

**THE HIGH COURT  
JUDICIAL REVIEW**

[2006 No.739 J.R.]

**BETWEEN****M. K.****APPLICANT****AND****THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE REFUGEE APPEALS TRIBUNAL****RESPONDENTS****Judgment of Mr Justice Brian McGovern delivered on the 23rd day of January, 2008**

1. This is an application for leave to apply for judicial review by the way of an order for *certiorari* quashing a decision of the second named respondent made on the 15th May, 2006, affirming the recommendation of the Refugee Appeals Commissioner that the applicant not be declared a refugee. The applicant also seeks as a declaratory relief and an interim injunction restraining the first named respondent from acting upon the decision of the second named respondent until these proceedings have been determined, or alternatively for a stay. The applicant also seeks an order extending the time within which to bring which to bring these proceedings.

2. Counsel for the respondents informed the court that the application was made slightly out of time but that no point is being taken on this and in the circumstances I am prepared to extend the time for the bringing of the application.

3. The plaintiff claims to be a national of the Democratic Republic of Congo (DRC) who came to the State on the 12th February, 2004 to seek asylum. She applied for asylum on the 13th February, 2004. She was interviewed before the Refugee Applications Commissioner (RAC) on the 13th December, 2004. On the 11th May, 2005 a report pursuant to s. 13 of the Refugee Act, 1996 (as amended) was published, and in that report the applicant was refused refugee status. She appealed the decision to the Refugee Appeals Tribunal (RAT), the second named respondent. Her appeal was refused in a decision of the second named respondent dated the 15th May, 2006. The applicant challenges this decision and seeks consequential orders preventing the first named respondent from acting upon the refusal of second named respondent to grant refugee status. The applicants claim for asylum was rejected on the grounds of lack of credibility and insufficient evidence. There were a number of factual errors in the decision of the second named respondent but they are not, in my opinion of material significance. For example the RAT states in the report, "*her husband was a soldier and as Chief of the Mai Mai, she was the wife of a person who had a lot of responsibilities*". In fact the applicant has said that her husband was a Chief of the Mai Mai. Muzenzé, which is the place where she alleges she was in prison, is described as Muzezé. It is stated "her father was a gold miner and was involved with the Mai Mai." In fact it was her husband who she says was involved with the Mai Mai. On page 5 of the RAT report it is stated that "the applicant claimed to have been actively involved in mobilising women on account of her husband's high profile in the Mai Mai." That was an important feature of her account because she alleges that it was that association with her husband and with the Mai Mai organisation that puts her in danger if she returns to the RC. Therefore even if a mistake was made in stating that her father was involved with the Mai Mai it was of no consequence. It is also suggested that there was an error made when setting out the precise route taken by the applicant when she had escaped from prison. Having heard the evidence and reviewed the papers it is not clear that there was a mistake of substance or, if there was a mistake that it was of any significance in terms of the overall decision made. The findings in relation to the applicant's credibility did not depend on that particular piece of information, but went, rather, to the issue as to whether or not the plaintiffs account was credible as a whole.

4. The Illegal Immigrants (Trafficking) Act, 2000 sets out the procedure for challenging a decision of the RAC or the RAT, or a decision of the Minister made in connection with an application for refugee status. Section 5 of the Act provides that a person shall not question the validity of such an order or decision otherwise done by way of an application for judicial review. Section 5(2)(b) of the Act, states:

"...such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed".

The Supreme Court has held that "substantial grounds" means grounds equivalent to "reasonable", "arguable" and "weighty" and must not be "trivial or tenuous". In *re Article 26 of the Constitution and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 394-5 adopting Carroll J. in *McNamara .v. An Bord Pleanala (No.1)* [1995] 2 ILRM 125. It is clear that the intention of the legislature was that asylum applications would be dealt with by a cohort of people who would develop an expertise in the area and that, their decisions were to be binding unless the High Court held there were substantial grounds for contending that there was some defect in the process or lack of vires which would warrant granting leave. It is clear from the legislation relating to asylum matters that the High Court is not sitting as an appellate court to rehear the facts or to substitute its own view on the facts for that of the RAC or the RAT.

5. One of the problems in dealing with decisions which largely turn on credibility is that the court does not have an opportunity to assess the applicant in person and must do so by way of the documents produced before the court, which include the answers to questionnaires and answers given at interview.

6. In this case it seems to be accepted that if the applicants account is credible she would qualify for refugee status because there is country of origin information to show that widespread atrocities are being carried out in the DRC against the population in general and against women in particular. There is clear evidence that in the widespread fighting in the country, rape has been used as an instrument of war. It is also CLEAR from country of information origin that atrocities have been carried out by all sides in the various disputes that are ongoing in the country, including the Mai Mai of which the applicant claims to be a member. It is accepted by the applicant that s. 11(A) of the Refugee Act, 1996, provides that where an applicant appeals against the recommendation of the RAT under s. 13, the burden of proof shall be on the applicant to show that she is a refugee.

