Neutral Citation No. [2009] IEHC 356

THE HIGH COURT

JUDICIAL REVIEW

2008 504 JR

IN THE MATTER OF THE REFUGEE ACT 1996, IMMIGRATION ACT 1999, ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000,

AND S.I. 518 OF 2006

BETWEEN

E. M. M.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL (TRIBUNAL MEMBER), BEN GARVEY, MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND CHAIRPERSON, REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Ms. Justice Irvine delivered on the 31st day of July, 2009

1. This is an application for leave to apply by way of judicial review for, inter alia, an order of certiorari quashing the decision of the first named respondent made on 26th February, 2008, and notified by letter of 14th March, 2008, recommending the refusal of refugee status. The applicant claims that the said decision was ultra vires, was made in breach of the European Communities (Eligibility for Protection) Regulations 2006, and/or EU Council Directive 2004/83, and/or in breach of the Refugee Act (Appeals) Regulations and/or was reached in the absence of fair procedures and/or natural and constitutional justice.

2. As this is an application for leave to apply for judicial review, the applicant must establish substantial grounds for contending that the decision of the Refugee Appeals Tribunal (the "RAT") should be quashed. In McNamara v. An Bord Pleanála (1) [1995] 2 ILRM 125, Carroll J. interpreted the phrase "substantial grounds" in the provisions of the Planning Act of 1992, as being equivalent to "reasonable", "arguable" and "weighty" and held that such grounds must not be "trivial or tenuous". The applicant's claim for leave to institute the current proceedings will be adjudicated upon against the backdrop of the burden of proof so outlined by Carroll J.

Background facts

3. The applicant claims to be a national of the Democratic Republic of Congo ("DRC"). He arrived in this jurisdiction on 14th January, 2005, and immediately applied for refugee status. He completed the standard questionnaire on 25th January, 2005, subsequent to which he was interviewed by ORAC on 24th May, 2005.

4. The basis for the applicant's claim for refugee status was firstly his stated fear of persecution arising by reason of his Banyamulenge ethnicity. Secondly, he alleged a well founded fear of persecution because of the political opinion he felt would be imputed to him because of his father's involvement with the Mobuto

Party ("MPR"). He maintained that his father was Vice-Secretary of the MPR from 1984 to 1989. He claimed that his father had been imprisoned for his activities for a year in 1997. The applicant also stated that he himself belonged to a youth wing of the MPR. At one point in his life he had had to move neighbourhoods as his neighbours had discovered his ethnicity. Later, between 1999 and 2003 he had worked in his father's shop in Kinshasa. He used the named "E.". He maintained that both he and his father had been accused of helping in Rwandan rebel activities thus exposing themselves to a risk of persecution. In 2004, his father allegedly went to the east of the country to visit relatives and also to seek to broker a cease fire in that region. His father initially kept in contact with his family but later in 2004 communications ceased. The applicant stated that he was subsequently advised by his cousin that his father's body had been found. In 2005, soldiers allegedly came to the applicant's house. He was queried about his father's activities. The applicant maintained that his family were taken away by the soldiers who subsequently raped his sister and tried to force him to have sex with his mother. He was separated from his family, brought to a detention centre, where he was beaten and tortured. He was detained in camp Kabila in Kinshasa and was accused of high treason. He managed to escape when his guards were asleep due to their consumption of alcohol and drugs.

5. The applicant maintained that he made his escape, although weak, by climbing a mango tree and exiting over a perimeter wall. Thereafter he allegedly crossed a river and ultimately walked to the house of a friend of his father's. This friend helped the applicant leave the DRC through its main airport, Kinshasa, by bribing relevant officials including those in charge of the plane. He maintained that he travelled on a false passport to South Africa, through France, prior to arriving in Ireland.

6. By letter dated 28th June, 2005, the applicant was notified that the Commissioner had recommended that his application for refugee status be refused. Thereafter, his solicitors delivered a notice of appeal on 18th July, 2005. By letter dated 12th September, 2005, the applicant's solicitor forwarded additional documentation to the RAT, referable to the political situation in DRC, and by further letter of 28th September, 2005, he enclosed a copy of a Spirazi report in relation to the applicant.

7. The hearing before the RAT took place on 5th October, 2005. On that date, the applicant produced his DRC identity card which had been sent to him by his cousin. The initial decision of the RAT became the subject matter of judicial review proceedings which were ultimately settled, subsequent to which his appeal was remitted to the Tribunal for a fresh hearing before a different Member.

