Neutral Citation Number: [2010] IEHC 490

#### THE HIGH COURT

#### JUDICIAL REVIEW

2008 701 and 702 JR

**BETWEEN** 

R.C. AND G.G.M.

**APPLICANTS** 

AND

#### THE REFUGEE APPLICATIONS COMMISSIONER AND

### THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

**RESPONDENTS** 

# JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 15th day of July, 2010

- 1. The applicants are a married couple and nationals of Zimbabwe. They sought **leave** to apply for judicial review of the decisions of the Refugee Applications Commissioner dated the 15th for the husband and 14th May 2008 for the wife, which recommended that they should not be granted declarations of refugee status. The hearing took place on the 10th, 11th and 12th February, 2010. Mr Paul O'Shea B.L. appeared for the applicants and Mr David Conlan Smyth B.L. for the respondents.
- 2. The decision of this Court given ex tempore was to refuse leave but the delivery of the judgment with the reasons for such refusal was delayed so as not to prejudice the applicants' existing appeals to the Refugee Appeals Tribunal. This was necessary as the Court had indicated strong disapproval of the audaciousness of the application in the circumstances of established mendacity of a particularly egregious character where the Court considered action to engage the sanctions for deliberate lying contained in s. 20(2) of the Refugee Act 1996, as amended.
- 3. The material background to this challenge was that in both cases the Commissioner made findings pursuant to s. 13(6) of the Refugee Act 1996, which meant that any appeal pursued by the applicants would be a documentary appeal. The applicants argued that they will be severely prejudiced by the absence of an oral hearing and they argued that the Commissioner based his decisions uniquely on credibility grounds and failed to assess the kernel of their claim which is, essentially, that the husband is the brother of a former opposition MP who was forced to flee persecution in Zimbabwe and was granted refugee status in the U.K.

## **Background**

- 4. In September, 2007 the applicants made individual applications for asylum in Ireland claiming to have married in Zimbabwe in 2002 and to have come to Ireland from Zimbabwe a few days before their application in flight from persecution. Both parties recounted an elaborate, detailed and mutually consistent history of their life in Zimbabwe and, in particular, how in 2002 they and other family members were targeted by Zanu-PF youths because of their close blood relationship with prominent members of the MDC opposition party. They claimed to have been exposed to a barrage of threatening phone-calls and intimidation of a high order directed to themselves and their customers at their place of business including assaults at their home and business. The intimidation was such that they had to close down their shop and relocate to Bulawayo for five years. In August, 2007 their farmhouse where they lived was attacked and burned down by Zanu-PF youths. The husband and his brother escaped with their lives through a window of their house. The next day the husband sought out his wife who was staying with other relations and the applicants travelled through South Africa and Germany arriving in Ireland in September, 2007.
- 5. In support of their asylum applications the applicants submitted a number of identity documents and a greater series of documents relating to "TM", a politician in Zimbabwe who they claim is the husband's brother. These documents included a newspaper article, a photocopy of TM's passport and a letter from the U.K. Home Office granting refugee status to the said TM together with a document purporting to be from TM, which discusses the harassment of his brother and sister-in-law (i.e. the applicants) in Zimbabwe in 2006 and 2007. That letter purports to have been sworn before a Commissioner for Oaths in the U.K. The applicants also furnished letters from the Home Office granting refugee status to another man with the same surname together with a document purporting to be from the immigration authorities in Canada stating that yet another male with the same surname (Mr R M) was involved in the refugee process in Canada. In addition, they submitted a further document stating that the third man Mr R M and another person were recognised as refugees in Canada. They also furnished a letter from a Mr. B F M stating that he is a brother of the husband and informing the reader that he sought refugee status in the United States because he feared persecution by reason of his political activities. Finally, a Zimbabwean driver's licence in the name of Mr B F A and a U.S. travel document in his name were furnished.
- 6. Notwithstanding this impressive array of documents pertaining to persons who shared the husband's family name, the officer designated by the Commissioner to interview the wife made her aware that he harboured suspicions regarding her story as all her personal documents related uniquely to the period prior to 2002 and because her knowledge of events in Zimbabwe post-2002 was poor. His suspicions were subsequently borne out as before the husband and wife each attended for a second interview, information obtained from the U.K. authorities revealed that persons with the same biographical details as the husband and wife had been in the UK on valid visas during the entire period during which they had claimed to be suffering persecution in Zimbabwe.
- 7. The husband's second s. 11 interview with the Commissioner took place on the morning of the 12th May 2008 while the wife's second interview was in the afternoon. When the information obtained from the U.K. authorities was put to the husband at his interview he denied that he had given false information and expressed serious concern that someone had "stolen his identity" and he persisted with his initial claim that he had been in Zimbabwe at all relevant times.
- 8. The Commissioner also received information from the U.K. authorities that a person sharing the wife's biographical details had been a student in the U.K since at least 2002 and that her permission to remain as a student had been renewed annually thereafter until

2006. She had married a man from Zimbabwe with the same name and biographical details as the husband in 2006 in the U.K. and in 2007 her permission to reside in the U.K. had not been extended. An appeal had been lodged and then withdrawn.

