Neutral Citation [2012] IEHC 155

THE HIGH COURT

JUDICIAL REVIEW

[2008 No. 1337 J.R.]

BETWEEN

M.T.T.K. (DEMOCRATIC REPUBLIC OF CONGO)

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Kevin Cross delivered the 20th day of April. 2012

1. This is an application for judicial review of the decision of the Refugee Appeals Tribunal (RAT) dated 29th October, 2008, which affirmed the earlier recommendation of the Office of the Refugee Applications Commissioner (ORAC) that the applicant should not be granted a declaration of refugee status. Leave was granted by Hogan J. on 17th November, 2011, on a number of grounds that centred on the following three issues:-

(a) the risk arising to the applicant due to his alleged ethnicity, Tutsi and/or perceived connections to Rwanda;

(b) the risk arising to the applicant by virtue of his position as a failed asylum seeker; and

(c) any benefit that the applicant is derived from the South African immigration system by virtue of his marriage to a citizen of that country.

2. The applicant is seeking an order of *certiorari* to take up and quash the RAT decision and a further order directing that his claim be remitted for rehearing and for an injunction restraining the second named respondent from taking any steps pursuant to s. 17(1)(b) of the Refugee Act 1996 (as amended) to affirm the recommendation of the first named respondent to deny the applicant refugee status and/or to deport the applicant.

Background

3. The applicant claims to be a national of the Democratic Republic of Congo (DRC) who applied for asylum in this State on 15th February, 2006.

4. The applicant based his application on a fear of persecution arising from reasons of race, imputed political opinion and members of a particular social group. He alleged that he is of mixed ethnicity as his father was Congolese and Lulua ethnicity and his mother is a Rwandan of mixed Tutsi ethnicity. In the DRC, some would view the applicant as Tutsi or as having Rwandan connections.

5. The applicant claimed that in 2004 that he was arrested by the authorities in the DRC and accused of being a supporter of the Rwandan government/militia and spent two months in jail during which time he was tortured. He then alleged that he escaped when the Rwandan militia attacked the place of detention.

6. The applicant claims that he went to Rwanda but was arrested there as he had no J.D. documents. He claims he was detained in that country until January 2006, until his uncle made arrangements with a police officer to have him released. Thereafter, he travelled to Ireland via a number of countries.

7. The ORAC made a recommendation on 17th October, 2006, which was communicated to the applicant on 28th December, 2006, that he should not be declared to be a refugee and thereafter, the applicant appealed to the RAT. The RAT rejected the appeal as it did not believe the applicant's narrative.

The Applicant's Submissions

8. It was argued by Mr. David Leonard, of counsel, on behalf of the applicant that the applicant had made a distinct and separate claim to entitlement to refugee status based upon his status as a person perceived to be Tutsi or connected with Rwanda which was not considered by the RAT. He argued that the objective information before the RAT highlighted that such persons are exposed to risk of persecution in the DRC (see *A.B. and D.M (Risk Categories Review- Tutsi added) DRC- CG* [2005] UK IAT 00118).

9. The applicant submitted that if someone established that they are from the DRC and that they would perceived to be a Tutsi or affiliated with Rwanda that they are likely to be entitled to refugee status based upon that point alone. Such an entitlement would not be lost merely because the decision maker was not satisfied as to the truth of their story.

10. The applicant then argued that where there was no finding by the RAT, the court should in accordance with the principles set out in *Muia v. Refugee Appeals Tribunal* [2005] I IEHC 363, proceed on the basis that the applicant was accepted by the RAT as being such a person. In the alternative, the applicant submitted that the decision is vitiated by the failure of the Tribunal to make clear

whether or not he was rejecting the claim. See *Salim v. Refugee Appeals Tribunal* (Unreported, High Court, Birmingham J., 15th September, 2010).

11. The applicant submitted that the RAT misunderstood its own jurisdiction and consequently failed to adjudicate upon the risk to the applicant if he returned to the DRC as a failed asylum seeker; the court having already ruled that this was within the remit of the RAT. See *F.V. v. Refugee Appeals Tribunal* [2009] IEHC 268. The applicant further reasoned that the determination of the eligibility for refugee status entails a forward looking test which involves considering what would happen to the applicant if returned to the DRC.

