Neutral Citation Number: [2009] IEHC 503

THE HIGH COURT

2006 1310 JR

BETWEEN

A. T. T.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

AND

THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

Judgment of Mr. Justice Birmingham delivered the 19th day of November, 2009

1. By order of the High Court dated the 19th January, 2009, the applicant was granted leave to seek judicial review, on certain grounds, of a decision of the tribunal dated the 4th October, 2006. The decision which is the subject matter of the present proceedings was initially challenged on a great number of grounds, and there followed an unusually lengthy leave hearing, lasting three days, which resulted in the applicant being refused leave in respect of some of the grounds that he had advanced but being granted leave on relatively narrow grounds.

2. The background to the claim for asylum is that the applicant states that he is a national of the Democratic Republic of the Congo and indeed this has not been the subject of controversy. The applicant is now 27 years of age. In 2000 he became involved in the youth wing, JUDPS (Union of Youth for Democracy and Social Progress), of the UDPS, an opposition party in the Democratic Republic of the Congo (D.R.C.) Thereafter, he operated as a party activist distributing information about party meetings and the like.

3. Matters seemed to have been essentially uneventful until 2002 when, according to him, at a time he was not there, a summons was sent for him to his home. Shortly after this members of the military came to his family home, broke down the door and, at gunpoint, subjected the family, including the applicant to acts of unspeakable depravity. The applicant was removed from his home and brought to a detention centre, the Demiap, where he was placed in a cell by himself. The next day he was brought to a different place of detention which was under ground. There, over the following two weeks or so he was raped seven or eight times and lashed twice daily.

4. After approximately two weeks the military came to him, provided him with a shirt and took him to a jeep which brought him to a friend. He stayed at a particular location for some nine to ten months. During this period he alleges that on an occasion he went to the river but he was seized by crocodiles, but following the intervention of a priest who went to the Chief of the village, the applicant was brought back to life after ten days. After the intervention of the priest in the

crocodile incident, the applicant stayed with him in a seminary. One day an uncle came to him and told him that his face was in the newspapers and that there was no place for him to stay in the Democratic Republic of the Congo. At that stage he was introduced to a friend who went with him to the airport, from where both travelled to Belgium and then onward to this country. Subsequently the applicant was not in a position to produce travel documents and indicated that the agent looked after everything.

5. The operative part of the decision that is now challenged is relatively brief and, for ease of reference, I will quote it now.

"The applicant is not a refugee. The following matters are the reasons for my decision:

(1) Since the establishment of the Inter Government Agreement in 2003 after the Sun City Agreement, country of origin put to the applicant states that there is no systematic targeting of UDPS members. While there are reports of arrest, it is also reported that UDPS have their own lawyers in D.R. Congo who represent supporters and are successful in obtaining their freedom, should they be detained.

(2) In relation to his stay in Demiap Detention Centre, country of origin information states many people share a cell but the applicant gave evidence that he was alone. His evidence therefore contradicts well-known facts.

(3) His knowledge of the JUDPS was not in keeping with someone who was supposedly involved in that organisation and his attempts at explaining these short comings were not plausible.

(4) As someone who was allegedly involved in politics and whose face was allegedly all over the newspaper because of his activities, it is not plausible that he was unaware of the developments in D.R. Congo, particularly as these took place when he was in that country. His reply that "I didn't keep up-to-date in relation to politics" is not plausible.

(5) His evidence of being killed by crocodiles and being brought back to life through the intervention of a priest who later helped him leave D.R. Congo is not believable even allowing for cultural differences.

(6) The matter of arrest warrants and summons were addressed at the hearing and it is well recognised that these and others documents can be forged or easily obtained in D.R. Congo. Blank documents are also available.

(7) He states he was in a part of D.R. Congo for almost ten months after his ordeal but no harm whatsoever came to him, none of course except being killed by crocodiles and then being brought back to life by a priest. This in a part of D.R. Congo where the applicant was free from persecution, that is if he actually did experience such.

(8) Section 11(b) of the Refugee Act, 1996 (as amended) applies to evidence of his departure and arrival here.

