Neutral Citation Number: [2010] IEHC 362

THE HIGH COURT

JUDICIAL REVIEW

2008 1117 JR

BETWEEN

V. C. B. L.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL, CHAIRPERSON OF THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered 15th day of October, 2010.

1. This is an application for leave to seek judicial review of a decision of the Refugee Appeals Tribunal ("The Contested Decision") dated 16th September, 2008, which affirmed a negative recommendation upon an application for asylum by the above-named applicant made by the Refugee Appeals Commissioner in a report dated 20th November, 2006.

2. The Contested Decision rejects the claim made by the applicant to fear persecution if returned to his country of origin upon the same ground as that given by the Commissioner in the report namely, a lack of credibility in the account which the applicant gave of having fled because of discrimination he had suffered as a member of a particular ethnic group and more importantly because of persecution by reason of his imputed association with the political activities of his father.

3. The applicant is a native of the Republic of Congo (Brazzaville) the former French colony but now a state which is to be distinguished from the neighbouring former Belgian colony, the Democratic Republic of Congo. The applicant claimed that his father had been a politician and a member of the Pan-African Union for Social Democracy (UPADS). He said his father had been imprisoned for his political activities but escaped to the Ivory Coast. According to the applicant his mother and sister had been killed by Cobra Rebels.

4. The Contested Decision is distinguished by two features. First, it refers in its title and at several places in the body of the text to the applicant as having "DR Congolese" nationality and his country of origin as being "DR Congo". The opening sentence of the summary of his claim set out in s. 3 reads: "This applicant said he was from the Democratic Republic of Congo." The following sentence reads: "He was born in Brazzaville."

5. Not surprisingly, this admitted mistake constitutes the primary basis for the substantial ground put forward as requiring that the decision be quashed as unsound. It is submitted that this is an error on the face of the record which makes the decision unsafe; which goes to the heart of the Tribunal's jurisdiction in the appeal and therefore renders the decision invalid.

6. The second feature of the case strongly relied upon is that there has been an excessive delay in the determination of the appeal following the oral hearing. The hearing by the Tribunal member took place on 15th February, 2007 but the Contested Decision did not issue until 16th September, 2008 – a delay of 19 months. That this delay was excessive is accepted by the respondents. The applicant had complained about this delay to the Tribunal member when a year had elapsed following the hearing and, in the absence of a response from the Tribunal member, gave notice in September, 2008, of an intention to apply for judicial review in order to compel the Tribunal to determine the appeal. That proceeding (2008 No. 1040 JR) was then initiated but shortly thereafter was overtaken by the issue of the Contested Decision and proceeded no further.

7. Thus, the second ground advanced is to the effect that the long delay renders the Contested Decision unlawful because it has been adopted in breach of the applicant's rights to natural justice and fair procedures. It is also argued that the delay caused or contributed to the mistake of fact made by the Tribunal member as to the country of origin. Supplementary grounds are also advanced to the effect that the Tribunal failed to consult and to take account of up-to-date information relating to the conditions in the country of origin. This argument is directed at the fact that the finding of lack of credibility at para. 6 (a) of the Contested Decision relies upon information to the effect that the political movement or party (UPADS) which the applicant said was the target of repression and the source of the political persecution which he feared, had, since elections in 2002, no longer been suppressed but had become part of the political process.

8. The issue before the Court on the present application, accordingly, is whether these constitute "substantial grounds" warranting the grant of leave for the purposes of s. 5 of the Illegal Immigrants (Trafficking) Act 2000.

9. While it is undoubtedly true that the applicant is a native of the Republic of Congo (Brazzaville) and that the references in the Contested Decision to the DRC are incorrect, this cannot be said, in the Court's judgment, to constitute a mistake of fact which is so material to the substantive analysis and consideration in the Contested Decision as to vitiate its validity. In reality, this Tribunal member has given an incorrect title to the country of origin in question but does not appear to have made any mistake in understanding the identity of the particular state to which the facts, events and alleged persecution related. It is a mistake as to the correct name of two similarly named and neighbouring countries. Indeed, as counsel for the respondents pointed out, the same mistake was also made by the applicant's own legal representatives (The Refugee Legal Service) when writing during 2008 on his behalf. Their letters too, describe the applicant as being a native of the Democratic Republic of Congo.

10. More importantly, however, it is clear from the body of the decision that the Tribunal Member made no mistake as regards the details and substance of the case before him. The exposé of the factual background of the claim including the recital of the history and events, the description of the locations, ethnic groups and persons referred to by the applicant, are all correctly described. The

events are recounted as having occurred in Brazzaville or other locations within the Republic of Congo and not as having taken place in Kinshasa or at locations identifiable as within the DRC. The political party is the UPADS and the elections are those which took place in the Republic of Congo in 2002.

11. The Court is therefore satisfied that, notwithstanding the misnaming of the country of origin, there has been no material error of fact which could be argued to raise an implication that there had been an actual misunderstanding or misconception on the part of the Tribunal member which vitiated his assessment of the claim and evidence before him in the appeal.