12. The applicant submitted that should the court find that a jurisdictional error has occurred, it must return the matter to the RAT without further investigation, as well as the material was implausible or is not a matter for the court to decide. He submitted that the court should depart from the discretionary approach adopted in *F.V.* and instead followed the logic of the Supreme Court in *Talbot v. An Bord Pleanála* [2008] IESC 46, [2009] 1 I.R. 375, which, in the opinion of the applicant made it clear that the High Court may not presume for itself how a statutory decision maker would assess an application where the application remitted to the statutory body following a successful judicial review.

13. It was argued by the applicant that having made a distinct claim that he feared persecution on the basis of his status as a failed asylum seeker, he was entitled to have that claim assessed by the RAT. Reliance was placed on *S.I v. Minister for Justice* [2007] IEHC 165 (Unreported, High Court, Finlay Geoghegan J., 11th May, 2007) in that regard.

14. Finally, the applicant contended that it was only pure speculation on behalf of the Tribunal Member that led him to believe that the applicant was entitled to any legal status in South Africa arising from his marriage to a South African citizen.

The Respondent's Submissions
15. The respondents represented by Ms. Fiona O'Sullivan, of counsel, contended that the credibility findings were such as to completely undermine any suggestion of ethnicity or affiliation with Rwanda. Furthermore, the assertion was in fact considered by the RAT as the Tribunal Member explicitly stated that he considered the UK AIT decision as well as previously decisions of the RAT.

16. The respondents then stated that even if the Tribunal Member had erred in not considering whether the applicant would face a risk of persecution due to his status as a failed asylum seeker, the matter was an irrelevance as the evidence before the RAT was implausible, for the documents in question did not achieve the minimum level of materiality and credibility, a requirement articulated by *F.V.* Furthermore, the court in *Okito v. Refugee Appeals Tribunal* (Unreported, 16th July, 2010), already rejected the very material relied upon by the applicant in support of this assertion.

17. The respondents contended that the court was indeed allowed and entitled to review the country of origin information, previously ignored by the RAT in order to ascertain if it reached a certain level of applicability. The respondent cited numerous cases in support of this proposition- *F.V.* (above); *Mutombo v. Refogee Appeals Tribunal* (Unreported, McCarthy J., 2009); *Y.L. v. Refugee Appeals Tribunal* (Unreported, 7th October, 2009); and *Okito* (above). These cases, the respondents argued, established that in order to justify quashing a decision of the RAT on this basis, it will be necessary to demonstrate that cogent, authoritative and objective country of origin information exists to show that failed asylum seekers are being targeted for persecution. In addition, these places clearly stated that as well as this stated claim there must also be evidence of a Convention nexus as this type of claim could easily manufactured.

18. In relation to the South African issue, the respondents submitted that this decision was made in the context of credibility findings and if there was an error, it was a minor one that did not render the decision as a whole irrational.

(A) The risk of persecution based on ethnic origin or perceived connections to Rwanda
19. In the introduction section of the Tribunal's decision, the Tribunal Member stated, at p. 1:-

> "The applicant claims to have a well founded fear of persecution on grounds of race, political opinion and membership of a particular social group."

20. The Tribunal Member went on to state at p. 14, in the analysis section of the decision that:-

> "The applicant initially made an application on grounds of race but later included membership of a particular social group and political opinion."

21. Drawing on these statements, it is obvious to this Court that he was entirely clear to the Tribunal Member that the applicant's alleged ethnicity was a distinct and separate point warranting individual consideration.

22. Turning to the examination at hand, it is quite clear to the court that at no point in the five page analysis of the decision did the Tribunal Member weigh the merits of this claim. I do not accept, as urged by the respondents that the applicants totally lack of credibility is commentary enough.

23. However, I also do not accept that it was correct to infer, as is proposed by the applicant that silence on this issue should amount to its inferred acceptance. Unlike Clark J. in *Muia v. Refugee Appeals Tribunal* [2005] 1 IEHC 363, where she held at para. 3.8 that she was "prepared to accept that where there is ambiguity as to the extent of a finding of lack of credibility then the applicant is entitled to the benefit of any such ambiguity", this is a substantive hearing not a leave application and therefore, I am not prepared to render "ambiguity" as evidence of acceptance of ethnicity or Rwandan affiliation, particularly in the light of a wholly unreliable applicant. Similarly, however, I am not prepared to infer, in the face of deafening silence that the applicant was found not to be of Tutsi extraction or Rwandan affiliation. If the Tribunal Member wished for the court to draw such a conclusion, then he should have be explicit in his remarks and stated that this as his conclusion.

