

**THE HIGH COURT**

**Judicial Review**

**[2013 No. 87 J.R.]**

**BETWEEN**

**K.K. ( a minor suing by his mother and next friend M.M.K.)**

**(Democratic Republic of Congo)**

**APPLICANT**

**AND**

**Ben Garvey, sitting as the Refugee Appeals Tribunal**

**RESPONDENT**

**AND**

**The United Nations High Commissioner for Refugees**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Eagar delivered on the 17th day of September, 2015**

1. The applicant is a fifteen month old child and a national of the Democratic Republic of the Congo (DRC). His mother applied for asylum on his behalf, and the relief sought by the applicant is an order of *certiorari* by way of an application for Judicial Review quashing the recommendation of the Refugee Appeals Tribunal dated the 23rd of January 2013, and an order extending the time for the purpose of the institution in conduct of the proceedings.
2. The grounds on which the relief were sought are as follows:
  - a. The respondent completely rejected the applicant's mother's credibility on the grounds (a) that her own claim for asylum, which had been made of political opinion, had been refused, and (b) she had not mentioned aspects of the claim made at appeal at an earlier stage.
  - b. In his assessment of facts and circumstances, the respondent was required by Regulation 5 (1) (a) of the EC (Eligibility for protection Regulations, 2006) to take into account all relevant facts as they related to the country of origin at the time of taking a decision on the application for protection. He was also required by Regulation 5 (1) (c) to take into account the individual position and personal circumstances of the applicant.
  - c. There was clear medical evidence before the respondent that the applicant's mother was a person living with HIV/AIDS. There was also country of origin information before the respondent showing that 85% of the people living with HIV/AIDS in the DRC do not have access to anti-retroviral drugs. The obvious inference was that if the applicant's mother was returned to the DRC she would die, leaving the applicant alone. There was also country of origin information before the Respondent to the extent that children in such circumstances – left alone or with extended families – are at grave risk of exploitation and even of identification as child witches.
  - d. In these circumstances the Respondent was under an obligation fully to examine the possibility that the Applicant had, notwithstanding the rejection of the mother's credibility, nevertheless a valid Convention-based reason for being unable or unwilling to return to his country of origin. This was especially so in the case of the DRC which the Respondent must have known to have been a particularly dangerous and unstable country.
  - e. The Respondent failed fully to consider the prospective risk of persecution faced by the Applicant. For this reason the decision is invalid.
  - f. The Applicant put before the Respondent cogent, authoritative and objective country of origin information to the effect that failed asylum seekers are targeted for persecution in the DRC, and that they are a particular social group for the purposes of the Convention. There is a fundamental defect in the conclusion of the Respondent in that it is not clear on what basis the large amount of country of origin information submitted on behalf of the Applicant was discounted. The decision is so vague and opaque that its underlying rationale cannot be properly or reasonably deduced. Accordingly the decision is invalid and should be quashed.
  - g. The Respondent erred in law in conflating the applicant's asylum claim with that of his mother. The Respondent erred in law in holding that the applicant's asylum claim fell to be rejected because that of his mother had been rejected. The applicant's claim was different to his mother's claim. The Respondent failed to consider the applicant's case on its own merits. Accordingly the decision is invalid, and should be quashed.
3. The statement of grounds was grounded on the affidavit of M.M.K., the mother of the applicant, and she said that she was a national of the Democratic Republic of the Congo (DRC), born on the 3rd of March, 1973 in Kinshasa. She came to Ireland in 2007 to claim asylum. Her claims were based on a fear of persecution in the DRC based on her political opinions which are opposed to the "then" government of Joseph Kabila. She says that her own claim for asylum was rejected and that she was the subject of a deportation order made on the 4th of October, 2010. She says that when she arrived in Ireland she was diagnosed with HIV/AIDS and that she has been receiving anti-retroviral treatment. She further says that the Applicant was born in Ireland on the 3rd of November