8. The rescheduled hearing took place on 1st October, 2007. The hearing was adjourned to allow the applicant's Birth Certificate and the Death Certificate of his wife, which had been submitted to the second named respondent in support of an application for leave to remain temporarily in the State, to be obtained. These had not been located at the date scheduled for the resumed hearing namely 3rd December, 2007.

9. On 3rd December, 2007, the applicant contends that his counsel and the Tribunal member entered into a long and contentious dispute regarding another case in which he was not involved. He states that the dispute lasted approximately twenty minutes and that he was unnerved by this exchange. Further, when his hearing resumed, the Tribunal member questioned him regarding his birth certificate and the death certificate of his wife which still had not been produced. The Tribunal member allegedly expressed doubts as to whether or not the said documents had ever been submitted to the second named respondent and also remarked that in any event, the documents would

have to be regarded with suspicion as they were not verifiable in the same manner as a passport. The applicant states that the hearing was adjourned because of his counsel's lack of decorum.

10. The hearing before the RAT resumed on 14th January, 2008. The Applicant's file, including the original of his Birth Certificate and his wife's Death Certificate, were still missing, notwithstanding further correspondence exchanged with the second named respondent. However copies of the said documents had been procured and submitted by the applicant. On this occasion, the applicant was represented by the solicitor from the Refugee Legal Service.

Decision of the RAT

11. The recommendation of the Tribunal member of 26th February, 2008, was to reject the applicant's appeal and this decision was notified to him by letter dated 14th March, 2008.

12. The analysis of the applicant's claim is set out at s. 6 of the Tribunal member's report. He sets out the basis of the claim's claim for refugee status as being:-

(i) His Banyamulenge ethnicity; and

(ii) His father's connection with the old Mobuto regime.

The Tribunal member concluded:-

(a) That country of origin documentation indicated that since 2002/2003, MPR followers were not suspected of being involved in collaborating with rebels and that accordingly his father's alleged pedigree would not suggest that the applicant would be at risk of persecution on account of his father's activities.

(b) That the applicant's account of being able to walk out of custody when allegedly detained for high treason in the circumstances described was simply not credible.

(c) That the applicant's account of being able to work in his father's shop without difficulty for four years was in conflict with his evidence that he had previously had to leave a particular neighbourhood because of his Banyamulenge ethnicity. He had not in any event suffered persecution during his period residing in either location.

(d) That the copy of the applicant's birth certificate cast substantial doubt upon the credibility of his claim. He had said that his father had gone to the east of the country in 2004 and was killed there due to his political activities. He had maintained that he and his family had been persecuted due to his father's MPR activities. He had stated that his mother had obtained his birth certificate from the civil registry office in Kinshasa. This was in conflict with what appeared on the birth certificate. It recorded that his father was a civil servant living in Kinshasa and that it was he who, on the 14th February 2008, had procured the said certificate.

(e) That whilst the Spirazi report made an observation as to the applicant's perceived credibility, that the assessment of credibility was for the fact finder who had the material to test the evidence.

(f) That having regard to the totality of the evidence, the applicant had not discharged the burden of proof of establishing a right to refugee status.

The Applicant's submissions
Counsel for the applicant, Mr Saul Woolfson, B.L. made a significant number of submissions in support of his contention that there are reasonable grounds to contend that the decision of the Tribunal member should be quashed. The more significant of his contentions can be summarised as follows:

i. that the appeals process was tainted by a lack of fair procedures, including alleged prejudgment of the claim on the part of the Tribunal member due to what had occurred at the hearings, which had taken place on the 1st October and the 3rd December, 2007;

ii. that the Tribunal member did not, contrary to S. I. 518 of 2006, and in particular Regulation 5(1)(a) have the political or legal knowledge necessary to fairly carry out his role. Neither did he have regard to all of the matters to which he was obliged to have regard under the said regulation. He submitted that the Tribunal member's decision demonstrated a lack of understanding that the Tutsi or Banyamulenge were considered to be Rwandan and/or perceived by the authorities to be supporters of Rwandans. In particular, he relied upon the fact that the Tribunal member appeared to draw an adverse inference from the fact that the applicant had made no mention of his Banyamulenge ethnicity in his ASY 1 Form or his questionnaire. It was arguable therefore that the Tribunal member accordingly misunderstood the applicant's claim. Counsel for the applicant submitted that the Tribunal member would not have reached this decision if he had, inter alia, been aware of and applied the decision of the United Kingdom Asylum and Immigration Tribunal in A.B. v. D.M. or fully understood the relevant country of origin documentation. It was claimed on the applicant's behalf that he would have fallen within the risk categories described as categories I and II and also possibly category III of the decision based on his own affiliation to the MRP and his father's collaboration with the rebels. Applying this knowledge to the required forward looking test, the Tribunal member should have realised that the applicant's Tutsi or Banyamulenge ethnicity would justify his claim of a well founded fear of persecution if returned to DRC.