7. Therefore in reaching a decision as to whether or not to grant leave to the applicant, the applicant has to satisfy the court that she is a refugee within the meaning of the legislation and in challenging the decision of the RAT she has to establish substantial ground for quashing the decision. The RAT and RAC are entitled to assess the credibility of the applicant and in doing so s. 11(B) of the 1996 Act, sets out matters which may be taken into account. One of those is whether or not the applicant possesses identity documents, and if not whether she has provided a reasonable explanation for the absence of such documents.

8. In this case the only document purporting to be an identity document produced by the applicant was a birth certificate. Exhibit F in

the affidavit of the applicant sworn in support of this application contains a record of the oral appeal hearing which took place on the 14th July, 2005. She was asked about her birth certificate and said that Mr Salé gave it to her. When asked was it hers, she replied "my name's on it". Mr Salé was a man whom she says she met after escaping from the prison and who helped her to come to Ireland. She was asked how Mr Salé got her birth certificate and said she did not know. The birth certificate undoubtedly refers to someone of the applicants name and appears to have been issued in the 13th March, 2003. She says that she escaped from Muzenzé prison in June 2003. She admits that she came into the country on foot of a false French passport, also supplied to her by Mr Salé. It seems to me that in these circumstances it was not unreasonable for the RAC to conclude that the birth certificate produced was not a proper identity document. She had no other identity documents to produce, because she says that Mr Salé took the passport back from her. She had no passport to produce at the hearing before the RAC or the RAT, she had no internal identity card or any other photographic evidence to support who she claimed to be and where she came from. She had no travel documents. This was expressed to be of some concern to the Tribunal, and I don't think such a conclusion is capable of challenge in these proceedings, either on the grounds of rationality or otherwise, having regard to the facts. Neither do I believe that the finding that the Tribunal could not attach any weight to the birth certificate is something which is susceptible to challenge having regard to the evidence.

9. The plaintiff has given an account of how she fled the RDC and arrived in Ireland. This account was not believed by the RAT or the RAC. If the plaintiff is to be granted leave to apply for judicial review on this part of the claim she must show that there are substantial or arguable or weighty grounds for contending that this decision was in some way unsupported by the evidence or irrational, or based on some mistake or error. The report of the second named respondent dealing with this aspect of the matter states:-

*"The applicant claims that while fleeing from her place of detention, she met a friend of her fathers on the road. It was he who arranged her departure from the DRC. That the applicant in such a situation could by chance come across a friend of her father in circumstances as outlined by the applicant, defies belief and the applicants account in that record is not capable of being believed. The applicant travelled through Tanzania en route to Ireland. The applicant did not apply for asylum there and when asked why this was so, told the Tribunal that Tanzania is still Africa and is near to the DRC, that a lot of people know her and could accuse her. She was told by Mr Salé that she would not be secure there, and as she depended on him she accepted that this was so. The applicant's subjective belief in that regard is not supported by any objective facts, the applicants account is not capable of being believed".*

10. It is worth looking at the account given by the applicant in interview. In the s. 11 interview she describes how she escaped from prison with other people, and how she fled. She then says "we walked and walked and eventually I met a person called Salé in a place called Fizi, it is at the exit to go to Kalamu. I travelled with him. He is an old friend of my father. We went to Kalamu, but when I got there my father was not there anymore. Salé said we could not stay so we went to Tanzania by boat. He was the only person I had, he organised everything up until the moment I found myself in Ireland." She goes on to say that she stayed in his house in Tanzania for over a month and when asked how her trip was organised, she said "he organised it all. We took a plane from Dar es Salaam in Tanzania to a country where they spoke English. From there to Brussels and from there to Ireland." She said they left the plane in an English speaking country and spent the night somewhere outside the airport. The next day they went back to the airport and flew to Belgium. They changed flight in Belgium and flew to Ireland on the same ticket. She said that she used a French passport which didn't have her picture on it. We know from subsequent evidence that she accepts it was a passport which did not have her name or face on it, but someone who looked like her. When she was asked where was it now she said "when I came to this office he took back all the documents".

11. She repeated this at the hearing before the RAT. She said that Salé took everything back. She was asked did she pay him anything and said "no". When she was asked why she chose to come to Ireland she said "it didn't depend on me. Salé was in control." I have already indicated that she gave evidence that Mr Salé gave her a birth certificate and she does not know where he got it. She said he was in front of her going through passport control in Belgium, so there was no problem. She says that she was well dressed.

12. If one is to paraphrase the applicant's evidence, she escaped from prison in the DRC when it was attacked by members of the Mai Mai. While fleeing she met Mr Salé who is a friend of her father. She fled to Tanzania with him and stayed in his home for one month. He travelled to Ireland with her having organised a false passport and a birth certificate, which may or may not be genuine. He then took the passport from her and she did not see him again. She made no payment to him.