9. These details were put to the wife at her second s. 11 interview at a stage when her husband had been made aware that this information was available. At first the wife denied that she was the person referred to in the U.K. report but she then admitted that she had been in the U.K. since 2002. She said that she came to Ireland in 2002 and after a few months went to the U.K. where she met the second named applicant for the first time and that they were married in July, 2006 in the UK. She said that his family includes several high profile MDC members. She also admitted that she had been in Zimbabwe in early 2005 for a period of three weeks to visit her sick mother after which time she returned to the U.K. where she was a student. She and her husband did not apply for asylum in the U.K. because he did not think it was a safe country because "he was attacked there."

#### The decision in Ms C (the wife)'s case

10. In the s. 13 report prepared in relation to the wife on the 15th May, 2008, the Commissioner's officers concluded that her account in relation to the events in Zimbabwe after 2002 was not true. A finding under s. 13(6) (b) of the Refugee Act 1996 followed in that she "made statements or provided information in support of the application of such a false, contradictory, misleading or incomplete nature as to lead to the conclusion that the application is manifestly unfounded".

11. The Commissioner also outlined the wife's later assertion that she and her husband did not apply for asylum in the U.K. because her husband had been attacked and beaten up on his way home from work in 2006 / 2007 and the assertion that the husband had started attending MDC rallies at this time. The wife's evidence that her husband could not identify any of his attackers or why he was attacked was noted as was the assertion that when the matter was reported, the British police said that they could not find his attackers. The fact that the wife had returned to Zimbabwe in 2005 was deemed inconsistent with a well-founded fear of persecution. The s. 13 report also found that the wife had failed to provide a full and true account of how she travelled to the State and that she had not provided a reasonable explanation for not seeking refugee status in the U.K. In a somewhat understated finding it was said that if these points were taken cumulatively, there was "a considerable credibility deficit".

#### The decision in Mr M. (the husband)'s case

- 12. The impugned s. 13 report in the husband's case outlined his account and the documents submitted by him in support of that account. The Commissioner stated that while the source and the authenticity of those documents could not be verified, they had been considered. It was found that if the husband's claim was accepted, it could amount to persecution but that was without prejudice to the assessment of the credibility of the claim. The Commissioner then referred to COI which related to TM who at some time was a Member of the Zimbabwean Parliament.
- 13. The Commissioner's report went on to consider the husband's conduct at his two interviews and his denial of ever being resident in the U.K. It was noted that he had been given numerous opportunities to admit that he had lied and that he had been in the UK since 2002. Quite understandably the Commissioner found that in the face of the evidence of his residency in the UK, the husband had failed to apply for asylum in the first safe country and failed to provide a reasonable explanation for failing to do so. Clearly, if the information obtained from the U.K. authorities which was confirmed by his wife was that he was in the U.K. between 2002 and 2007, his allegations of being attacked by Zanu-PF youths in Zimbabwe from 2003 through to 2007 were untrue. Findings were made under s. 11B (b) of the Refugee Act 1996 and s. 13(6) of the Act (set out at paragraph 10 above). It was therefore found that the husband did not have a well-founded fear of persecution.
- 14. Notwithstanding the strong findings regarding the untruthfulness of the applicants' accounts and the fact that the contents of the document from TM purporting to refer to the harassment of the applicants in Zimbabwe in 2006 and 2007 could only be viewed as fabrication, the applicants challenged the validity of the Commissioner's decisions.