iii. That there was an onus on the Tribunal member to assist the applicant in producing evidence by reason of the contents of paras. 46 and 196 of the UNHCR Handbook. Mr Woolfson relied upon the shared duty of the Tribunal member and the applicant to ascertain and evaluate all of the relevant facts. These facts, he submitted, included the decision in A.B v. D. M. Accordingly, the Tribunal member was further obliged to determine the applicant's claim to refugee status, having regard to the decision in B.B. v. D.M.D.R.C. C.G. [2005] UKIAT 00118, a directly relevant decision wherein the risk categories for the likely persecution of Tutsis were revised. To have excluded consideration of this decision called into question the validity of the ultimate decision as well as the knowledge of the Tribunal member.

v. That adverse credibility findings were made regarding the applicant's escape where inadequate consideration was given to material facts such as:-

(i) that the guards were smoking hash;

(ii) that it was not an official detention centre which he had escaped from;

(iii) that his escape had not been considered in the context of what was occurring in a country such as DRC where the lack of fundamental rights meant that places of detention were awash with bribery and corruption and that in such places guards and security forces were not likely to behave in a manner in which they might be expected to behave in the western world. Escapes were not uncommon.

Mr Woolfson maintained that he had reasonable grounds to contend that this credibility finding was unsustainable particularly in circumstances where the Tribunal member's reason for rejecting the applicant's account of how he escaped was not explained and neither was that account tested against relevant country of origin documentation.

vi. That the Spirazi report was not adequately considered in the context of the Tribunal member's decision as to credibility thus rendering his decision on credibility open to challenge. Counsel complained that the Tribunal member's reference to the report being considered in the light of the "Istanbul Protocol" was a bald statement and no analysis of the same is set out.

vii. That the Tribunal member erred in fact in concluding that the applicant's claim based on ethnicity was a minor part of his overall claim particularly by reason of the alleged persecution of himself and his family, his references in his questionnaire to his father of being of Rwandan origin and to his father's brothers having remained in Rwanda. He had explained to the Tribunal member that those of Rwandan nationality or who were perceived as having such a nationality or origins were regarded as hostile to the DRC. This mistake of fact arguably rendered the validity of the decision questionable.

viii. That the Tribunal member failed to have regard to his identity card and his wife's Death Certificate, as obliged onto the European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518 of 2006).

ix. That any discrepancy regarding the applicant's copy Birth Certificate had to be assessed against the backdrop of the original Birth Certificate having been lost by an agent of the second named respondent. The applicant was not given the benefit of the doubt in relation to his explanation that his mother had collected his Birth Certificate.

13. Finally, it was submitted that the court should scrutinise the decision of the first named respondent with particular care in circumstances where the Tribunal member had rejected the applicant's claim for refugee status based upon credibility findings. He relied upon the decision of MacMenamin J. in Atanasov & Ors v. Refugee Appeals Tribunal (Unreported, 7th July, 2005) to stress the significance of adverse credibility findings in the light of any potential prospect the applicant might have of applying for subsidiary protection at a later date.

The Respondent's Submissions

14. Counsel on behalf of the respondent Ms. Siobhan Stack B.L., submitted that there had been no breach of natural justice or fair procedures, or any breach of s. 16(8) of the Refugee Act 1996 arising from the Tribunal member's conduct on the two occasions when the applicant's appeal hearing was adjourned, namely on the 1st October and the 3rd December, 2007. No complaint had been made by the applicant or his legal advisers in relation to either hearing. The full appeal was permitted to proceed without any complaint. The first named respondent was not asked to recluse himself. Counsel submitted that there was no evidence of any prejudgment, either on the dates when the hearing was adjourned or in the decision. The applicant was in any event estopped by his participation in the full appeal from complaining about the process that had occurred on the previous two occasions.

15. Counsel for the respondents submitted that there was simply no evidence to support the applicant's contention that the first named respondent did not have adequate knowledge of the risk of persecution to ethnic groups in the DRC. She submitted that the approach of the first named respondent could not be faulted. He had considered a risk of persecution from two potential sources. The first of

these was based upon the applicant's Banyamulenge ethnicity and the second based upon an assertion that his father had allegedly been Vice General Secretary of the MPR, a Mobuto related political organisation.