2011. She further says that her son and herself receive treatment to minimise the risk of transmission of HIV from the deponent to him. She says that she has been advised by her doctors that it is not yet clear whether these efforts have been successful, and that it will not yet be clear until the Applicant is about five years of age. She says that the applicant's father is an Angolan national and a failed asylum seeker. He sees her and the Applicant three times a month but has neither guardianship nor custody rights. The deponent says that she another son in Ireland who was born in the National Maternity Hospital, Dublin on the 19th of February, 2008. She further says that on the 28th of November 2011 she met with her son's solicitor and was advised that having regard to the dismissal of her case, it would be best to confine her son's case to her fears for him that it was possible to show were objectively well-founded. I say that these were, *inter alia*, that the risk of persecutory discrimination and stigmatisation faced by her son because of her HIV condition, and the risk of persecution as a failed asylum seeker. These fears were reflected in a letter written on behalf of my son, the applicant, to the Office of the Refugee Applications Commissioner on the 28th of November, 2011.

4. She further states that she was interviewed by one of the Commissioner's authorised officers on the 19th of December, 2011. She told the Commissioner that she was afraid for the Applicant on the basis of her own history in the DRC because she feared he had HIV, and that if anything happened to her, there would be no-one to look after him. Because she felt under pressure, she forgot to mention her fear for him as a returned asylum seeker. This was a mistake on her part but even though the Commissioner's authorised officer was aware that she had discussed this fear with her solicitor and, because it was referred to in his letter dated the 28th of November, 2011, the Commissioner's authorised officer never once asked her about it. She further exhibited a letter from St. James's Hospital confirming that she was a person living with HIV/AIDS. She said that by letter dated the 9th of March, 2012 which enclosed the report of the Commissioner of the s.11 interview dated the 16th of February 2012, the Commissioner recommended that her son, the Applicant, not be declared a refugee.

5. She says that the Commissioner found that her son's claim should be rejected because her claim had been rejected. Her fear for him on the grounds of persecutory discrimination and stigmatisation because of her HIV condition was cursorily rejected. Her fear for him as a failed asylum seeker was not even considered because she had not mentioned it in her interview. She said she had not mentioned this before because she had not been aware of the connection between Luba ethnicity and political persecution in the DRC until she discussed it with her solicitor. She further said that her son would be discriminated against on the basis of his being a person living with HIV/AIDS because no conclusive diagnosis was possible at that stage. She further said that a bundle of case law and country of origin information which was referred to in the said written submissions was submitted to the Respondent on her son's behalf at the oral hearing of his appeal held on the 7th of June, 2012.

6. She further stated that at the appeal hearing on the 7th of June 2012, she gave evidence to the Respondent of her fears for her son. She confined her evidence to matters which could be shown to be objectively well-founded. She was conscious that the Respondent, Ben Garvey BL, was the same Tribunal member who had dismissed her own claim. She said that she told him that her son was at risk as a Luba boy and as a failed asylum seeker. She told him that she feared that if she returned with her son to the DRC she would not get treatment for HIV/AIDS and she would die, leaving him alone. She said that she was afraid that if this happened, he would be neglected, targeted and accused of being a witch. She mentioned that by way of further correspondence furnished to the Respondent on her son's behalf on the 8th of June and the 18th of January 2013. The letter of the 18th of January 2013 drew the attention of the Respondent to further country of origin information to the effect that the authorities in the DRC were targeting returnees who had claimed asylum abroad. She said that by letter dated the 25th of January 2013, and received on the 28th of January 2013. She was furnished with the Respondent's decision to affirm the recommendation of the Commissioner that her son not be declared a refugee. She said that the Respondent had failed to conduct a prospective assessment of the risk of persecution faced by her son in the DRC, that he acted unreasonably in respect of his treatment of the aspect of her son's claim based on the risks faced by failed asylum seekers in the DRC, and that he at all times conflated her son's case with her own case, never considering her son's case on its merits.

7. She stated that she was not a fluent English speaker and that the pleadings were drafted in English and had to be translated for her by an interpreter at the offices of their solicitor, and that the proceedings commenced on the 7th of February, 2013.

8. On the 30th of March 2012 Conor O'Briain, solicitor on behalf of the applicant, enclosed a Notice of Appeal on behalf of the Applicant indicating that documentation and submissions would be forwarded in advance of the oral hearing.