I am not satisfied he suffered persecution and given the state of developments in D.R. Congo since the Sun City agreement, the recent elections and matters

already referred to in relation to that country I am satisfied that he has no future fear of persecution."

The applicant has not established that he has a well-founded fear of persecution for any of the reasons in s. 2 of the Refugee Act, 1996. I affirm the recommendation of the Commissioner.

Leave Granted

6. The applicant was granted leave on four grounds (namely):-

(1) That the tribunal had acted in breach of fair procedures by relying on country of origin information that had not been disclosed to the applicant or his legal advisor as referred to in para. (1) of p. 7 of the decision.

(2) That the tribunal breached s. 16(8) of the Refugee Act, 1996 as amended by failing to state the nature and/or source of information that came to its attention in the course of the appeal as referred to in para. (1) of p. 7 of the decision.

(3) The tribunal erred in fact in supposing that the applicant had claimed, that he had been told that his face was all over the newspaper because of his activities in the Democratic Republic of Congo.

(4) The tribunal acted in breach of fair procedures in failing to put the issue of possible forgery of documents to the applicant at the hearing.

7. Of these four grounds, those relating to the newspaper photographs and possible forged documents might be regarded as subsidiary to the main grounds and I am in a position to deal with these briefly and will do so now.

8. So far as the point that there was an error of fact on the part of the tribunal, in supposing that the applicant had claimed that he was told by his uncle that his face was all over the newspapers is concerned, I am quite satisfied that this is not a point on which the applicant could possibly succeed. In the section of the tribunal decision that recites and summarises the evidence, it is correctly recorded that the applicant's evidence was that his uncle came and told him that his face was in the newspaper and that there was no place for him to stay in the D.R. Congo. The reference at para. 4 of the operative part of the decision to the applicant's face allegedly being all over the newspapers is no more than an aside. A red pencil could, without any difficulty whatever, be drawn through the subordinate clause where the reference appears and the sense and meaning of the sentence would be entirely unaffected. It amounts to no more than a rhetorical flourish.

9. So far as the question of forged documents is concerned, there is no specific finding that the documents produced were in fact forged. It does not seem to me that the tribunal member was doing anymore than indicating, that he was not operating on the assumption that the documents produced were necessarily authentic and that as such they corroborated the applicant's account. It appears that the question of the documents was specifically addressed at the hearing and in particular the applicant's attention was drawn to the fact that country of origin information indicated that such documents were not furnished to the subject. By so doing, it was clearly being suggested to the applicant that if his account was correct, that he would not be in possession of documents of that character, and in so far as he was in possession of documents which he ought not to have had, that there had to be doubts about their authenticity. I can find no problem with the approach taken to this issue whatever.

10. The issue in relation to country of origin information is less straight forward and it is to that issue I now turn.

11. In order to put the controversy in relation to country of origin information in context I divert to say that the history of the D.R.C since independence from Belgium in 1960 has been a particularly unhappy one marked by secession, foreign intervention, civil war and kleptomania. Throughout its history respect for human rights has been non-existent.

12. From 1999 on various efforts were made to bring peace and security to that troubled country. Initial efforts failed completely. In January, 2001 the then President Laurent Kabila was assassinated and was succeeded by his son Joseph. This was followed by peace talks involving neighbouring countries that had intervened in the affairs of the Democratic Republic of Congo, a number of rebel groups and the government which were hosted by the United Nations Security Council in New York. Later in that year, opposition political parties, armed groups and members of civil society met in Addis Ababa to start the Inter – Congolese Dialogue (ICD). The stated aim was to resolve the conflict between rebel forces and the Government and to agree the setting up of an interim government until free democratic elections are held. However, the D.R. Government pulled out of the talks. The talks though, were rescheduled and started again in Sun City in South Africa in February, 2002 leading to an agreement in April of that year to which the Government and most though not all of the rebel groups, signed up. Ultimately, in April, 2003 representatives of all parties to the conflict in the Democratic Republic of the Congo signed a power sharing peace deal in Sun City. The D.R. Government, rebel movements, opposition political parties and representatives of civil societies agreed to set up a transitional Government to oversee Democratic election and thereafter a transitional Government was indeed set up. It is to this development that reference was made by the tribunal member at para. 1 of p. 7 of the decision.