16. Counsel submitted that it was clear from the decision that the Tribunal member knew that the applicant was identifiable as Banyamulenge from his father's surname. She submitted that the failure of the part of the first named respondent to refer to the decision in A.B. v. D.M. did not demonstrate any lack of knowledge on the part of the first named respondent regarding a risk of persecution in the DRC. The onus was on the applicant under s. 11A (iii) of the Refugee Act 1996 to prove his entitlement to refugee status. There was nothing in the UNHCR Handbook which could trump that legislative obligation. The applicant was represented by a solicitor and counsel and it was up to them, not on the Tribunal, to produce this decision.

17. In relation to country of origin information, counsel for the respondent submitted that there had been no breach of Section 16(8) of the 1996 Act. This section was not applicable to the facts of the present case. That section requires copies of any documents which are relevant to a hearing to be given to an applicant if he does not already have them prior to the hearing of the appeal. Insofar as complaints were made that the Tribunal member failed to specifically identify the country of origin documentation relied upon in reaching his decision, Ms Stack submitted that most of the relevant country of origin documentation had been put to the applicant in the course of the appeal hearing and that in any event, all of the documentation had been furnished by the applicant. No new information had been sourced by the Tribunal.

18. Counsel for the respondents submitted that at the core of the decision of the first named respondent were a number of credibility findings. Firstly, the details on the copy of the applicant's Birth Certificate were entirely at odds with the facts relied upon by the applicant in the course of his application for refugee status. The applicant had put forward a document which contradicted his own story. The content of the Birth Certificate undermined his entire case based upon his father's MPR connections. The Birth Certificate established that the applicant's father was alive in February 2006 and that he was living in Kinshasa and working there as a civil servant. This information was in complete conflict with the applicant's evidence regarding his father's alleged political activities his subsequent disappearance and death.

19. The second credibility finding made adverse to the applicant's interest concerned his account of escaping from captivity having been charged with high treason. The Tribunal member found the applicant's account of being captured, being beaten for ten days yet managing to escape from his captors when one of the guards allegedly fell asleep was simply not credible.

20. The final credibility finding made by the Tribunal member related to the applicant's alleged fear of persecution arising from his Banyamulenge ethnicity. The Tribunal member was not satisfied with the applicant's account that he had worked for four years in his father's shop without incurring any hostility in circumstances where he stated that it was his father's name that would have exposed the fact that he was Banyamulenge. Even though he used the name E., he was working in his father's shop. The Tribunal member further found that the applicant's ability to work in his father's shop in this fashion was inconsistent with his evidence that he had previously had to leave another neighbourhood because of his ethnicity. He had not in any event been persecuted during either period.

21. Ms Stack submitted that all of the credibility findings of the Tribunal member were made following a rational analysis of all of the evidence, were made in the

course of hearing where the applicant was afforded the principles of natural justice and where those findings could not be stated to be based on instinct or mere gut feeling.

Decision

22. The court has considered fully all of the papers submitted in the course of the present application for leave to apply for an order of certiorari. The court has further had regard to all of the submissions made by counsel on behalf of the parties, including those made in writing and to the case law cited therein. Having done so, the court does not accept that the applicant has established substantial grounds to challenge the decision of the Tribunal member of the 26th February, 2008. An arguable case has not been made out that he acted ultra vires or in breach of fair procedures or in breach of the principles of natural and/or constitutional justice. Neither has an arguable case been made out the Tribunal member acted in breach of the European Communities (Eligibility) for Protection Regulations 2006, and/or EU Council Directive 2004/83 or in breach of the Refugee Act (Appeals) Regulations. Further, the applicant has not shown substantial grounds to contend that the Tribunal member did not have the requisite knowledge of the DCR and in particular the situation there regarding politics, race and ethnicity so as to adequately or properly adjudicate upon the applicant's appeal and accordingly any claim against any of the respondents based on such an assertion is unsustainable.

23. The court has considered the affidavit of the applicant and in particular the averments concerning the truncated hearings which were held on the 1st October, 2007, and the 3rd December, 2007. The height of the applicant's evidence is that on the first occasion he was interrupted by the Tribunal member and felt that he had difficulty in finishing his sentences. That hearing was adjourned in circumstances where the Tribunal member indicated that the applicant's Birth Certificate and the Death Certificate of his wife were material to the appeal. These documents were not available due to the fact that they had been submitted to the second named respondent in the course of an application for leave to remain temporarily in the State. No objection was taken to the Tribunal member's management of the hearing on the 1st October, 2007 and neither was any complaint regarding the hearing committed to writing thereafter.