9. On the 7th of June 2012, Conor O'Briain, solicitor on behalf of the applicant, presented a document entitled "skeleton submission of the appellant". Included in those submissions were the following:

- i. K.K. had a well-founded fear of persecution in the DRC by reason of his membership of a particular social group comprised of Congolese children and/or Congolese children who do not have parental carers.
- ii. K.K. has a well-founded fear of persecution in the DRC by reason of his membership of a particular social group comprised of Congolese nationals who claim asylum abroad. Failed asylum seekers may constitute a particular social group for the purposes of the Convention and said that "cogent authoritative and objective COI that failed asylum seekers are targeted for persecution in the person's country of origin and demonstrating a Convention nexus would have to be shown.
- iii. K.K. has a well-founded fear of persecution in the DRC by reason of his race, that is his membership of the Kasai – Luba ethnic group. K.K.'s mother also fears that her son will be persecuted in the DRC for the same reason that she herself fears persecution. This fear, though subjectively real, is not capable of being substantiated. Accordingly it is not advanced as a ground for refugee status and does not form part of K.K.'s claim in this appeal. Neither is it claimed that K.K. would suffer persecution as a person affected by HIV/AIDS, save and insofar as the disease will deprive him of the society and protection of his mother. Further, that K.K.'s claim on appeal is different to the claim made by his mother, decisions made in respect of his mother's claim should not be relied on in the determination of K.K.'s appeal.

10. Also submitted to the Refugee Appeals Tribunal was a substantial amount of country of origin information which included information in relation to killings of so-called "witches" titled, "*Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions - Mission to Democratic Republic of the Congo*" [1st June, 2010]. This dealt with, *inter alia*, that:

"significant numbers of children and women are accused of being witches in the DRC, and are subjected to torture, harsh beatings and other cruelty as a result. ...This violence is one outcome of a widespread social phenomenon which vulnerable members of the community are blamed for misfortunes, such as the loss of a job or illness. According to international and local NGOs, tens of thousands of children abandoned on the streets of Kinshasa and other major cities are especially vulnerable to witchcraft accusations."

11. A further document from the office of the United Nations High Commissioner for Refugees dated the 17th of August 2007,

highlighted concern received about the *de facto* segregation in Kinshasa where Luba Congolese and Swahili speakers are discriminated against and have difficulty finding housing. Also included in the documentation was a U.S. State Department report entitled, "2011 Country Report on Human Rights Practices: *Democratic Republic of Congo*" [published 24th May 2012]. In a section about children, the Country Report quoted:

"Many churches in Kinshasa conducted exorcisms of children accused of witchcraft involving isolation, beating and whipping, starvation, and forced ingestion of purgatives. According to UNICEF children with disabilities or even speech impediments and learning disabilities were branded as witches. This practice sometimes resulted in parents abandoning their children. According to UNICEF as many as 70 percent of the street children it assisted claimed to have been accused of witchcraft."

12. Also included in the documentation was a research paper published by UNHCR under the heading, "Breaking the spell: responding to witchcraft accusations against children". The research document says:

"In the Democratic Republic of Congo (DRC), "urban witchcraft" began in the 1980's. Traditionally, belief in an invisible world is very common. In the context of economic and social crises – such as that experienced in the DRC from the 1980s – witchcraft is an easy "excuse" to explain the misery and misfortune of the family."

Further, the research document also states:

"The role of children has thus been altered in the past forty years due to the dramatically changing context of economic insecurity, HIV and AIDS, and other macro and micro factors affecting families on the African continent."

The document also states:

"In conflict and post-conflict societies such as Liberia, Angola and the Democratic Republic of Congo, there has been a massive rise in witchcraft accusations, especially against children".

At another section, the research document states:

"Today, the spread of HIV and AIDS and the consequent social crisis of increased morbidity caused by ineffective health care solutions and facilities, fits well into local notions of witchcraft."

