

**THE HIGH COURT****JUDICIAL REVIEW****[2011 No. 634 J.R.]****BETWEEN****R.S. (Sri Lanka)****APPLICANT****AND****MINISTER FOR JUSTICE AND EQUALITY****REFUGEE APPEALS TRIBUNAL****ATTORNEY GENERAL****RESPONDENTS****JUDGMENT of Ms. Justice Stewart delivered on the 29th day of July, 2016.**

1. This is telescoped hearing for judicial review seeking an order of *certiorari* to quash a decision of the Refugee Appeals Tribunal (RAT) dated 31st May, 2011, and notified to the applicant by cover letter dated 14th June, 2011, which affirmed the negative recommendation of the Office of the Refugee Applications Commissioner (RAC) not to grant the applicant's claim for refugee status.

2. These proceedings were issued on 21st July, 2011, approximately two weeks outside the 14-day timeframe allowable for initiating a judicial review of this nature. An extension of time was sought and the respondents did not object to same. Further, the applicant explained the delay on affidavit as follows:-

*"I say that upon receipt of the Decision herein challenged on or about the 15th June 2011 I awaited advices from my former Solicitors, the Refugee Legal Services. I had already formed the view that I wished to challenge the decision on whatever legal basis was available to me. I subsequently received advices in writing from my former Solicitors to the effect that there may be ground for challenging the Decision by way of Judicial Review and that I should contact a private Solicitor which I did with all due expedition and I therefore pray this Honourable Court for such an extension of time as may be required to initiate the within proceedings."*

In these circumstances, I am satisfied that good and sufficient reasons have been set out by the applicant such as to warrant an order to extend the time for the bringing of the judicial review application in this case and so I extend the time.

**Background**

3. The applicant is a Sri Lankan national of the Tamil ethnic group. He was born on 29th September, 1978. The following is the account provided by the applicant of the alleged persecution that gave rise to his claim for international protection in Ireland. The applicant states that he was a member of the Liberation Tigers of Tamil Eelam (LTTE) and worked as their photographer. He was arrested, detained, interrogated and tortured by State authorities and members of Eelam People's Democratic Party (EPDP), a Tamil paramilitary organisation supporting State forces, in order to extract information from him. He was held over a five-day period and released on 17th August, 2007. The applicant was released on the condition that he sign on every day at army headquarters. On 17th October, 2007, the applicant was again seized by EPDP members, brought before three people and asked to identify the LTTE commander. He informed his captors that he did not know the people but, eventually, pointed randomly at one person because he was afraid. The EPDP then shot that man in the head in front of the applicant. The applicant stated that his safety is now under threat from the LTTE because he provided information to State authorities. The applicant left Sri Lanka on 5th November, 2007, and travelled to Moscow. After spending 47 days there, he arrived in Ireland on 28th December, 2007, and applied for asylum on that date.

4. The applicant submitted documents in support of his claim, namely: a national identity card, a birth certificate, work identity cards, education certificates, internet news printouts, medical certificates, photographs and Human Rights Commission letters. The applicant was interviewed pursuant to s.11 of the Refugee Act 1996 (as amended) on 30th April, 2008, where a Tamil interpreter assisted via telephone. The applicant sought to have the decision delayed until a SPIRASI report was finalised. By letter dated 11th August, 2008, further documentation was submitted, including the applicant's LTTE membership card, a letter from the LTTE's political wing that outlined the applicant's role as their photographer, corrections to the translated questionnaire, documents that identified the applicant's brother as an LTTE member, information concerning his death as a fighter and country of origin information (COI) reports. The SPIRASI report, dated 27th August, 2008, was forwarded to the RAC by cover letter dated 15th September, 2009, which stated that the applicant's psychological trauma is consistent with the events he described. The applicant attended for a second s.11 interview on 7th September, 2009, with a Tamil interpreter present at interview.

5. The RAC issued a negative recommendation in respect of the applicant's claim for international protection on 2nd October, 2009, which the applicant appealed to the RAT by notice of appeal dated 2nd November, 2009. The applicant attended the offices of the RAT for the purposes of that appeal on 14th February, 2011. He submitted, *inter alia*, further COI documents, letters from Irish organisations attesting to the applicant's good character, a letter from the Restoring Family Links section of the Irish Red Cross; a reference from a research scholar at Trinity College Dublin School of Ecumenics' People's Tribunal of Sri Lanka, an ophthalmologist's report and a further SPIRASI report from a different examining physician dated 13th July, 2010.