24. When the Appeal hearing resumed on 3rd December, 2007 no complaint was made or reservation expressed regarding the approach of the Tribunal member on the previous occasion. On this date however, the applicant maintained that he witnessed a long and unpleasant exchange between the Tribunal member and his own counsel about another case. He says in his affidavit that he found the exchange disturbing, that he was bewildered and that there appeared to be significant tension between the Tribunal member and counsel. He complained that when his own hearing resumed, he was questioned about the originals of the Birth Certificate and his wife's Death Certificate. The Tribunal member allegedly commented to the effect that the documents would, in any event, have to be regarded with suspicion when produced as they were not verifiable in the same manner as a document such as a passport. The applicant went on to recount that the hearing was then adjourned.

25. The court has also considered the affidavit of Ms. Grainne Brophy, solicitor of the Refugee Legal Service and the exhibit thereto which is a note taken by Mr. Alan Woods, solicitor, regarding the exchange which occurred between Mr. James Healy B.L. and the Tribunal member.

26. The court concludes that the applicant has not made out any substantial or arguable case that what occurred at the two abridged hearings before the Tribunal member provides any grounds for contending that fair procedures were

not afforded to the applicant. It is regrettable that from time to time parties to litigation will witness their own legal advisers becoming embroiled in heated exchanges with a judge or, as occurred in this case, the Tribunal member. This may well prove distressing or upsetting but provides no basis for contending that there has been any lack of justice or fair procedures. The exchange which unnerved the applicant in the present case had nothing to do with his own case. Further, no complaint was made to the Tribunal member at the relevant time by the applicant or his legal advisers or in the aftermath of the behaviour complained of. No letter was sent by way of complaint and the Tribunal member was not asked to recluse himself. I accept that a decision to ask the Tribunal member to recluse himself would have been a difficult call to make having regard to the consequences for the applicant if the Tribunal member failed to do so and the applicant decided thereafter not to participate in the process. However, there is no evidence that any consideration was given to asking the Tribunal member to recluse himself or that the applicant or his legal advisers considered that the Tribunal member had acted improperly such that it can now be contended that there was any lack of justice or fair procedure.

27. Having considered all of the evidence in relation to the hearings which took place on 1st October, 2007 and 3rd December, 2007, the court is not satisfied that the applicant has made out an arguable case that the Tribunal member can be stated to have prejudged the outcome of the applicant's claim to refugee status. The Birth Certificate which the Tribunal member allegedly stated would have to be viewed with suspicion in the course of the hearing which occurred on the 3rd December, 2007, was admitted into evidence through a copy of the original document. The Tribunal member cast no aspersions on the validity of the copy document, and wholly accepted its contents which he ultimately went on to conclude rendered the applicant's account of his father's capture and subsequent death unreliable. Neither has any arguable case been made out that the applicant was not afforded a hearing that complied with the rules of natural justice or fair procedures.

28. Finally, the court accepts the submission made by counsel for the respondent that the decision in Corrigan v. The Irish Land Commission [1977] I.R. is apt. In that case a majority of the Supreme Court ruled that an appellant, who with full knowledge of the facts had made no objection to the membership of an appeal Tribunal (composed of the same two lay Commissioners who had earlier certified provisionally that his land was required for the relief of congestion) was precluded by his conduct from raising the issue of bias. In a similar fashion in this case the court concludes that the applicant has, by participating in the process following the two hearings which took place in October and December 2007, approbated any alleged want of fairness on the part of the Tribunal member in the course of those earlier hearings.

29. Leaving aside any challenge on the part of the applicant which is based upon the two preliminary hearings referred to above, the applicant has raised a significant number of complaints regarding the manner in which the Tribunal member reached his decision. In this regard, the court must bear in mind that these are judicial review proceedings and they are not an appeal from the decision of the Refugee Appeals Tribunal. Accordingly, the onus is on the applicant to demonstrate that the respondent acted in a manner which was contrary to natural justice and/or fair procedures. Alternatively, the applicant must establish that the respondent considered facts or material which should have been excluded from his considerations or that he excluded facts or material which should have been included by him in those considerations such that the validity of the decision ultimately could arguably be called into question. Similar

considerations apply in respect of any errors of fact made by the respondent provided that they are sufficiently material to the ultimate decision.

30. In relation to credibility, as has been stated in so many cases including by Peart J. in Imafu v. Refugee Appeals Tribunal [2005] IEHC 416, "the Court must not fall into the trap of substituting its own view on credibility for that of the Tribunal". The first named respondent must, of course, approach the issue of credibility in a correct manner and his assessment must be carried out in accordance with the principles of constitutional justice. He must not rely upon a gut feeling.