#### **Decision of the Refugee Appeals Tribunal**

13. The hearing of the appeal took place on the 7th of June 2012, but a decision was not made by the respondent until the 23rd of January, 2013. The report notes that the applicant's claim was based, *inter alia*, on the grounds of appeal as set out in the Notice of Appeal submitted by the applicant's solicitors, dated the 30th of March, 2012. It also noted that subsequently further grounds of country of origin information were advanced. In respect of the Applicant's claim, the report notes that the mother of the Applicant claimed that she was suffering from HIV and maintains that the Applicant inherited the virus from her. She told the Tribunal that if the Applicant is returned to the Democratic Republic of Congo, he will receive no medical help. The mother of the Applicant stated that if she was unable to receive treatment for her complaint in the DRC she may die, and the applicant may die. His mother claims that she belongs to the Luba tribe, and she was asked to describe how Luba tribe members were viewed in the DRC and she replied that they are treated badly. She also stated that if she returned she would be arrested and the Applicant would be left on the streets. Asked why she would be arrested, the witness stated that on arrival she would be detained as a failed asylum seeker.

14. In answer to the Presenting Officer, the mother of the Applicant said that the Applicant would not be persecuted on account of acquiring HIV. She also acknowledged that it was not established that the Applicant had AIDS. The witness stated the reason could not stay with relatives was because he was receiving medical treatment. The witness was asked if she would be arrested on her return to the DRC for political reasons, or because she is a failed asylum seeker. She replied that if you are an asylum seeker abroad and return to the DRC, you will be arrested and tortured. The Tribunal member noted at that point that the organisation IOM states that they are not aware that returned failed asylum seekers are subject to such treatment.

15. In the analysis of the Applicant's claim, the Respondent indicated that the Applicant presented as an accompanied minor born in this jurisdiction, November 2011, to a DRC mother and an Angolan father. Owing to his tender age, the Applicant's asylum application was completed by the mother of the infant. The Applicant's mother stated at interview that, due to her own political problems in DRC, she feared that the Applicant would be killed by the Congolese authorities or left to the authorities if there would be no-one to look after him. Further, she felt that the Applicant was in need of medical attention, and would not receive adequate medical treatment in the DRC. She also fears that, owing to problems his father had in Angola, the Applicant would have problems there. She also fears that, owing to the problems that his father had in Angola, the applicant would have problems there. As he was the Refugee Appeals Tribunal member who heard the appeal of the applicant's mother, he recited that the findings that she did not have a well-founded fear of persecution were upheld by the Refugee Appeals Tribunal. During the Applicant's interview his mother was asked if the problems she feared K.K. would have in the DRC related solely to her own problems, and she replied, "Yes, exactly". The Respondent indicated that the mother had expressed no fears on the grounds of ethnicity or persecution due to being classified as a failed asylum seeker on returning to the DRC.

16. At this point, the Respondent indicates that, "the Applicant's mother reconstructed her evidence after the interview, and introduced two additional elements to her own claim which had been decided, and that of her son, K.K." He then indicates that, after her own claim for asylum failed, she had sought Ministerial Approval to remain on humanitarian grounds which included a belated ground of Luba ethnicity and states that the Minister for Justice refused her claim. He also states that, as the issue of her son's ethnicity was not previously raised, "that fear is not well-founded". The Respondent also states that a further new ground, that of fearing persecution because of being classified as a failed asylum seeker was advanced by solicitor's for the Applicant after the Applicant's mother completed his questionnaire and attended his interview, during which she failed to mention this fear. The Respondent also indicated that he had considered the reports, and concludes by stating that he is satisfied there is no evidence to show he would be at risk of persecution as a citizen of the DRC when accompanied by his parents [this court's emphasis].

#### **Submissions by Counsel for the Applicant**

17. Counsel on behalf of the Applicant (Michael Lynn SC) with Colm Smith BL indicated that the principal questions presented in the proceedings are:

- a. Whether the Tribunal member failed to assess individually the Applicant's prospective risk of persecution in the DRC,

and relied unduly on the rejection of his mother's claim.

b. Whether the Tribunal member's finding to the effect that the Applicant would not be at risk in the DRC as a failed asylum seeker is unreasonable in that it is so vague and opaque that its underlying rationale cannot be properly or reasonably deduced.