13. However, hopes that were invested in the establishment of the transitional government have not been fully realised. It appears that the effectiveness of that government has been crippled by conflict among its component parties.

14. The elections which the agreement had envisaged were delayed and when they did take place in 2006, they were initially boycotted by the UDPS which conducted a campaign of protest against the election resulting in clashes between riot police and party supporters in 2006.

15. The leader of the UDPS had also called for a boycott of a referendum held in December 2005 on adapting a new constitution. It seems that their appeal for a boycott which was based on the fact that they opposed a provision in the constitution, which they felt amounted to selling the country to foreigners, met with little success as there was a high turnout and appears to have led to the party giving some reconsideration to its stated position that it would boycott the elections.

16. Finally, to complete the painting of the picture of the scene prior to the tribunal hearing on 8th May, 2006 it is necessary to point out that by that stage a very considerable volume of country of origin information had been introduced into the proceedings. So, country of origin reports in relation to the position of the UDPS, including newspaper articles were submitted at the time of the applicant's ORAC interview on 19th November, 2003. When that report became available, it referred to a number of reports sourced by the authorised officer comprising extracts from the UNHCR 8th European Country of Origin Seminar Report, June

2002, extract U.K. Home Office Report October, 2002, extract U.K. Home Office Report, April, 2003. The applicants decided to appeal the recommendation and in the course of that appeal, the applicant and his advisors submitted a very considerable volume of country of origin of information under cover of a letter of 23rd July, 2004. Under cover of this letter twelve documents or extracts were submitted in addition to a medical report. Perhaps of particular interest in the light of what happened subsequently is that two of the documents submitted were reports from the Research Directorate of the Immigration and Refugee Board of Canada for April and May, 2003.

17. That appeal by the applicant was unsuccessful and the applicant launched judicial review proceedings which were compromised on terms that the applicant was to have a further appeal before a different tribunal member.

18. For various reasons there were difficulties in scheduling the appeal and the hearing was adjourned on a number of occasions. In advance of one of those scheduled hearings, the applicant's current solicitor submitted further documentation comprising:

(a) Human Rights Watch World Report, 2006.

(b) IAS (Immigration Advisory Services) Research Analysis, September, 2005.

(c) U.K. Immigration Appeals Tribunal decision – *A.B. and D.M. v. Home Secretary*, 21st July 2002.

(d) Country reports on Human Rights Practices, 2004 released by the Bureau of Democracy, Human Rights, and Labor of February 28th, 2005.

(e) Accord-UNHCR 8th Country of Origin Information Seminar, June 2002.

19. When the hearing eventually proceeded on the 8th May, 2006 the applicant's solicitor at the hearing submitted a number of further documents comprising an extract from a U.K. Home Office Report, 2005, an extract from the U.S. Department of State Report on Human Rights Practices of 2006, a CNN.com report headed "Police Detained Opposition Protestors in Congo" and an extract from an Amnesty International Report relating to the situation of a particular human rights activist. To add to the amount of documentation available the ORAC officer submitted an extract from an IRIN news report of 3rd January, 2006.

20. In the aftermath of the hearing, the applicant through his solicitor submitted still further documentation. He did that on two occasions, the 16th May, 2006 and the 30th June, 2006. The documents in question were M.O.N.U.C. (UN Mission to DRC) report of the 10th May, 2006, the IRIN report of the 24th May, 2005, and a further extract from a UK Home Office report of April 2006.

21. I have set out this rather lengthy history of the application to provide a background to the tribunal hearing. However, what is really at issue is the role played by the tribunal member at the hearing that eventually took place on the 8th May, 2006. That aspect is dealt with by the applicant at para. 23 of his grounding affidavit, where he comments "the tribunal member referred to a particular extract from the U.K. Home Office Report of October 2005, (para. 6.236)". On the issue that remains live in the present proceedings, this is the only specific reference made by the applicant save that at para. 30 where he comments "with respect to his consideration of country conditions in DRC and a

purported change of circumstances with reference to the UDPS and its members and sympathisers and the defects and errors in the manner in which he has approached this matter, I refer in this regard to the contents of the affidavit to be sworn by my solicitor, Mr. O'Briain".