31. In this case multiple challenges are made not only to the decision of the Tribunal member but also to the process and wherein that decision was made. It is important in this context that the court does not lose sight of the need to evaluate the reasonableness of the submissions made on behalf of an applicant against the backdrop of the overall procedural fairness of the hearing and the findings of fact which form the core of the ultimate decision. In this respect the court has found sound guidance in the decision of Peart J. in G.T. v. Minister for Justice, Equality and Law Reform (Unreported, High Court, 27th July, 2007) where at p. 6 he stated as follows:-

"For a variety of reasons, not confined to the three matters by which the decision is sought to be impugned herein, this applicant was not personally believable. It is not desirable that a decision be parsed and analysed word for word in order to discern some possible infelicity in the choice of words or phrases used and to hold that a finding of credibility adverse to the applicant is invalid, unless the matters relied upon have been clearly misunderstood or mis-stated by the decision maker. The whole of the decision must be read and considered in order to reach a view as to whether, when the decision is read in its entirety and considered as a whole, there was no reasonable basis for the decision maker reaching that conclusion. If a decision maker makes a significant and material error in how the evidence has been recorded, or other serious error of fact, then of course the process by which credibility has been assessed falls short of that required to meet a proper standard of constitutional justice. But such an error must go beyond a mere possible ambiguity arising from the words used. The error must be clear and it must go to the heart of the decision making process, and fundamentally undermine it.

This Court should not lightly interfere with an assessment of credibility, since it is quintessentially a matter for the decision maker who has the undoubted benefit of seeing and hearing at first hand the applicant giving her evidence. This Court cannot substitute another view simply by a reading of words on the page and by way of the summary contained in the documents, unless an error is a clear and manifest error, without which a different decision might well have been reached. The present case is not such a case."

32. The court does not accept that the applicant has made out an arguable case to suggest that the decision of the first named respondent should be quashed on the grounds that the Tribunal member did not have adequate knowledge of the risks of persecution based upon issues of ethnicity in the DRC. Insofar as that submission was based upon a sentence in the decision of the Tribunal member which states as follows "the applicant made no mention of his Banyamulenge ethnicity/tribe either in his ASY 1 Form or his questionnaire" that statement does not give the applicant arguable or substantial grounds to suggest that the decision of the Tribunal member should be quashed. Firstly, that sentence is correct as a matter of fact. Secondly, it is clear from the entirety of the decision of the Tribunal member and in particular his analysis of the claim that he

specifically engaged himself in considering whether or not the applicant had a well founded fear of persecution by reason of his Banyamulenge ethnicity. At p. 16 of his decision he repeatedly refers to the applicant's claim as one which is based upon his Banyamulenge ethnicity. The Tribunal member's knowledge in this regard is also supported by the fact that the Tribunal member questioned the applicant as to how he could have worked in his father's shop for some four years without suffering persecution in circumstances where his ethnicity could be determined from his father's surname.

33. The court rejects the assertion that the failure on the part of the first named respondent to produce to the applicant and/or to rely upon the decision in A.B. v. D.M. (DR) CG [2005] UKIAT 00118 can be relied upon as a substantial ground for seeking to quash the decision of the Tribunal member. The onus of proof as per s. 11A(3) of the Refugee Act 1996, is upon the applicant seeking refugee status. The applicant had his own legal advisers, both solicitor and counsel. It was not mandatory for the Tribunal member to bring this decision to their attention. Further, the decision itself has no status in Irish law. The UNHCR Handbook at para. 196 cannot be stated to impose such an obligation on the first named respondent. Further, it appears that the Tribunal member was aware of the categories of risk referred to in the decision in A.B. v. D.M. as he considers in his decision the applicant's claim to refugee status under two of those categories. However of much more weighty significance is the fact that the Tribunal member ultimately concluded that the applicant's evidence supporting his alleged well founded fear of persecution, based on either his Banyamulenge ethnicity or his father's connections with the old Mobuto regime, entirely lacked credibility. In such circumstances, once the credibility findings made by the Tribunal member are not arguably open to challenge the significance of the decisions in A.B. v. D.M. or B.B. .v. D.M.D.R.C. C.G . [2005] UKIAT 00118, would appear to be doubtful.

34. This Court must not lose sight of the fact that the applicant's claim to refugee status was based upon two different assertions regarding his alleged well founded fear of persecution. The first of these allegedly stemmed from a risk of persecution as a result of his father's involvement in the MPR. The second ground which he relied upon in support of his alleged well founded fear of persecution was his Banyamulenge ethnicity a fear deriving from the fact that he could be identified as Banyamulenge from his father's name.

35. The Tribunal member entered upon a consideration of both of the aforementioned issues. The fact that the Tribunal member stated in his decision that the applicant's claim to refugee status based on his Banyamulenge ethnicity was a minor part of his overall claim is irrelevant does not give the applicant reasonable grounds to maintain that the validity of the Tribunal member's decision can be called into question. This aspect of the applicant's claim was fully considered and rejected based upon credibility findings made by the Tribunal member. It should also be borne in mind that the applicant's claim for refugee status did not fail solely upon the basis of one adverse finding made against the respondent regarding credibility issues.