18. He referred to the written submissions furnished to the Respondent in advance of the hearing, and that the principal claims advanced were, in summary:

a. That the Applicant had a well-founded fear of persecution in the DRC by reason of his membership of a particular social group comprised of lone Congolese children if his mother died of HIV/AIDS.

b. That K.K. had a well-founded fear of persecution in the DRC by reason of his membership of a particular social group composed of failed asylum seekers.

c. That K.K. had a well-founded fear of persecution in the DRC by reason of his Luba ethnicity.

19. Counsel pointed to what he believed to be the failure of the Respondent to comply with Regulation 5 of the EC (Eligibility for Protection) Regulations, 2006. Regulation 5 (1) (a) of which required it 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, including laws and regulations of the country of origin, and the manner in which they are applied." And he quoted the 25th of January, 2012 report from Medecins Sans Frontieres, which indicated that the vast majority of people living with the AIDS virus in the Democratic Republic of Congo are deprived of life-saving treatment due to withdrawal of international donor support and a lack of national prioritisation of the crisis. The number of HIV-positive people in the DRC is currently estimated at more than one million, and he argued that there was a very much more than reasonable degree of likelihood that K.K.'s mother would die of an opportunistic infection, and that K.K. would thus be orphaned, left alone and forced to live rough. Country of origin information was referred to which strongly indicated that the Congolese street-children had serious risk of abuse, violence, sexual exploitation, forced servitude and trafficking, and that such children were even at risk of being identified as witches, and referred to the Report of the Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions dated the 24th of May, 2012. Counsel further submitted that, as K.K.'s father had neither guardianship nor custody rights, the issue of his father's involvement in his care was not considered. He stated that the Tribunal failed to comply with the obligations in the Regulations because the Tribunal bound itself to the rejection of the claims for Refugee status of K.K.'s parents. He also indicated that the proposition, that where a parent's claim has been rejected the child's claim must be rejected also, is without authority. And he quoted from Clark J. in a case of *I.N.M. v. The Refugee Appeals Tribunal and Others* [2009] IEHC 233, in which he said:

*"It will be highly unusual for a parent to fail to establish a fear of persecution and for a dependent minor child to succeed. It will be even more unusual for a toddler to succeed where his mother fails. However the unusual does happen as where for instance the young child has a father who belongs to a persecuted group but the mother does not. It follows that where facts exist which could establish a totally independent claim for a child, then it is appropriate for the parent to make a separate application for asylum for the child."*

20. Counsel for the Applicant also indicated that the Respondent's finding in respect of the risk to failed asylum seekers in the DRC was unreasonable and referred to the country of origin information furnished.

### **Submissions by Counsel for the Respondent**

21. Counsel for the Respondent submitted that the evidence relating to the Democratic Republic of Congo proffered in the submissions on behalf of the Applicant go as to the weighing of evidence, which is the province uniquely of the Tribunal and not a matter for the High Court in Judicial Review proceedings. Counsel also argued that what the court was being asked to do by the Applicant is to strike down a finding based on an acceptance of the evidence of the next friend. He referred to *C.O.I. v. RAT* [2008] 1 IR 2008, where Mr. Justice McGovern approved the comment of Lord Sedley in *Shirazi v. the Secretary of State for the Home Department* [2003] EWCA Civ 1562, and Geoghegan J. in *Atanasov v. RAT and others* [2006] IEHC [ ]. At page 53, Mr. Justice McGovern J. said,

*"[19] How can it confidently be said that the reasoning in the applicant's case was correct when his sister-in-law achieved a different result on the same facts and in circumstances where there were so many common features between the two applicants based on their relationship and family history? It cannot be conducive to the proper conduct of the asylum process if this should occur."*

22. Counsel submitted that the Tribunal's position that claims already rejected should not be opened was correct. In relation to the change of claim, it was submitted that the Applicant's mother had introduced new grounds at the Tribunal that she had not made before, and that such a radical change in the account is clearly a matter which goes to credibility (although this was not credibility), and finally suggested that the Applicant's claim amounted, at its height, to a complaint that a decision-maker presented with conflicting evidence did not proffer the evidence submitted by the Applicant.