12. In support of this ground, reliance has been placed by counsel for the applicant on the judgment of the High Court in *A.B.-M. v. MJELR* (Unreported, O'Donovan J., 23rd July, 2001) as authority for the proposition that a mistake by the administrative decision maker as to the identity of the country of origin is a material error which renders the Contested Decision invalid. Coincidentally, the asylum seeker in that case had been referred to in the relevant decision as being from the DRC when he, too, was a native of the Republic of Congo. However, a judgment does not become an authority on a point of law by reason only of a coincidence of facts. The Court has not found this judgment to be of material assistance to the issue that arises in the present case for the following reason.

13. It is striking that the judgment in question contains no indication of the basis upon which the asylum claim had been made or of the particular type of persecution claimed to have been feared. It is not apparent therefore what connection existed between the identity of the country of origin of the applicant and the ground upon which the claim for asylum had been rejected. It was accepted by the parties that there had been a mistake in naming the country of origin in the decision but without knowing the basis of the claim it is not possible to understand why, as a matter of law, such an error of fact necessarily jeopardised the validity of the decision to refuse a declaration of refugee status. The learned High Court judge seems to have approached the matter in the following manner:

> • He accepted the principle from *C.I.E. v. An Bord Pleanála* to the effect that an error of fact is not a ground for *certiorari* unless it produces an error of law; that the mistake must result in the decision maker thereby giving itself a jurisdiction it would not otherwise have;
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> • He had regard also to the judgment of Henchy J. in *State (Holland) v. Kennedy* [1997] I.R. 193, to the effect that a tribunal with powers of a judicial nature might commence a hearing within jurisdiction but during its course exceed its jurisdiction thereby exposing its decision to *certiorari;*
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> • He then considered that "the country of origin of an applicant … is a vital factor when considering whether or not to recognise refugee status";
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> • While accepting that the two officers responsible for the decision in question might have made a purely typographical error and not themselves had been mistaken as to the identity of the correct country of origin he said:
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> > "It seems to me that, when considering this application, I cannot ignore the record; the implications of which are that both the recommendation of 13th July, 1999 and decisions of 30th July, 1999 were made without jurisdiction and, accordingly I am disposed to making appropriate orders of *certiorari* quashing the said recommendation and the decision to uphold it".

14. Without knowing the basis of the asylum claim in question and why it was rejected, this Court does not consider that it ought to treat itself as bound by any point of law in that reasoning. It is true that the particular identity of a country of origin may sometimes be "vital" in assessing the well-foundedness of a claim to fear persecution. That will be particularly so where the source of persecution claimed to be feared is specific to a particular country or region because of a civil war or ethnic violence or because, for example, the possibility of protection by internal relocation is under examination. It does not necessarily follow, in the judgment of the Court, that a mistake in the form of attributing an incorrect title to a country of origin must always constitute a mistake of fact which vitiates an otherwise valid examination of all factors relevant to the asylum claim. For example, if in the present case, the content of the Contested Decision had shown that the Tribunal member had consulted country of origin information relating to political conditions in the DRC and then rejected the appeal because the information disclosed no evidence of supporters or members of UPADS being repressed or mistreated, the mistake would be material and fatal because it necessarily demonstrates a fundamental misunderstanding on the part of the Tribunal member. On the other hand, if an asylum claim based upon wrongful imprisonment and mistreatment is rejected because investigation proves that the applicant was lying; that the events never occurred because the applicant is shown to have been in an entirely different country on the dates in question, a misnaming of the country or place where the imprisonment is alleged to have occurred could not be said to be fatal to the validity of the examination of the substance of the asylum claim.

15. It must be borne in mind that the common law concept of "error on the face of the record" applies to some omission, misdescription or mistake in a document essential to the power being exercised which has the effect of depriving the exercise of jurisdiction. (See for example: *State (Cunningham) v. O'Floinn* [1960] I.R. 198 – omission of a precise statement of the offence in an order of conviction: or *Simple Imports v. Revenue Commissioners* [2000] 1 I.R. 243 – mistaken statement in a search warrant of the grounds for its issue.) In the judgment of the Court, the misnaming of the country of origin or nationality in a narrative appeal decision of this kind does not fall into that category. So far as the validity of the exercise of the jurisdiction to make or refuse a recommendation in relation to refugee status is concerned, it is the fact that the applicant is "outside the country of his or her nationality" which is essential to the definition of "refugee" in s. 2 of the Act of 1996 rather than the particular identity of the country.

16. For these reasons the Court considers that no actual mistake of fact material to the validity of the Contested Decision has been made and that insofar as the misnaming could be characterised as an error on the face of the decision it is not an "error on the face of the record" in the legal sense of that term which goes to the valid exercise of the Tribunal's jurisdiction.