36. At the core of the Tribunal member's decision were a number of findings in relation to credibility. I will deal with these in turn.

37. The first adverse credibility finding made by the Tribunal member was that he failed to accept the applicant's account of his escape from his alleged detention. He found the applicant's account not to be credible. The applicant had maintained that he had allegedly been tortured because of his father's activities and was being held on the grounds of high treason in camp Kabila in Kinshasa. The Tribunal member failed to accept that in such circumstances, the applicant could

have managed to escape in the manner described by him by passing a guard who had allegedly fallen asleep due to the consumption of alcohol and perhaps drugs.

38. The court rejects the submission made that the country of origin documentation did not support the Tribunal member's findings in this regard. The country of origin documentation does refer to escapes occurring from prisons but all such escapes as are referred to therein involved significant ingenuity on the part of the prisoners. There are reported cases of prisoners using their beds as ladders to help them escape through air vents. There are other reports of prisoners bribing their captors or otherwise using various devious methods to penetrate the prison's parameters. There is nothing in the country of origin documentation which lends legitimacy to the applicants account of his escape from a formal camp in which he was detained allegedly on the grounds of high treason. Having regard to the aforementioned facts, the court rejects the applicant's submission that it was necessary for the Tribunal member to give any greater an explanation that he did as to why he did not accept the applicant's account of his escape. There is nothing in the Tribunal member's decision on this credibility finding to suggest that he reached the same as a result of either conjecture or gut feeling. The court further rejects the submission made that merely because the Tribunal member failed to refer in his decision to the fact that the guard concerned had, on the applicant's account of events, allegedly been smoking hash and had thus fallen asleep, in some way undermines the validity of this credibility finding.

39. The second adverse credibility finding made by the Tribunal member related to the facts relied upon by the applicant in support of his alleged fear of persecution deriving from his Banyamulenge ethnicity. In turn, this alleged fear derived from the fact that he could be identified as Banyamulenge from his father's surname. The Tribunal member found the applicant's evidence lacked credibility in circumstances where he advised the Tribunal member that he had been in a position to work in his father's shop in Kinshasa for four years without complication or persecution. The Tribunal member found this evidence to be inconsistent not only with his alleged well founded fear of persecution based upon potentially being identified as being of Bamyamulenge ethnicity due to his father's surname but also with his evidence to the effect that he had previously had to move neighbourhoods because his neighbours gained knowledge of his ethnicity and that he was at risk of persecution as a result.

40. The final adverse credibility finding made by the Tribunal member concerned the applicant's alleged well founded fear of persecution based upon his father's MPR activities and his contention that his father was dead as a result of those activities. Based upon the content of the copy birth certificate produced by the applicant, the Tribunal member concluded that the applicant's claim in this respect had been seriously undermined.

41. The approach of the Tribunal member to this finding of credibility cannot be faulted. On the face of the birth certificate it was reported that the applicant's father, D.M., was a civil servant residing in Kinshasa and that he was the father of the applicant whose first name was "E.". This birth certificate was produced by the applicant and his legal advisers. The contradictions between what appeared in the birth certificate and the applicant's evidence at the hearing were put to the applicant in the course of the appeal hearing. Having heard his response, it was perfectly open to the Tribunal member to find, as he did, that the applicant's story concerning his father's disappearance and political involvement was not credible thus undermining any claim to refugee status based upon his father's alleged MPR activities. The applicant's whole story that his father had moved to the east of DRC to visit relatives and/or to broker a cease fire in that region prior to disappearing and later being reported dead was undermined.

42. In relation to the credibility findings made by the Tribunal member based on the copy birth certificate the court has carefully scrutinised that document which was produced by the applicant's advisors. From the face of the document the following facts appear incontrovertible, namely:-

i. D.M., presented in person at the civil registry office in Kinshasa on the 14th February 2006 for the purpose of obtaining the birth certificate of "E.M.";

ii. D.M., declared himself to be the father of E.M. who is recorded as having been born on the 9th June 1975;

iii. D.M., declared himself to be a civil servant residing in Kinshasa;

iv. The information at i-iii above was deposed to in the presence of two witnesses and the deponent and the witnesses each signed the deposition.