6. The RAC's s.13 report set out the following reasons for its recommendation that the applicant should not be declared a refugee:

- i. The fact that the applicant had to sign on daily at army headquarters was not consistent with his stated fear of State authorities;
- ii. It was not credible that the EPDP would release the applicant after he had witnessed the shooting;
- iii. The claim that the applicant lived in Sri Lanka for his entire life was undermined by his inability to readily identify all local bank notes;

- iv. His inability to translate basic Sinhalese words undermined his claim that he was habitually residence was in Sri Lanka;
- v. His fear of being arrested at the airport, if returned to Sri Lanka, was not supported by COI materials;
- vi. The applicant did not provide any evidence of travel, and there were issues with the account of his travel;
- vii. The applicant's description of getting through Moscow airport was not credible,
- viii. The applicant's description of his arrival in Ireland by ferry was not supported by recorded arrivals in Ireland that day;
- ix. The applicant's claim that he travelled through regions in Europe that had yet to enter the Schengen area was not credible;
- x. The applicant spent a considerable period of time in Moscow and his reasons for not claiming asylum there were not credible;
- xi. The COI materials did not support the applicant's claim that he would be at risk from State authorities; and,
- xii. As a person of Tamil ethnicity, the applicant could safely relocate to Colombo, according to COI materials.

### **Impugned decision**

7. The RAT affirmed the negative recommendation of the RAC in their decision dated 31st May, 2011, and issued to the applicant by cover letter dated 14th June, 2011. From p. 21 of the decision, the Tribunal member sets out the applicant's claim and analyses it, which can be summarised as follows:-

- i. The applicant failed to provide a sufficient explanation to substantiate his claim that Ireland was his first safe country, since he spent 47 days in Moscow without claiming asylum. Having regard to s.11B (b) of the 1996 Act, the Tribunal member stated that this undermined the applicant's credibility.
- ii. The applicant stated that he had lived in Sri Lanka for his whole life but his geographic knowledge, knowledge of Sinhalese and ability to identify bank notes were very limited. The Tribunal member stated that it would appear that the applicant made false representations in support of his application and this further undermined his credibility.
- iii. The applicant's claim that he would be in danger from the LTTE as a person that had provided assistance to opposing forces was not substantiated by the COI materials.

8. The Tribunal member then goes on to state, from p. 36, as follows:-

*"Based on the above, and in circumstances where the applicant has not demonstrated that he is an activist of sufficiently high profile to be unable to obtain sufficient protection, it does not appear that the applicant is a person who holds a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, and accordingly he does not qualify as a refugee.*

*The risk to the applicant from the LTTE is minimal, and where such a risk does exist, the protection offered by the Sri Lankan state is sufficient. The applicant is not at risk from the Sri Lankan authorities.*

*The applicant engaged in a demonstration which he said was outside what he called the Irish Embassy on O'Connell Street and outside the Irish Parliament. I assume he meant the G.P.O. He took this decision in circumstances where he must have known that a demonstration would be reported in the media. This is usually the object of the exercise. In doing so, in my view, he took a conscience and deliberate decision to highlight and publicise himself, otherwise there is no logical explanation for engaging in such a demonstration.*

*I am also mindful of the fact that the applicant appears to have omitted references to the plastic bag being put over his head.*

*In the case of RTVSSHD, Storey J. dealt with issues surrounding the Istanbul Protocol, the concept of 'highly consistent' which is referred in the medical reports is defined as 'a lesion which could have been caused by trauma described and there are few other possible causes'. The medical reports, while using the words highly consistent do not address the relative likelihood of the few other possible causes and as a consequence in line with Storey J.'s view the report is of less potential value. Having read and indeed re-read the medical reports and the evidence, there is nothing in the medical reports that would alter my view as set out above. I have considered them at length given the nature of the medical reports. It seems to me that the medical report and the tribunal are unable to state with any particularity how and in what circumstances such sequelae as are set out in the medical report came about.*

*I have already stated that there is nothing in the COI that would indicate that return of refugees or persons such as the applicant in this case are in any danger."*

### **Applicant's submissions**

9. Counsel for the applicant, Mr. O'Dwyer, S.C. appearing with Mr. O'Shea, B.L., submitted that the first finding reached by the Tribunal member; that s.11B (b) was relevant to the applicant's claim, was reached without the applicant making any claim that Ireland was his first safe country. Therefore, the provision should have no relevance to the applicant's claim and should not have any bearing on his credibility. The applicant relied upon the decision of *F.T. v. Refugee Appeals Tribunal & anor* [2013] IEHC 167. In any event, the applicant submits that he did provide a reasonable explanation for not having claimed asylum in Russia, which was not engaged with by the Tribunal member.