13. One has to ask why would a person who she met while fleeing from the prison act in this fashion even if he was a friend of her father. Why would he travel all the way from Africa through at least two other countries to bring her to Ireland and provide the necessary documentation for her to come here, and not accept any payment for this service. No explanation is given as to why he would have gone to all this trouble for nothing. In fact the evidence would suggest that it cost him money because he provided the tickets. On any objective basis, this account is simply not credible.

14. In the light of that account and the lack of any proper identification documents, it is easy to see why the RAT found the plaintiff to be lacking in credibility. Her account of events in the DRC and her description of her involvement with the Mai Mai was not accepted by the RAT. She described how she escaped from the prison in the DRC when it was attacked by the Mai Mai. She says that many people were killed. There was no country of origin information to support this. Her evidence to the effect that the DRC is a village society and that records would not be available of such events could be true, but that is as much as you could say about it. It could equally be untrue and, it seems to me that, it is more likely than not that some corroborative evidence of this could have been found if the event she described had occurred. But in any event in the light of the other credibility issues, it would be wrong to criticise the RAT for failing to accept the applicants account when the evidence fell far short of what would be required. I find that the applicant has not established substantial grounds for contending that that decision ought to be quashed.

15. The applicant gave answers to questions about the structure of the Mai Mai. It could be argued that she gave sufficient information to establish a knowledge of the Mai Mai. Should the court grant leave to apply for an order of certiorari quashing that decision of the RAT because it might have reached a different conclusion on this issue. Counsel for the respondents argued that the RAT is a specialist Tribunal and that some deference should be shown to it by the court on that account. If the applicant comes from the DRC, then she probably would have a certain amount of knowledge of the Mai Mai, whether she was an active member of it or not. Having regard to all the facts in this case, I hold that the applicant has not made out a substantial case for contending that the decision of the RAT on this part of her appeal ought to be quashed. The Tribunal member said that the applicant was able to name the leaders of the organisation, but that this is information which is readily available.

16. The applicant complains that the decision of the RAT states that the applicant fears persecution in the DRC for reasons of her imputed political opinion, and this is factually wrong and demonstrates a failure on the part of the second named respondent to appreciate the nature of the applicants claim. I do not accept that contention. In para. 10 of her affidavit, the applicant states that she fears persecution in the DRC by reason of her political opinion and for political reasons due to the fact that her late husband was

a Mai Mai Chief.

17. There is one other feature of this case which I believe to be of some significance. In her grounding affidavit the applicant says that she is in an extremely traumatised and vulnerable state as a result of the physical and sexual abuse that she suffered in the DRC. She says that she attended a psychologist with a view to obtaining a medical report, and acknowledges that she did not obtain a report. She says that "...I lost contact with my psychologist". She found it extremely traumatic to speak about her experiences to anyone and that she continues to find this matter extremely difficult and humiliating. On the 10th June, 2005, the applicant's solicitors wrote to the second named respondent stating, *inter alia* "...We intend submitting a psychologist's report from Irin McNulty, St. Brendan's Hospital". In the appeal against the RAC decision the applicants solicitor stated "as a result of their political beliefs and activities, she described how she was arbitrary (stet) arrested, detained and interrogated without due process and brutally and repeatedly raped and tortured at the hands of the opposition Rassemblement Congolaise pour de Democratie (hereinafter "RCD") and its supporters. (In this regard, the appellant is attending a psychologist in St. Brendan's Hospital and a psychological report will be submitted as soon as the same are forthcoming)."

18. Despite the fact that the plaintiff claims that she was raped and mutilated, and that she was attending a psychologist, no medical evidence was produced before the RAC or the RAT. The court acknowledges that it is extremely difficult and traumatic for victims to sexual assaults (particularly multiple sexual assaults used as an instrument of war) to recount those events. Most applications for asylum necessarily involve the recounting of painful events which led to the applicant coming to this jurisdiction and seeking refugee status. There is no other way in which such claims can be evaluated. While the court acknowledges the difficulty for applicants in having to recount painful details from their past, it is necessary that this be done to properly evaluate the application. The failure to produce a report from the psychologist in this case is significant. It is not at all clear what the applicant meant in stating in her affidavit "I say that I lost contact with my psychologist". The burden of proving that she is entitled to refugee status lies on applicant, and the legislature has held that she must show substantial grounds for contending the decision of the decision making body be impugned, before she can be granted leave. In the light of the findings made by the RAC, and the lack of corroborative evidence to support the applicants account, it is extraordinary that she did not produce medical evidence when she had in fact attended a psychologist and when there might have been some medical evidence to corroborate her claim.

19. It is clear that the applicant's case turns largely on issues of fact and the extent to which the RAC was prepared to accept the applicant's accounts of those facts. That does not entitle an applicant to be given leave to apply for judicial review. The applicant has to go further and establish an arguable case for some flaw in the procedure, or irrationality or breach of natural or constitutional justice or lack of *vires*.

20. It seems to me that in the particular circumstances of this case, the applicant has failed to establish that there are substantial grounds for contending that the decision of the second named respondent is invalid or ought to be quashed, and in the circumstances I refuse leave to apply for judicial review against the respondents.