Having regard to these facts the Court concludes that there are no arguable grounds to suggest that the Tribunal member's decision as to the applicant's overall credibility could be impugned. The birth certificate constituted sound, objective, independent documentary evidence on an issue critical to the applicant's claim for refugee status. Further each of the adverse findings on the credibility issues referred to above bore a legitimate nexus to the facts relied upon by the applicant to support his alleged well founded fear of persecution as was advised to be necessary by Finlay Geoghegan J. in Kramarenko v. Refugee Appeals Tribunal (Unreported, High Court, 2004).

43. The fact that the Tribunal member did not mention the applicant's identity card as a material factor in his decision is irrelevant. The applicant's identity was not in issue. Similarly, any complaint based on the failure of the Tribunal member to refer to the applicant's wife's death certificate is of no material consequence. Her death was unconnected in any material way to the applicants claim that he had a well founded fear of persecution should he be returned to the DRC.

44. The weight to be attached to evidence on a credibility issue is not a matter for this court. Hence the weight, if any, to be attached to the subjective view of the author of the Spirasi report as to the applicant's credibility in the context of the other evidence supporting a contrary view, was once again a matter for the Tribunal member.

45. The court further rejects the applicant's assertion that substantial grounds have been advanced to contend that the Tribunal member erred in law in failing to afford to the applicant the benefit of the doubt in relation to the contents of the Birth Certificate. The Tribunal member accepted that the copy Birth Certificate was genuine. The fact that the original may have been mislaid by the second named respondent is entirely irrelevant. There was no suggestion that this copy Birth Certificate was a forgery. It was produced by the applicant and its contents entirely undermined the applicant's claim to a well founded fear of persecution based upon his father's MPR activities. There was no obligation on the Tribunal member to spell out in his decision why he did not accept the applicant's contention that his mother collected and obtained the Birth Certificate on his behalf. It is perfectly clear from the text appearing on the Birth Certificate that the Tribunal member found that evidence to be in conflict with the content of the Birth Certificate itself.

46. The court has concluded that the Tribunal member's decision appears to have been based upon a rational analysis of the evidence and of the relevant documentation which in the present case included the copy Birth Certificate and the country of origin documentation. The Tribunal member's conclusions on the

validity of the applicant's claim to refugee status were principally grounded in adverse credibility findings. These findings clearly had an individual and cumulative effect upon the Tribunal member in the context of the decision made. In reaching his conclusions the Tribunal member did not rely upon any material errors of fact such are described by Peart J. in Da Silveria v. Refugee Appeals Tribunal & Ors (Unreported, High Court, 9th July, 2004). Accordingly there are no other arguable grounds upon which that decision can be challenged.

Conclusion

47. Insofar as the two preliminary hearings are concerned, the court is not satisfied that the applicant has made out any case to contend that he was not afforded a hearing which complied with the principles of natural justice and fair procedures. The court is further not satisfied that the applicant has made out any arguable case to suggest that the Tribunal member may have prejudged the applicant's claim to refugee status in the course of such hearings.

48. Any decision made by the Refugee Appeals Tribunal must be reviewed in the round. This Court is not involved in an appellate process.

49. The Tribunal member, from his decision, can be seen to have understood fully the basis for the applicant's claim to refugee status both in terms of his ethnicity and also his own alleged political activity and that of his father. Insofar as the hearing of the substantive appeal is concerned, the court is satisfied that the Tribunal member considered both aspects of the applicant's claim for refugee status and conducted that hearing in accordance with the principles of natural justice and fair procedures.

50. It is not the function of this court to second guess the credibility findings of the Tribunal member which went to the core of his decision in the applicant's claim for refugee status once it is satisfied that the appropriate principles were applied by him in making such findings. These are the principles set out by Clarke J. in Imafu v. Minister for Justice, Equality and Law Reform and the Refugee Applications Commissioner (Unreported, High Court, 27th May, 2005). The applicant was challenged in respect of apparent inconsistencies in his evidence and he was afforded ample opportunity to refute them. In reaching his conclusions the Tribunal member appears to have engaged upon a rational analysis of all material facts including where available relevant documentation. Reasons were given by the Tribunal member, where relevant, for his specific adverse findings on credibility issues and each of those issues bore a legitimate nexus to the basis of the applicant's claim to refugee status.

51. No arguable case has been made out to demonstrate that relevant material was excluded by the Tribunal member from his considerations or that he included in his considerations material or evidence which he should have excluded, when reaching his decision.

52. The onus was at all times on the applicant to establish his refugee status and he failed to discharge the appropriate burden of proof.

53. In the aforementioned circumstances, the applicant's claim must fail. Any subsidiary arguments made by the applicant not specifically dealt with in this judgment are not material having regard to the fact that the Court has found that there is no arguable basis upon which the core finding of the Tribunal member as to the credibility of the applicant's claim can be challenged.