10. The applicant submits that the minimum standards, as mandated by Regulation 5(1) European Communities (Eligibility for

Protection) Regulations 2006 (S.I. No. 518 of 2006), were not adhered to and there was an over-reliance by the Tribunal member on the United Kingdom Border Agency's Operational Guidance Note on Sri Lanka, while hundreds of pages of COI put before the Tribunal member were not referred to at all. The applicant argues that relying on one document submitted by RAC's presenting officer, whilst not referring to any documents submitted by the applicant, is a breach of fair procedures. Furthermore, the applicant submits that the principles set out by Cooke J. in *I.R. v. Minister for Justice, Equality and Law Reform & anor* [2009] IEHC 353 were not adhered to when assessing the applicant's credibility, particularly where COI supportive of the applicant's claim was disregarded.

11. The applicant argues that the medical evidence was not properly considered and it was not appropriate for the physician to engage in conjecture about how the applicant's scars and wounds occurred, given that the examining physician stated that they were 'highly consistent' with and 'typical' of the course of events described by the applicant. The applicant relied, *inter alia*, on the decision of Clark J. in *R.M.K. v. Refugee Appeals Tribunal & anor* [2010] IEHC 367 in this regard.

12. The applicant contends that an assessment of the likelihood of future persecution based upon past persecution was not undertaken, as mandated by the 2006 Regulations and set out by MacEochaidh J. in *K.B. v. Minister for Justice, Equality and Law Reform* [2013] IEHC 169. The applicant also submits that, due to his participation in protests in Ireland, the decision-maker has not dealt with the refugee *sur place* issue in a fair and reasonable manner.

#### **Respondent's submissions**

13. Counsel for the respondents, Ms. Carroll, B.L., submitted that the applicant's case centres entirely on credibility. Having found against the applicant on credibility, it is alleged that the Tribunal member did not need to consider the issues of internal relocation or state protection, as per the decision of MacEochaidh J. in *G.O. v. Refugee Appeals Tribunal & ors* [2013] IEHC 89.

14. The respondents argued that the credibility findings are in line with the principles set out by Cooke J. in *I.R.* and MacEochaidh J. in *R.O. & anor. v. Minister for Justice & ors.* [2012] IEHC 573.

15. The respondents contend that it is made clear in the impugned decision that the medical reports were fully engaged with and that the weight to be attached to such evidence is a matter for the decision-maker, as per this Court's decision in *H.A.A. [Sudan] v. Refugee Appeals Tribunal & ors.* [2015] IEHC 144. The respondents pointed out that the applicant's submissions concentrate on the second medical report, without regard for the first SPIRASI report prepared by a different physician. In that report, it is stated that 'on physical examination, all was normal; there was no evidence of external injury'. The respondents highlight that said report was prepared only ten months after the applicant stated he left Sri Lanka, whereas the second report was prepared in July, 2010.

16. In relation to future risk of persecution, the respondents argued that, where a story is considered to be completely lacking in credibility, the Tribunal member is not obliged to consider the issue of future risk. The respondents rely on Peart J.'s decision in *J.B.R. v. Refugee Appeals Tribunal & anor.* [2007] IEHC 288 in this regard.

17. The respondents submit that the Tribunal member did take the COI submitted into account but the weight to be attached to it is a matter for the decision-maker. The respondents further submit that the decision should be read in the round, from which it is clear why the Tribunal member did not believe the applicant's story.