### **Discussion**

23. It is the view of this Court, and has often been claimed, that an appeal before the Refugee Appeals Tribunal is a *de novo* hearing of the application. The respondent in this case stated that the applicant's mother had reconstructed the evidence after the interview and introduced two additional elements to her own claim, which had been decided, and that of her son, K.K. An experienced solicitor submitted to the Respondent the grounds of appeal which clearly raise issues which were separate from the claim of the mother. However in this Court's view the Respondent failed to deal with the issues raised in the grounds of appeal.

24. Whilst this court has some understanding of the decision of McGovern J. in *C.O.I. v. RAT* (previously cited), the minor Applicant is entitled to have the claims considered appropriately by the Respondent, with the best interests of the child being the primary consideration of the Tribunal during all dealings with a child, both in relation to procedure, and substantive consideration of the appeal.

25. In *Rawson v. The Minister for Defence* [2012] IESC 26, Clarke J. stated:

*"More recently in Meadows v. Minister for Justice, Equality and Law Reform [2010] 2 I.R. 701 Murray C.J. said that a failure to supply sufficient reasons would affect the applicant's "constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective."*

*...As pointed out by Murray C.J. in Meadows a right of judicial review is pointless unless the party has access to sufficient information to enable that party to assess whether the decision sought to be questioned is lawful and unless the courts, in the event of a challenge, have sufficient information to determine that lawfulness."*

26. The decision in this case fails to deal in any substantive way with the claims made by the Applicant apart from complaining that, "the Applicant's mother reconstructed her evidence after the interview."

27. It further appears that the Respondent failed to consider appropriately the country of origin information reports in relation to the claims made by the minor Applicant, which I have set out above. Further, the decision of the Tribunal seems to indicate that the Tribunal member had information which he should not have had in relation to the decision of the Minister for Justice to reject the mother's application to remain in Ireland on humanitarian grounds. This suggests that the Respondent had information from the Minister for Justice. It is clear that in the judgment of the European Court of Justice, in *HID, BA and the Refugee Applications Commission and the Refugee Appeals Tribunal, The Minister for Justice Equality and Law Reform, Ireland and the Attorney General*, the judgment of the court delivered the 31st of January, 2013, at para. 45 the Court said:

*"[45] Concerning the applicants' allegation relating to the lack of an effective remedy, the High Court found that the ORAC was 'the determining authority' referred to in Article 2(e) of Directive 2005/85, that the recommendation of the ORAC under section 13 of the Refugee Act was 'the decision at first instance' on the asylum application and that the appeal before the Refugee Appeals Tribunal was the effective remedy referred to in Article 39 of that directive. As that remedy was a full appeal on both matters of fact and law in the context of which the Refugee Appeals Tribunal could re-hear the claim, entertain new testimony and undertake additional inquiry, it was deemed to comply with the minimum requirements of Article 39."*

28. At para. 46 the Court said:

*"[46] The High Court also found that the Refugee Act required the Refugee Appeals Tribunal to be independent and that the provisions governing its establishment, its functioning and its organisation, as well as the appointment and remuneration of its members, were not substantially different to those of other statutory courts or tribunals having a similar role, and held that it constitutes a 'court or tribunal'"*

29. It is quite clear that the information relating to the decision of the Minister on the Application for humanitarian leave to remain was not only known to the Respondent, but used by him in partially justifying his decision, that alone would be sufficient to quash the decision of the court. This Court is satisfied that the Respondent failed to adequately consider the complaint of the Applicant in the light of the country of origin information. It is interesting that the first named Respondent describes the Applicant being accompanied by his parents, which seems to suggest that the Respondent had failed to understand the facts of the case.

30. It is also the view of this Court that the use of the information which the Respondent had in relation to the decision of the Minister for Justice to refuse to grant humanitarian status to the mother of the Applicant was absolutely inappropriate. In those circumstances, as this is a telescoped hearing, the Court will grant leave to the Applicant and quash the decision of the Respondent, and I direct that the appeal be reconsidered by a different member of the Refugee Appeals Tribunal.

*Counsel for the Minor Applicant: Michael Lynn S.C. with Colin Smith B.L. instructed by Conor O'Brian Solicitors*

*Counsel for the Respondent: Tim O'Connor B.L. instructed by the Chief State Solicitor*