22. That affidavit was sworn by Mr. O'Briain on 9th November, 2006. In that affidavit he helpfully highlights extracts from the volume of information that had been submitted by him and by his predecessor as legal advisor. This was done in support of the contention that the approach of the tribunal member was unreasonable and irrational and in conflict with the overwhelming weight and preponderance of the information which was submitted.

23. So far as the role of the tribunal member is concerned, he records, as his client had that the tribunal member had referred to an extract from a U.K. Home Office report of October, 2005. However, he goes on to say, and it is this aspect that is at the centre of the present hearing that the tribunal member also referred to information which he said he had available to him on a website www.ein.org.uk which was stated to be dated 30th November, 2005. He quotes the tribunal member as saying that the information outlined that there was no evidence of systematic persecution of UDPS and also as having referred to the Peace Agreement which had been reached in the DRC and as referring to the UDPS having lawyers who represented them and who could obtain their freedom from detention. Mr. O'Briain explains that it was his understanding that the tribunal member was reading directly from a report contained on that website.

24. Mr. O'Briain explains that he subsequently addressed the position with regard to the UDPS by making further submissions after the hearing and that he referred in his submissions and letters to the significant body of reputable information which had already been submitted.

25. As part of his response Mr. O'Briain, as we have seen, submitted still further information on the situation in the DRC. Mr. O'Briain also carried out some research in relation to the EIN website. It appears that EIN is a specialist provider of information on U.K. Immigration and Refugee issues via the internet. As I understand it, the site does not carry out its own analysis but rather assembles documents from other sources such as immigration tribunal decisions, newly published up-dated country of origin material and the like. The structure of the site is that it is in two parts, a public site and a subscription site. In order to access the subscription part, the applicant's solicitor was required to pay approximately €500. He did this and he explains that when he did he could not locate a report of the 30th November, 2005, but believes that he has been able to identify the extract which corresponds to the conclusions of the tribunal member.

26. He deals with it in these terms.

"There is a section in one of the reports which states that in a telephone interview on the 10th November, 2005 with the Executive Secretary of The Centre for Human Rights and Humanitarian Law which is described as a "Congolese Human Rights Organisation in Lubumbahsi, it is reported (arising from that telephone interview) that UDPS leaders and supporters are sometimes arrested and detained but because UDPS is well organised and has its own lawyers, its supporters are often released a few days or even hours after they are arrested".

27. I was quite disturbed when I first read this as it appeared to raise the possibility that this was a wholly unreliable report, an unrepresentative report, indeed a rogue report on which reliance was placed. I hasten to add that was my

initial impression and my initial concern and that I am not making any criticism whatsoever of the way the issue was dealt with by Mr. O'Briain. However, further examination goes a very long way to allay those initial fears of mine.

28. The extract located is from an Immigration and Refugee Board of Canada document entitled "The Union for Democracy and Social Process (UDPS), particularly whether internal factions exist; the attitude of government authorities towards UDPS leaders and members, 20th March, 2006". The publications of the Immigration and Refugee Board of Canada are familiar to all who practice in the area of Immigration and Asylum Law, and are widely held in high regard. Indeed, as we have already seen, two of its monthly reports in relation to the Democratic Republic of the Congo had actually been submitted on behalf of the applicant. As is normal with documents of this character it refers to information assembled from various sources which in this case included a Human Rights Watch Report of 15th December, 2005 and a press release of 22nd June, 2005. Overall, it seems to me that the document supports the use to which it was put by the tribunal member. Of interest is the fact that the document contains the following paragraph:-

"The report from the May, 2004 joint mission to Kinshasa by Projet ARGO cited statements made by a UDPS leader, who said that since the law authorising the operation of political parties in DRC came into force in March, 2004, "the UDPS has enjoyed greater freedom of action than before despite being under close government surveillance." (Projet ARGO July, 2004).