#### **Decision**

18. The Tribunal member dealt with s. 11B(b) at page 22 of the decision, page 33 of the Booklet of Pleadings, where it is stated as follows:-

*"The applicant stated in evidence that he spent a total of 47 days in Moscow prior to coming to Ireland. On being asked why he did not apply for asylum in Russia, the applicant said that he was told by the agent travelling with him that there was no asylum and no refugee status in Russia. He said the weather was much colder than that to which he was accustomed, he had no money and there was no good food. I find that the applicant failed to provide a reason explanation to substantiate his claim that the State is the first country in which he arrived since departing from his country of origin or habitual residence in accordance with Section 11(B)(b) of the Refugee Act 1996 and his credibility thereby undermined. I reached this conclusion on the basis that it is clear from the Articles of Evidence that the weather was a factor in whether or not he would seek refugee status while in Russia. This indicates that he thought about the process and decided not to seek protection in the first available country. That is the reason in my view why the credibility of his position is undermined."*

It seems to me that the Tribunal member gave due consideration to the applicant's evidence and it is also clear that the applicant provided reasons as to why he did not apply for asylum in Russia (having spent 47 days there). I am satisfied that the Tribunal member was entitled to conclude that the applicant decided not to seek asylum in the first available country, and was therefore entitled to arrive at an adverse credibility finding in this regard.

19. Tribunal decisions should be read in the round and individual parts should not be parsed and analysed in a fashion divorced from the overall findings of the case. The applicant's story was not believed by the Tribunal member. It is not for this Court to substitute its view for that of the Tribunal member.

20. In the case of *H.A.A. [Sudan] (supra)*, I stated the following at para. 25:-

*"With regard to the medical reports it seems to me that the tribunal member did consider the medical reports and considered them in the context of determining the applicant's credibility. It is established law that the probative value to be attached to medical reports is a matter for the decision-maker. The function of this Court is to ensure that the process adopted by the tribunal member was fair and that the evidence was considered. I have no doubt and it is apparent from the decision that the tribunal member did have regard to the medical reports but having considered the totality of matters did not attach any probative value to the reports."*

21. The question that arises from the foregoing is whether due regard was paid to the medical evidence submitted by the applicant and whether appropriate reasons were given for its rejection. At p.37 of the booklet of pleadings, the Tribunal member stated:-

*"In the case of RTVSSHD, Storey J. dealt with the issues surrounding the Istanbul Protocol, the concept of 'highly consistent' which is referred to in the medical reports is defined as 'a lesion which could have been caused by the trauma described and there are few other possible causes.' The medical reports while using the words highly consistent do not address the relative likelihood of the few other possible causes and as a consequence in line with Storey J.'s view the report is of less potential value. Having read and indeed re-read the medical report and the evidence. There is*

*nothing in the medical report that would alter my views as set out above. I have considered them at length given the nature of the medical reports. It seems to me that the medical report and the tribunal are unable to state with any particularity how and in what circumstances such sequelae as are set out in the medical report came about."*

The applicant submitted medical reports in the course of his application, with the first examination occurring in August, 2008 and the second examination in July, 2010. In reviewing the impugned decision, it appears that the decision-maker gave due consideration to those reports. The decision-maker determined the probative value to be attached to those reports. That is the function of the Tribunal member. It is clear from the RAT decision that the Tribunal member did not accept that the second medical report (which used the term 'highly consistent', as referred to in the Istanbul Protocol) was of sufficient probative value, in the context of the contents of the first medical report, the details thereof report and the specific circumstances and dates surrounding the applicant's medical assessment. I therefore reject the challenge to the decision on this ground.

22. The applicant argued that, in circumstances where it is clear that the applicant speaks and writes Tamil, an assessment of the likelihood of future persecution should have been carried out for persons of his profile, notwithstanding the rejection of his claim. On p.36, the decision-maker states:-

*"The risk to the applicant from the LTTE is minimal, and where such a risk does exist, the protection offered by the Sri Lankan State is sufficient. The applicant is not at risk from the Sri Lankan authorities."*

The decision-maker did assess the potential dangers faced by the applicant if he were to be returned to Sri Lanka. The applicant also contended that the decision-maker should have carried out a fair and reasonable assessment of the refugee *sur place* issue in circumstances where the applicant engaged in protests since coming to Ireland and now feared persecution because this participation was widely reported in Sri Lankan media. The applicant is entitled to engage in protests in Ireland, as there is a right to freedom of assembly. The decision-maker comments that "[the applicant] took a conscious and deliberate decision to highlight and publicise himself, otherwise there is no logical explanation for engaging in such demonstrations." These are rational conclusions on the part of the Tribunal member.

