grave crime satisfying, for example, the definition of crimes against humanity."*

52. The applicant submitted that in breach of fair procedures, the Tribunal failed to have regard to the fact that the applicant had already served his sentence. It was submitted that the Tribunal was in error in concluding that the seriousness of the applicant's crimes, namely, being a driver in the commission of crimes, constituted a "grave crime" sufficient to exclude him from international protection.

53. The applicant relied on para. 157 of the UNHCR Handbook which states:

> *"In evaluating the nature of the crime presumed to have been committed, all the relevant factors - including any mitigating circumstances - must be taken into account. It is also necessary to have regard to any aggravating circumstances as, for example, the fact that the applicant may already have a criminal record. The fact that an applicant convicted of a serious, non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant."*

54. The applicant submitted that the Tribunal acted disproportionately and in breach of the applicant's rights to fair procedures and natural and constitutional justice in finding that the applicant was excluded from international protection by reason of the provisions of Article 1F of the Geneva Convention.

55. Section 2(c) of the Refugee Act 1996 (as amended) provides that a person is excluded from the definition of refugee where:

> *"There are serious grounds for considering that he or she . . .*
>
> *(ii) has committed a serious non-political crime outside the State prior to his or her arrival in the State."*

56. The Tribunal applied this sub-section which applied to non-political offences. The respondent pointed out that the offence for which the applicant was convicted related to the killing of three campaigners for another political party on the morning of or eve of an election. The applicant referred to these murders as the murder of "three activist politicians" in his ASY1 Form. Accordingly, it was submitted that the applicant's crimes came within the definition provided in sub-paragraph (ii) of s. 2(c).

57. The applicant accepted his involvement in the murders, stating "*in 2000, I regretted my involvement in these murders and came to the belief that the Hezbollah Party were linked to terrorists and so I went to the police*". The applicant also accepted that he was involved in arson and other offences, including robbery. The applicant was convicted and sentenced to eight years imprisonment in respect of his involvement in these crimes. As noted above, the applicant contends that the crimes were not of sufficient seriousness to amount to a "serious non-political offence", but he did not contend at any stage that they were political in nature, such that they should be excluded from consideration under Article 1F of the Convention.

58. Regulation 12 of S.I. 518/2006 provides that a person is excluded from the definition of refugee status if he or she has instigated or otherwise participated in the commission of the acts or crimes mentioned in s. 2(c) of the 1996 Act. Regulation 2(2) provides that a word or expression that is used in the Regulations and is also used in the Council Directive shall have, in the Regulations, the same meaning as it has in the Council Directive unless the contrary intention appears.

59. Article 12(2) of Council Directive 83/2004 provides:

> *"A third country national or a Stateless person is excluded from being a refugee where there are serious reasons for considering that . . . .*
>
> *(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes . ."*

60. The respondent referred to the case of *Germany v. B and D* (Joined Cases C-57/09 and C-101/09) where the Court of Justice considered the Exclusion Clause as provided for in Article 12 of Directive 83/2004. It was submitted that it was clear therefrom that the deciding authority cannot apply the Exclusion Clauses without carrying out an assessment of the specific facts in issue "*with a view to determining whether there are serious reasons for considering that the acts committed by the person in question, who otherwise satisfies the conditions for refugee status, are covered by one of those Exclusion Clauses*".

61. The respondent pointed out that a specific question was put to the applicant in the course of the interview in relation to the possibility of exclusion from the definition of a refugee of a person who had committed a serious non-political crime. The applicant responded "*I need to say that I was involved, but then I became a volunteer for the State . . .*" He also stated, at p. 7 of the interview, that he was a driver for the leader of Hezbollah and that he "*drove the leader to the plitical (sic) duties, religious and also on the criminal side. I was aprt (sic) of the team and I drove for them. I was asked to take the oath, I had to work to the L'Equipe de Force, they only do criminal activities*". It was pointed out that this was consistent with the newspaper article, and in particular, with the article in 'Le Dimanche' of 5th February 2006, in which the applicant stated that he was part of the team Le Force and that he had not acted under duress.

62. It was submitted that the Tribunal had relied on the applicant having participated in offences of murder and arson. The notes of

the Tribunal hearing indicated that the applicant admitted that his role as driver included driving during the commission of crimes and that he was present when the three people were murdered. The judgment of the Intermediate Court of Mauritius, submitted by the applicant, described him as a "hardened criminal" and "a self-confessed accomplice" to arson. The applicant contended, in the amended Form 1 notice of appeal, that the crime in issue was not a sufficiently serious crime for the exclusion to apply and submitted that the consideration of the proportionality of the persecution claimed, with the offence in issue, should be carried out. However, he did not assert that it was political.

63. The respondent has submitted that, undoubtedly, the crimes in question, being the killing of three persons and arson, were serious crimes. As the Tribunal noted, the UNHCR Guidelines on the applicability of Exclusion Clauses provides as follows:

> *"14. This category does not cover minor crimes nor prohibitions on a legitimate exercise of human rights. In determining whether a particular offence is sufficiently serious, international rather than local standards are relevant. The following factors should be taken into account: the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty and whether most jurisdictions would consider it to be a serious crime. Thus, for example, murder, rape and armed robbery would undoubtedly qualify as serious offences, whereas petty theft would obviously not."*

64. The respondent submitted that in the instant case, the applicant was knowingly involved in serious criminality, although he has not admitted to using weapons. The Tribunal found that he had openly admitted to "*aiding and abetting and participating in joint criminal enterprises, including that of arson and murder*". It was submitted that this is supported by material before the Tribunal and by the applicant's affidavit.