24. The court would consider that the failure to grapple with the issue is similar to the failure as identified in the case of *Salim v. Refugee Appeals Tribunal* (Unreported, High Court, Birmingham J., 15th September, 2010) where Birmingham J. stated at p. 7 of the judgment:-

> "Overall and the view that I have formed is that the question of ethnicity and nationality was absolutely [central] to the case that the applicant was going to advance. If he was accepted as being of Somali national and by Bajuni ethnicity, then even if the specific account that he gave of the events in 2003 on the island and of the circumstances in which his

parents came to lose their lives was disbelieved, then the fact that, even though that was disbelieved, he was nonetheless of the claimed nationality and ethnicity would have provided a significant and substantial basis where his claim had to be considered and it seems to me that a decision that leaves one guessing as to whether or not that was the view of the Tribunal Member is arguably, in the sense that they are substantial grounds for contending such decision is inherently flawed. In these circumstances I propose to grant leave."

25. This is, of course, a case on the substantive claim rather than a leave application but while it is not for this Court to conclude that the applicant is of Tutsi extraction or Rwandan affiliation, it is for this Court to conclude that this is a matter that ought to have been considered by the RAT. The RAT failed to consider this issue and on that point alone, its decision cannot stand.

(B) The risk arising to the applicant by virtue of his position as a failed asylum seeker

26. At p. 17 of the decision, the Tribunal Member stated:-

> "The Tribunal has been asked to consider the situation of failed asylum seekers returning to DR Congo. The function of the Tribunal is to either uphold or set aside the recommendation of the Commissioner. Anything further that arises is a matter for the appropriate Minister."

27. In the opinion of this Court, this statement is incorrect. As it has already been accepted that the RAT is entitled to assess the merits of such a claim. In *F.V.* (above), Irvine J. reviewed this issue substantively and stated at para. 48 of her judgment:-

> "...the court is satisfied that the Tribunal Member made a technical error as to jurisdiction when he stated *'Counsel submitted that the Applicant is in fear of persecution if he is refouled. Under paragraph 5 of the Refugee Act 1996 as amended, refoulement is not within the remit of the RAT'*."

28. Given that the court accepts that the RAT did have jurisdiction to consider this issue but failed to do so and was in error in that failure, the next question to be answered is whether the court has any jurisdiction to review the merit of the neglected evidence before granting a return to the RAT on this point. For any decision, of course, there must be purpose behind it. As discretion is a fundamental part of judicial review, the court would consider that it is entitled to address the merits of the evidence, albeit in a limited capacity.

29. Therefore, I accept the reasoning as outlined in *F.V.* and as supported by *Okito* both of which make clear the level of consideration that this Court can pay to this type of evidence. However, before elaborating on the substance of the decision, I would emphasise that this line of reasoning does not bring the court into conflict with the Supreme Court decision of *Talbot*.

30. In *Talbot*, the High Court judge attempted to predict the outcome of a planning permission decision, concluding that it had no prospect of success. In *F V.*, the High Court was deciding whether the RAT had a duty to consider something, in respect of which no cogent evidence had ever been supplied to it and found that it did not. The discretion was exercised not on the basis that the applicant would ultimately fail, but on the basis that no cogent evidence had been put before the RAT to support the claim so as impose a duty to consider it.

31. Therefore, having faced the alleged conflict between *Talbot* and *F.V*. and having found there to be none, I will now turn to the manner in which this Court may assess the evidence.

32. In *F V.*, Irvine J. expressed the view that failed asylum seekers are not, as a matter of course, members of a social group. Irvine J. recognised the possibility that this type of claim was open to abuse, and accordingly required that particularly cogent evidence would be required before the RAT decision would be quashed for a failure to consider it. The test outlined at para. 37 of *F V.*, which I accept is as follows:-

> "...given the scope for abuse of the asylum process, the court is satisfied that cogent, authoritative and objective COI that failed asylum seekers were targeted for persecution in the person's country of origin and demonstrating a Convention nexus would have to be shown."