#### The Challenge

- 15. In his affidavit grounding these proceedings the husband has finally admitted on a qualified basis that he gave false information to the Commissioner.
- 16. The challenge to the Commissioner's decisions lay in the asserted failure to consider the applicants' core claim of their relationship with a prominent political family whose members had been granted refugee status in a number of jurisdictions. A further challenge was based on an asserted breach of fair procedures in that the wife's admissions that she had told lies was not put to her husband.
- 17. Mr O'Shea, B.L. who acted for the applicants did not seek to dispute the fact that his clients had lied but sought to minimise the effect of that lying by submitting that people will provide false evidence for many reasons but this does not mean they are not refugees. He relied on Professor Hathaway in *The Law of Refugee Status* who states at p. 85 / 86 / 87 that:-
  - "[...] a claim for refugee status should not be refused by reason of vagueness or incompleteness and there is no obligation for an applicant for refugee status to have a photographic memory. [...] Even clear evidence of a lack of candour does not mean that an applicant is not entitled to refugee status. [...] Lies do not prove the converse. [...] The determining authority must look at all the evidence. [...] An earlier lie might be something to consider in support of credibility."
- 18. He argues that this proposition is supported by *Symes* and *Jorro* who say in their textbook *Asylum Law and Practice* that even if a person is found to be lying it must still be assessed whether he or she had a well founded fear of persecution. On that basis, Mr O'Shea argued that the Commissioner was clouded in his judgment by the discovery that the applicant were lying.
- 19. As the submissions were understood, it was contended that notwithstanding the blatant untruth of the narrative of past persecution, if the Commissioner accepted from personal documents submitted that the applicants were indeed members of TM's family, the Commissioner ought to have accepted that they had demonstrated a well-founded fear of persecution for a Convention reason. It was argued that no inquiries or investigations regarding these assertions were conducted by the Commissioner and the decision falls to be quashed by reason of this failure.

#### The Respondents' Submissions

20. While the respondents contend that no substantial grounds have been established and they have concentrated - quite rightly in the Court's view - on the Court's discretion to refuse leave in light of a gross lack of candour, they nevertheless defended the adequacy of a paper-based appeal in the circumstances of these cases and addressed the inquiries conducted by the Commissioner on the alleged relationship to TM who was granted asylum in the UK. Mr Conlan Smyth, B.L. took the Court through the individual assertions made by the applicants that were noted in the interview record and the questions and answers relating to the alleged relationship with TM, which were recorded and referred to in the s.13 report. It was submitted that in the light of the queries made, it

was unstateable to assert that the Commissioner did not address this aspect of the claim.

#### The Court's Assessment

21. The submission that a breach of fair procedures affected the findings relating to the husband is rejected. At his second interview with the Commissioner's representative, the husband was given every opportunity to explain why he had stated that he was being harassed, intimidated and threatened in Zimbabwe at a time when he was lawfully residing in the UK. That interview was conducted before that of his wife. It was impossible to place his wife's evidence before him. The husband maintained the truth of his account of persecution and his claim that he had left Zimbabwe in 2007. The interview at which his wife admitted that she had lied took place later that day well after the conclusion of the husband's second interview and after, it can be assumed, information on the details of his earlier interview were shared. No question of unfair procedures arises and the applicants' submission is misconceived. If the Commissioner had conducted a third interview with the husband in order to specifically tell him what no doubt the husband already knew, the only options for the husband would have been either to admit the lie or to maintain the truth of his assertions. Either way, the die was cast as the information obtained from the U.K. authorities established that he had been lying which was confirmed by his wife. Nothing could have been usefully achieved by reconvening his second interview. He had already been presented with an opportunity to consider the information adverse to him and he had rejected its validity. Fair procedures do not require the adverse information to be put to him a second or third time.

### Inadequacy of paper-based appeal

- 22. The procedure adopted in this jurisdiction is that an applicant who has been notified of a negative s. 13 recommendation has an entitlement to request an oral appeal before the Refugee Appeals Tribunal under s. 16(3), Refugee Act 1996 as amended. This entitlement is not available where the s. 13 report contains a finding pursuant to s. 13(6) (b) of the Act that the applicant has made statements or provided information in support of his asylum application of such a false, contradictory, misleading or incomplete nature as to lead to the conclusion that the application is manifestly unfounded. Section 13(5) (1) provides that in such circumstances any appeal must be determined without an oral hearing. The recognition of manifestly unfounded claims pre-dates the 1996 Refugee Act and the constitutionality of allowing only a paper-based appeal in such cases was accepted by the Supreme Court in *V.Z. v. The Refugee Appeals Tribunal* [2002] 2 I.R. 135.
- 23. No averments were furnished in the applicants affidavit outlining any injustice or prejudice occasioned by a paper based appeal. There is nothing to prevent them from explaining in written submissions to the Refugee Appeals Tribunal why they fabricated a story of persecution and why they did not apply for asylum in the U.K. even though members of their family have allegedly sought and obtained asylum there and in other countries. They will have every opportunity to explain in writing why the letter from the ex-MP who they assert is a relative and refugee in the UK endorsed their story which can now be seem only as a complex fabrication. They can explain that notwithstanding their previous behaviour, they are in fact in need of international protection. It is open to them to furnish the Tribunal with additional evidence to substantiate their claim and if it is considered necessary by the Tribunal Member, the terms of ss. 16(6) and (7) permit a request to be forwarded to the Commissioner to conduct further inquiries or to furnish written observations concerning any matter arising from the written appeal. Finally, if their appeals are rejected they are not precluded from challenging the Tribunal's decisions by way of judicial review. In the circumstances, the applicants have been unable to establish any inadequacy in the form of appeal available to them and have not established substantial grounds for the contention that the Commissioner's decisions ought to be quashed on this ground.