65. The applicant asserted that he should not be denied refugee status since he had already served a term of imprisonment in respect of his offences. The respondent submitted that in *Germany v. B and D* (C-57/09 and C-101/09), even where a person has been sentenced and served a sentence, this does not preclude the application of the Exclusion Clause. In that case, B had been sentenced to life imprisonment in 1995, and was released in 2002. In the course of its judgment, the Court had regard to para. 14 of the UNHCR Guidelines, wherein it was stated that the factors to be considered in determining whether or not the offence was sufficiently serious included the form of procedure to prosecute the offence and the nature of the penalty. On this basis, it was submitted that the Tribunal Member's observation that the applicant was wrong in arguing that the crime is no longer relevant once the sentence has been served, was a correct observation.

66. In *Germany v. B and D*, the Court had regard to the principle of expiation of the offence. This was dealt with in para. 23 of the UNHCR Guidelines in the following terms:

> *"Where expiation of the crime is considered to have taken place, application of the Exclusion Clauses may no longer be justified. This may be the case where the individual has served a penal sentence for the crime in question, or perhaps where a significant period of time has elapsed since commission of the offence. Relevant factors would include the seriousness of the offence, the passage of time and any expression of regret shown by the individual concerned. In considering the effect of any pardon or amnesty, consideration should be given to whether it reflects the democratic will of the relevant country, and whether the individual has been held accountable in any other way. Some crimes are, however, so grave and heinous that the application of Article 1F is still considered justified despite the existence of a pardon or amnesty."*

67. The respondents further submitted that regard should be had to paras. 103 to 104 of the judgment in the *Germany v. B and D* case:

> *"103 In accordance with the wording of the provisions in which they are laid down, both those grounds for exclusion are intended as a penalty for acts committed in the past, as has been pointed out by all the Governments which submitted observations and by the Commission.*
>
> *104 In that regard it should be pointed out that the grounds for exclusion at issue were introduced with the aim of excluding from refugee status persons who are deemed to be undeserving of the protection which that status entails and of preventing that status from enabling those who have committed certain serious crimes to escape criminal liability. Accordingly, it would not be consistent with that dual objective to make exclusion from refugee status conditional upon the existence of a present danger to the host Member State."*

68. In relation to the applicant's contention that the Tribunal was required to assess the proportionality of applying the Exclusion Clause to the applicant, the respondent submitted that the Court of Justice expressly held that the Member State is not required to carry out an analysis of whether or not the application of the Exclusion Clause is proportionate to the offence which has been committed, once it is satisfied that the exclusion, in fact, applies. In this regard, the Court's attention was drawn to paras. 109 to 111 of the *Germany v. B and D* case as follows:

> *"109 Since the competent authority has already, in its assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person, it cannot – as the German, French, Netherlands and United Kingdom Governments have submitted – be required, if it reaches the conclusion that Article 12(2) applies, to undertake an assessment of proportionality, implying as that does a fresh assessment of the level of seriousness of the acts committed.*
>
> *110 It is important to note that the exclusion of a person from refugee status pursuant to Article 12(2) of Directive 2004/83 does not imply the adoption of a position on the separate question of whether that person can be deported to his country of origin.*
>
> *111 The answer to the third question is that the exclusion of a person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on an assessment of proportionality in relation to the particular case."*

69. The Tribunal member was entitled to have regard to the fact that the applicant had admitted to participating in serious criminal activity, including the murder of three people, robbery, and arson. The fact that he received a partial immunity from prosecution and only served five years of an 8-year sentence does not mean that the Tribunal Member could not invoke the exclusion provisions against the applicant.

70. In the circumstances, I am satisfied that the Tribunal Member acted within jurisdiction in holding that the applicant could be excluded from claiming refugee status on the basis of s. 2(c)(ii) of the Refugee Act 1996 (as amended).

Conclusions

71. For the reasons set out earlier in this judgment, I have come to the conclusion that two of the four credibility findings cannot stand. While it was stated in *I.R. v. Refugee Appeals Tribunal* [2010] IEHC 353, that an error as to one or more facts does not necessarily vitiate a conclusion as to the credibility, if that finding can be sustained by correct findings, I am satisfied that in this case the lack of credibility finding against the applicant cannot stand due to the fact that half of the credibility findings have been found to be unsupported by the evidence. The remaining findings are not sufficient to support the conclusion that the applicant was lacking in credibility.

72. On the evidence presented, the applicant has not rebutted the presumption that the State of Mauritius is presumed to be capable of protecting the applicant and his family. The applicant was protected within the SMF compound from 2000 until his departure for Ireland in 2009. His family continue to avail of that protection. The applicant has stated that they are safe within the SMF compound. Accordingly, I find that there has been no failure of State protection in this case.

73. The finding of the Tribunal that the applicant had committed serious non-political offences while outside the country of refuge, and that in the circumstances, the provisions of Article 1F of the Geneva Convention and s. 2(c)(ii) of the Refugee Act 1996 (as amended) applied, is a finding that the Tribunal was entitled to reach on the evidence. This finding should not be struck down.

74. In the circumstances, I will make an order permitting the applicant to seek judicial review of the decision of the Tribunal dated 9th November 2010.

75. I will make an order refusing the reliefs sought by the applicant and I refuse to strike down the decision of the RAT dated 9th November, 2010.