This same UDPS member further explained that people should no longer talk about the "repression" of UDPS leaders and supporters but rather about "skirmishes" with and "intimidation measures" from government authorities. The report then cited the Secretary General of the party as saying that, since the beginning of the transition, UDPS members who are apprehended at demonstrations and taken in for questioning "are no longer detained for more than one night or twenty-four hours, after which they are released". Moreover, according to another UDPS leader, the party has its own lawyers and defenders particularly, Mr. Mukendi, Mr. Meta and NGOs".

The reference to Projet Argo is a reference to a report from May, 2004 of a joint mission to Kinshasa conducted by the Commissariat Genéral Aux Réfugiés et Apatrides (OFPRA), the Office Francais de Protection de Réfugiés et Apatrides and the Swiss Office Federal des Réfugiés (ODR).

29. There is, therefore, no question of the tribunal member engaging in some flight of fantasy which involved tracking down some obscure and exotic source of doubtful provenance. What he has done, is he has accessed up-to-date information from a very highly respected source. However, that of itself does not dispose of either the fair procedure point or the breach of statutory procedure point.

30. Section 16(8) of the Refugee Acts as amended so far as material provides "the tribunal shall furnish the applicant concerned and his or her solicitor, if known, with an indication in writing of the nature and source of any other information relating to the appeal which has come to the notice of the tribunal in the course of an appeal under this section". It does seem that at the tribunal hearing, the background to which I have sought to set out so fully, there was at least a technical non-compliance with s.16(8) in that whatever was communicated to the applicant and his solicitor it was not furnished in writing.

31. However, it does not by any means follow that even if it is established that there has been a breach of s. 16(8) that this of itself leads to a conclusion that the decision must be quashed.

32. That much is clear from a series of cases including. *E.A.W. v. The Refugee Appeals Tribunal*, (Unreported Hedigan J. 4th November, 2008, *Hemen Hadi Mohammedi v. The Refugee Appeals Tribunal and The Minister for Justice, Equality and Law Reform* (Unreported, Cooke J. 13th May, 2009) and *M.N. v. The Refugee Appeals Tribunal* [2008] IEHC 218, the leave stage judgment of Birmingham J., 2nd July 2008 and substantive hearing Cooke J., 1st July, 2009. As it happens in each of these three different cases I granted leave, taking the view that an apparent breach of s.16 (8) provided substantial grounds for contending that the decisions was invalid. However, of significance is that in each case at the substantive hearing stage, Hedigan J. in *E.A.W.* and Cooke J. in *Mohammedi* and *M.N* rejected the challenge.

33. What I take from these decisions is that it is necessary to consider whether the apparent breach is one that goes to the fairness of the procedures or whether the breach is of a purely technical kind, not impinging on the quality of the decision making process. Part of that exercise involves identifying to what extent the documents not furnished related to a central element of the claim and to what extent consideration of the issue to which the documentation related was peripheral or superfluous.

34. In *E.A.W.* the document not furnished in writing was the U.K. Home Office operational guidance note on Sudan indicating that the Janjaweed operate exclusively in the Darfur region and that Darfurees are not, therefore, at risk outside of the Darfur area and may be expected to relocate to another area within Sudan. In *M.N. v. The Refugee Appeals Tribunal,* as it happened, the information in question was a lecture given by the U.N.HC.R. Protection Officer in Kinshasa which dealt with the question of whether UDPS members in the DRC continued to be persecuted after 2003 or whether persecution ceased at that stage. In *Mohammedi* the question of documentation not being furnished arose in a situation where the applicant was stating that he was born in Iran to Iranian Kurdish parents but had fled with his parents while still an infant to a refugee camp in Iraq. His claim to fear persecution was based on what would happen to him if returned to the camp in Iraq. However, the tribunal member conducted an internet search to see what support there would be for the proposition that an Iranian refugee returning from Iraq would be thrown into jail.