# The duties of an applicant

24. The applicants appear to have ignored that they have a duty when engaging in the asylum system to cooperate by presenting their account in a truthful manner. Those duties are set out in the form which is provided to all applicants at the initial stages of the process and when applicants are asked to fill out a questionnaire where applicants are warned of the consequences of not telling the truth. Those obligations and consequences are based on the terms of the Refugee Act where s. 11B (f) provides:-

"11B—The Commissioner or the Tribunal, as the case may be, in assessing the credibility of an applicant for the purposes of the investigation of his or her application or the determination of an appeal in respect of his or her application, shall have regard to the following: [...]

- (f) whether the applicant has adduced manifestly false evidence in support of his or her application, or has otherwise made false representations, either orally or in writing".
- 25. Section 11C (1) provides that "It shall be the duty of an applicant to co-operate in the investigation of his or her application and in the determination of his or her appeal, if any." Section 20(2) further provides:-

"If a person, for the purposes of or in relation to an application under section 8, gives or makes to the Commissioner, the Tribunal, an authorised officer or an immigration officer any statement or information which is to his or her knowledge false or misleading in any material particular, that person shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or to both."

26. Applicants are made aware of their obligation to tell the truth at all stages of their asylum process. That obligations arises from the Convention Relating to the Status of Refugees 1951 where at Article 5 it is stated:-

"Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order."

- 27. Article 11 of Council Directive 2005/85/EC ("the Asylum Procedures Directive") provides:-
  - "1. Member States may impose upon applicants for asylum obligations to cooperate with the competent authorities insofar as these obligations are necessary for the processing of the application."
- 28. In this case the behaviour of the applicants in knowingly providing the Commissioner with false and misleading information has all the appearance of criminal behaviour. Their gross misconduct in abusing the integrity of the asylum process would entitle the Court to refuse certiorari. It is deeply offensive to the justice system that applicants who have exploited the refugee system by their conspiracy to deceive should now come to this Court and complain that the system was unfair to them in that the husband was not afforded a second opportunity to admit his lies.

# The Court's discretion

29. The respondents urged the Court to exercise its discretion to refuse relief to the applicants in the circumstances of this case. However as no breach of fair procedures has been established even at an arguable level, the issue of the Court's undoubted

discretion to refuse certiorari simply does not arise. There is no merit to the leave application either in law or on the facts of sustained dishonesty which carries and did carry s. 13(6) consequences. All applicants have duties to tell the truth in their asylum claims. These applicants chose to create and rehearse an elaborate and highly detailed deception regarding their claim. They were found out. They have never attempted to explain their mendacity but seek to ignore this behaviour by claiming that real refugees are often forced to lie and that this should be borne in mind while they are given a chance to wipe the slate clean and begin again. As the respondents have argued, the applicants wish to have "egregious deceit to the authorities expunged from the system". It is difficult to imagine a greater level of dishonesty where the applicants over extended interviews conspired to deceive with minute and consistent details provided of their maltreatment in Zimbabwe. When the husband eventually admitted that his account was untrue he simply said that he furnished incorrect information to the Commissioner in support of his claim and he regrets that he did so. He did not identify which information is "incorrect" and his only explanation for not applying for asylum in the U.K. is that he and his wife would have been detained separately. No information was provided to this Court or to the Commissioner as to what the applicants were doing in the U.K. between 2003 and 2007 before they came to this State.

- 30. Ultimately, these applicants were found to have presented a case which was manifestly unfounded for two reasons: (1) their account of persecution and flight was an established fabrication and (2) they did not apply for asylum in the UK during the 5 or more years that they were there. The Commissioner looked in detail at the alleged relationship with the TM family which the applicants had stated formed the basis for their harassment and persecution in Zimbabwe at a time when they were, in fact, living in the UK and when TM and his brothers had already left Zimbabwe. The relationship therefore lost its relevance.
- 31. The Commissioner did in fact examine the asserted relationship between the applicants and TM and expressed a high degree of scepticism about it. He questioned why, if the applicants were the relatives of TM, they would lie in the way they did and why they did not seek asylum in Britain. On those facts the Commissioner acted lawfully and reasonably in making the negative s. 13(6) recommendation. The applicants undoubtedly presented information of such a false, contradictory, misleading nature as to lead to the conclusion that their applications were manifestly unfounded.

#### Decision

32. As the Court has already indicated, leave will **not** be granted.