33. In *Okito*, Ryan J. when faced with similar circumstances, stated:-

> "If the material achieves a certain minimum level of materiality and credibility, then it should have been taken into account and the method by which it should have been weighed and considered and balanced out in the context of the case as a whole is a matter for the Tribunal. So in those circumstances, if the material does achieve this standard, then judicial review ought in general to follow. I say that it ought in general to follow, because there may be exceptions and qualifications, depending on the circumstances. On the other hand, if the material does not achieve this standard of relevance and credibility, then it is legitimate for the court to say that it is not sufficiently important to warrant the remedy of judicial review and the discretion is appropriately and properly exercised in refusing relief."

34. I do not see any conflict between the observations of Irvine J. in *F.V*. and Ryan J. in *Okito*. The evidence must be cogent, authoritative and objective but that does not mean that the court should in any way engage in a judgmental issue to determine its merits (that would fall foul of the Supreme Court's observations in *Talbot*) but the level of materiality and credibility as stated by Ryan J. need only achieve a minimum of standard that would require them to be assessed as evidence by the RAT. When the court is assessing whether there is in existence, cogent, authoritative and objective COI, it must not fall into the trap of weighing up and coming to any decision on the merits of this evidence.

35. In examining the evidence to ensure that it reaches a minimum level of materiality and credibility, this Court considered a number of documents including two articles extensively highlighted by the applicant in his submission: an Observer article by Ms. Diane Taylor entitled "*torture fate awaits UK deportees*" dated 16th September, 2007; and a news report by the Institute of Race Relations entitled "*the grim fate that await those deported to Congo*" dated 2nd December, 2004. It should be noted that Ryan J. in *Okito*, already considered the merits of those articles and concluded that:-

> "The material has altogether too little credibility to warrant setting aside the decision in this case."

36. I too am not readily impressed with the contents of this material. In my opinion they appear one-sided but of a more worrying nature, unsubstantiated.

37. However, amongst the applicant's country of origin information was an article dated 24th August, 2006 which contained a UNHCR response to the credibility of a BBC report that had alleged a risk to failed asylum seekers returning to the DRC. This document stated that while they did not have evidence to suggest that there was systemic abuse of failed asylum seekers on being returned to Kinshasa Airport, it did advise against the forced returned to Kinshasa of persons of "Banyamulenge ethnic origin". Therefore, while it could not categorically be stated that all failed asylum seekers are at risk upon return to DRC, a category of them by virtue of their ethnicity are potentially at risk according to the UNHCR.

38. This Court does not know and does not speculate as to whether the applicant's ethnicity/Rwandan affiliation has any relationship to persons of "Banyamulenge ethnic origin" but strongly suspects that it does not. That, I feel, is not the point. In this case, the applicant in addition to the Observer and Institute of Race Relation articles which of themselves might not be sufficient had authoritative documentation which indicated that there was a risk to certain persons on return to the DRC by reason of their ethnicity/nationality. As the ethnicity/Rwandan affiliation of the applicant has not been yet adjudicated upon, the error by the RAT in declining to examine the consequences to the applicant of being forced to return to the DRC as a failed asylum seeker, was of such a nature of itself to warrant setting aside the decision in this case.

(C) Any benefit that the applicant is entitled to derive from the South African immigration system by virtue of his marriage to a citizen of that country

39. At p. 16 of the RAT decision, it is stated:-

> "The applicant travelled to South Africa on a number of occasions and married a native of that country. He is therefore entitled to South African protection if he pursues the matter. It is not credible that he neglected to do so before coming here. The UNHCR have stated where the applicant has more than one nationality and does not look for protection in the second country before seeking international protection such an application is not well founded."

40. The court would agree that it is questionable that the applicant never attempted to seek asylum in South Africa, given his marital connections to that country. However, whether the applicant should have applied for asylum in South Africa is a wholly different proposition to stating that he was entitled to asylum there as a matter of law.

41. The court holds that the Tribunal Member went far beyond the question of the credibility of the applicant when he made a number of assumptions about South African immigration law. I say "assumptions" because the Tribunal Member never supported these conclusions in any substantive matter by reference to law or policy of South Africa.

42. It may be correct to state that the applicant is indeed entitled to such benefit but there is nothing in the decision to support this proposition and neither indeed was this matter put to the applicant at any stage. Accordingly, the court cannot presume to rely upon this decision and I can only deduce that the conclusion was unreasonably made.

43. The court does not accept that the decision was made in the context of the credibility findings or that it was such a minor error that did not render the decision as a whole irrational.

Conclusion

44. For all the reasons outlined above, I would quash the decision of the RAT and remit the matter for rehearing and hear submissions in relation to the question of an injunction should the same be required.