17. As regards the next ground, in the absence of a material mistake of fact producing an error of law, the mere lapse of an excessive period of time between the hearing and the decision does not, in the judgment of the Court, give rise to a ground which, by itself, entitles an applicant to an order of *certiorari*. An administrative decision does not become unlawful by reason of delay alone. Delay may explain or be the cause of a defect in a decision but is not by itself a ground to annul it in the absence of some consequential error or wrong. A lapse of time may have some other explanation such as the illness or workload of the decision maker or some other factor unrelated to the integrity and content of the decision. In this case the misnaming of the country of origin is not of its nature a mistake which raises any implication as to faulty recollection on the part of the Tribunal member when belatedly writing his decision, particularly when regard is had to the otherwise detailed and accurate recital and examination of all other relevant matters. The fact

that the applicant threatened and commenced a judicial review proceeding does not alter this position. The entitlement to receive a decision within a reasonable time as a facet of the entitlement to fair procedures may justify the grant of an order of prohibition precluding the making of a delayed decision. Where that remedy has not been obtained, however, and where an applicant has sought to compel the making of the decision by the same Tribunal member notwithstanding the delay, the validity of the eventual decision cannot be assessed by reference to the lapse of time in the absence of some factor indicating that the lapse of time has brought about some other material defect or mistake.

18. There remains, accordingly, the submissions made in relation to the alleged failure to take into account up-to-date country of origin information and the failure to consider other relevant matters.

19. It is true that because the test as to the well-foundedness of a fear of persecution is a forward-looking one so that the reality of the risk should be assessed, so far as practicable, by reference to relevant conditions in the country of origin as close as possible to the decision to grant or refuse refugee status, whenever the alleged risk of persecution arises out of conditions there. However, the degree to which there has been a failure to abide by that imperative in any given case must be assessed by reference to the substance of the matter under consideration. In the present case, one of the key findings of the Tribunal member is that given at para. 6 (a) of the "Analysis of the Claim" where the Tribunal member points out that elections had taken place in "Congo-Brazzaville" in 2002 in which a candidate of UPADS stood in the presidential election and the party itself gained parliamentary representation in the legislative elections. The submission is made that by September, 2008, when the Contested Decision was adopted, this information was more than six years out of date. It is argued that in accordance with Regulation 5 (1) (a) of the European Communities (Eligibility for Protection) Regulations 2006, the Tribunal member ought to have consulted more up-to-date information as the regulation requires the "Protection decision-maker" to take into account "all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection".

20. The first answer to this submission is that the obligation of the protection decision maker is to take account of all information which is *relevant* to the issues he is required to decide in the application. The decision maker is not under an obligation, in the view of the Court, spontaneously to conduct a general review of all the conditions in the country of origin. Secondly, the information quoted in that part of the Contested Decision is the same information as was relied upon by the Commissioner at para. 4.2 of the Commissioner's report. Accordingly, if the applicant had wished to put in issue the anachronistic character of that information and to undermine the conclusion drawn from it by reference to a material alteration in political conditions, it was open to him and his legal representatives to do so as part of the appeal, at the appeal hearing or even subsequently during the lapse of time following the hearing. This was not done.

21. In that regard, the issue before the Tribunal member was effectively this. The persecution claimed was based upon the proposition that supporters, members and those associated with members of the political party in question were at risk of persecution or mistreatment in Republic of Congo. The conclusion reached on the basis of the information in question was that this was no longer the case because of the outcome of the elections and the intervening participation of that party in the democratic process. In the judgment of the Court, the argument now made is effectively theoretical and unfounded in fact. This is so because the applicant has exhibited in his affidavit by way of illustration of the alleged need to consult more up-to-date information, a document detailing the more recent history of the Pan-African Union for Social Democracy. According to this information that party, unlike other opposition parties which boycotted them, participated in parliamentary elections in June 2007 and increased its representation to eleven seats. It is true that the information also describes the party protesting about fraud, the composition of electoral commissions and as being weakened by its own internal disputes. Nevertheless, the essential point made by the Tribunal member is not undermined by the information namely, the rejection of the applicant's belief that he would be at the same risk of mistreatment for his political associations if returned now as would have been the case prior to 2002.

22. Finally, the Court does not consider that any substantial ground arises on the basis that the Contested Decision fails to address directly the documentary evidence and particularly what is claimed to be a copy of an arrest warrant and a summons which the applicant claimed he had received respectively in June, 2003, and in January, 2004. Having regard to the fact that the main basis for the Contested Decision lies in the assessment that any prior repression of the supporters and members of UPADS appeared to have ceased such that the claimed risk of persecution was no longer credible in 2007, the Court considers that the Tribunal member was not under an obligation to explain away all documents relied upon or to answer supplementary arguments that had been raised. On their face, the probative value of the documents in question was obviously highly doubtful. Quite apart from possible questions as to the authenticity and provenance of the two items having regard to their appearance, format and some handwritten alterations, it is unexplained how the applicant was in possession of photocopies and not the originals with which he claims he was served. At paragraph 8.2 of the Contested Decision the Tribunal member does in fact refer to the arrest warrant but bases the lack of credibility upon the fact that the applicant was nevertheless able to remain in the country from March, 2002 until September, 2006, without any step being taken on foot of the warrant by the authorities. Thus the reliance on the warrant by the applicant as corroboration is at least impliedly rejected by reference to the undenied fact that it never appears to have been followed up even though the authorities seem to have known how to reach him when he was no longer in Brazzaville.

23. For all of these reasons the Court considers that no substantial ground warranting the grant of leave has been made out in this case. The application is accordingly dismissed.