35. What the three cases have in common is that, in each case the document that was not furnished in writing dealt with fears for the future and what future options were open, but in each case at the substantive hearing judicial review stage, the view was taken that the tribunal decisions were in reality credibility decisions.

36. In this case it is clear that the position of the UDPS in the DRC following the establishment of the transitional government was a matter that was discussed at the tribunal hearing. In the course of that discussion the tribunal member referred to information which he said he had available to him on the ein.org. website indicating that the information outlined that there was no evidence of on-going systematic persecution of UDPS members while referring to the Peace Agreement and to the fact that the UDPS had their own lawyers who represented them.

37. The appellant was in a position to fully engage with this issue and did so by submitting further documentation to add further to the already substantial volume of documentation that was available consisting of a M.O.N.U.C (UN mission in Democratic Republic of the Congo) report of the 10th May, 2006 and IRIN report of 24th May, 2005 and a further extract from the U.K. Home Office report of April, 2005.

38. It does not appear that it was suggested at the tribunal hearing that the procedure being adopted, was disadvantaging the appellant, nor was any request made for an adjournment, in order to obtain and consider the documentation being referred to. In essence, the appellant and his advisors were aware at the tribunal hearing that there was information available to the tribunal member suggesting that UDPS members were no longer being persecuted. In substance, the applicant and his advisers received an indication of the nature of the information available to the tribunal member and information as to its source. It is true, that they were aware of that because the tribunal member told them so, and read to them extracts from the documentation available to him, rather than handing the information to them on a piece of paper. However, in the particular circumstances where everybody was focussed on country of origin information, and where the issue was in fact pursued on behalf of the applicant, I am not satisfied that there was any substantial unfairness. In coming to that view I do not ignore the fact that the argument is made on behalf of the applicant that the weight of the available documentation was the other way. However, that is an argument that would always have been made and it does not seem to me to be in any dependant upon or strengthened by the fact that documentation was read to the applicant and his advisors, rather than physically furnished to them.

39. That conclusion is strongly re-enforced if one analyses the decision with a view to identifying what was the actual basis for it. While the wording and structure of the decision might not be the clearest, it seems to me that if the decision is read as a whole, that it is clear beyond any possible doubt that the decision was in fact based on credibility findings. It must be recalled that the applicant's narrative involved, not just himself, but members of his family being subjected to acts of barbarism, compounded in his case by his subsequent treatment while in detention. In those circumstances the tribunal member's observation that he was not satisfied that the applicant suffered persecution is consistent only with the tribunal member refusing to believe that this happened.

40. While, it is true, that the decision of the tribunal does not expressly state that the account given of how the applicant's family was treated and how he himself fared in detention was disbelieved, it is just not possible to make sense of the decision on any other basis. The decision identifies a number of factors which led to this conclusion, including, his account of conditions in the Deimap detention centre, the extent of his knowledge of the JUDPS and the extent to which he kept up-to-date with political developments. Not surprisingly, the tribunal member comments that the evidence in relation to being killed by crocodiles and brought back to life is not believable. In that regard it has been argued that this does not relate to a central part of the narrative which is the ill treatment of the applicant and his family. However, that ignores the fact, that it will often be the situation that in order to form a view on whether central allegations are credible, that it is necessary to consider surrounding circumstances. There may be cases where the account given in relation to surrounding circumstances is such that it completely undermines an applicant's credibility. The applicant has made the point in his grounding affidavit, that what he had to say about the crocodiles is based on what he was told by the priest – in that sense he seeks to distance himself somewhat from the account. However, it is hard to believe that the account of

this episode would not have a very significant impact on how any decider of fact would view the credibility of the applicant.

41. In summary I am of the view that in truth this was a case that turned on findings in relation to credibility and that the applicant's account of being persecuted was simply not believed. That being so, it was, strictly speaking, unnecessary for the tribunal member to address the question of how matters have changed for UDPS members but in so far as he did, I am satisfied that there was no substantial unfairness in the way that he approached this issue. The most that can be said is that information which should have been furnished in writing was given orally. In these circumstances I am not of the view that the tribunal decision is one that ought to be quashed and I refuse the relief sought.