23. The applicant argued that there was a breach of fair procedures because no regard was paid to documents submitted by the applicant. The applicant draws this conclusion from the fact that only the UK Border Agency's operational guidance note was referred to in the decision. The applicant submitted that, in *MD (Women) Ivory Coast* CG [2010] UKUT 215 (IAC), operational guidance notes were explained as follows, at para. 265-266:-

*"Operational Guidance Notes fall into a different category. They are, in essence, policy statements. On many occasions, the Operational Guidance Notes will be supported by references to background material and may have sought assistance from RDS, as well as Tribunal case law taken from reported decisions. Insofar as they include background material, the background material is to be regarded like any other background information, subject to the fact that its selection may not have the same objectivity and is not independently scrutinised."*

*In the case of the Ivory Coast Operational Guidance Note, much of the contents are supported by references to key documents and the FCO Country Profile and other background material. Such background material must be evaluated in the normal way. Insofar as its contents are a statement of policy, it should be regarded as the Secretary of State's submission. It should not be regarded as country information in the normal sense but as the caseworker's own assessment of that material. As such, it is to be assessed on its merits but should not be treated as if it were an expert report or having greater authority solely by reason of its coming from the UK Border Agency."*

24. The applicant submitted numerous COI reports, some of which were submitted in the first instance to the RAC by the applicant's legal advisors, and some of which were submitted with the applicant's notice of appeal, and are exhibited before this Court. The decision-maker found, based upon the operational guidance note, that low-level activists are not at risk from the Sri Lankan authorities and low-profile government informants are not at risk from the LTTE. However, this directly contradicts COI submitted by applicant. For example, the UNHCR position paper on the international protection needs of asylum seekers from Sri Lanka, exhibited from p.849, states as follows at p.860:-

*"All asylum claims of Tamils from the North or East should be favourably considered. In relation to those individuals who are found to be targeted by the State, the LTTE or other non-state agents, they should be recognized as refugees under the criteria of the 1951 Convention [...]"*

25. It is for the decision-maker to decide the probative value to attach to the COI submitted. I should point out that a large volume of COI was furnished to the Tribunal after the RAC determination and little or no attempt was made to synthesise or particularise same. Indeed, at the hearing before this Court, it was conceded that not all of the submitted COI (in excess of 1200 pages, bound in three large ring-binder folders) was relevant and a slim volume of the pertinent documents was furnished to the Court instead. It seems to me that the applicant inundated the Tribunal with a large volume of non-specific documentation and then sought to challenge the Tribunal member for not addressing all of that information, with the intent being to gain the advantage of doubt cast over the process. This does not seem to me to be a proper discharge of the applicant's responsibilities as a participant in the asylum process. The Tribunal member is not required to refer to all pieces of information before him. Nevertheless, it should be clear from the decision that such submissions were taken into account by the decision-maker. The applicant is entitled to a reasoned decision based upon the evidence submitted through the course of his asylum application. I am satisfied that this occurred in this instance.

26. The respondents argued that there was a clear rejection of the applicant's credibility and, therefore, his claim was not deemed to be well-founded. The decision-maker took issue with parts of the applicant's claim and set out various credibility findings. I am satisfied that the Tribunal member unequivocally rejected the applicant's claim and that the consideration of internal relocation and State protection was of the 'even if' variety referred to by Clark J. in *K.D. v RAT* [2013] IEHC 481. His credibility was in doubt. However, the Tribunal member found that, even if the applicant's narrative were true, his activities as both an informant and an LTTE member were of such a low level that State protection and internal relocation would be available to him. These findings were based on the operational guidance note. The respondents relied upon the decision of MacEochaidh J. in *G.O. (supra)*, where he stated at para. 12:-

*"It is well established by case law that where the RAT fundamentally disbelieves an applicant's account, there is no legal requirement to examine further matters such as the question of internal relocation, the availability of State protection etc. But there is no prohibition on the RAT from carrying out such an exercise following negative credibility findings as happened in this case. No authority in support of that proposition has been advanced and I reject that complaint."*

27. I am satisfied that the decision of the RAT is reasoned and rational. The Tribunal member was entitled to make the findings and conclusions which he arrived at. I therefore refuse leave.