Neutral Citation Number: [2009] IEHC 328

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2008 510 JR**

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

**BETWEEN**

**M.D.A.**

**APPLICANT**

**AND**

**THE REFUGEE APPEALS TRIBUNAL (ELIZABETH O'BRIEN) AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**RESPONDENTS**

**JUDGMENT of Ms. Justice Mary Irvine delivered on the 20th day of July, 2009**

**1.** By notice of motion dated 25th April, 2008, the applicant seeks leave to challenge the decision of the first named respondent dated 27th February, 2008, which was notified to him by letter of 31st March, 2008, recommending refusal of his application for refugee status.

**2.** The applicant's proceedings seeking leave to apply for judicial review were issued eight days outside of the statutory period for the commencement of such proceedings. Whilst the statutory time limit is a strict one, and the court only has discretion to extend time where there are good and sufficient reasons for doing so, the court has concluded that it should extend the time provided for in s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, so as to permit the present application to be maintained. In doing so, the court has taken into account the brief period in respect of which the extension is required, the potential strength of the applicant's claim and the attitude of the respondent thereto.

**3.** The standard of proof to be applied on the present application is that set out by Carroll J. in *McNamara v. An Bord Pleanála* namely:-

"In order for a ground to be substantial, it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous."

**4.** It is as against this test that the court has assessed the validity of the applicant's claims.

**Background Facts**

**5.** The applicant is a national of Togo. He arrived in the State on 2nd November, 2005. He applied for refugee status with immediate effect. He supported his application for refugee status based upon an alleged fear of persecution by reason of political opinion allegedly imputed to him, which he contends forced him to leave Togo.

**6.** The applicant completed the standard refugee status questionnaire on the 9th November, 2005. His interview with office of the Refugee Applications Commissioner ("ORAC") took place on 23rd November, 2005. By letter of 4th January, 2006, the applicant was advised that his application for refugee status had been refused. A copy of the s. 13 report was enclosed with that letter.

**7.** The applicant lodged an appeal against the decision of ORAC. That appeal was heard on 16th March, 2006, but was the subject matter of judicial review proceedings which were compromised on the basis that the case would be remitted to the Tribunal for re-hearing.

**8.** The Refugee Appeals Tribunal heard the applicant's appeal on 12th February, 2008. At that time, the Tribunal had been furnished with a substantial body of additional material including additional grounds of appeal, written submissions, photographs depicting violence in the aftermath of elections in Lomê, the applicant's birth certificate, additional country of origin information and a number of previous decisions of the Tribunal thought to have a bearing on the facts in issue.

**9.** On the day before the scheduled hearing i.e. 11th February, 2008 and without notice to the applicant's solicitors, the Tribunal member heard an application for an adjournment by the Refugee Applications Commissioner. The Tribunal member refused that application. The following day, counsel for the applicant submitted to the Tribunal member that she should not proceed with the hearing in the absence of the presenting officer of ORAC. He also indicated that had the applicant been on notice of the adjournment application that he would have consented to the same and that the applicant wished the presenting officer to be present as was provided for by statute.

**10.** The Tribunal member proceeded with the hearing of the appeal notwithstanding the applicant's protestations, and by letter dated 31st March, 2008, the applicant was notified of the Tribunal member's recommendation that his appeal be disallowed. That decision was made on 27th February, 2008.

**The Facts Relied upon by the Applicant**

**11.** The facts relied upon by the applicant in support of his claim for refugee status can be briefly summarised as follows. The applicant is a married man with three children. He was born in Dalabe which is an area near Lomê, Togo. He moved to Bé on the outskirts of Lomê in 1990, and worked as a barber. Bé is an area which at all relevant times was populated mostly with government opposition party members. The applicant, however, had no party political involvement. The applicant left his home in Bé due to upcoming elections and went to stay with his family in Dalabe which was allegedly safer. There were usually problems in Bé at election time. His son became ill and he had to go back to Bé to collect money which he had left in his house in order to bring him to the hospital. In the course of this trip the applicant became caught up in a disturbance. His son was knocked unconscious and his own identity card was taken. Because his identity card showed him to be from Bé, he was picked up by soldiers who considered him to have been one of those involved in the

demonstration. The soldiers took his money and his ID card, before putting him on a truck with other people. The applicant escaped from this truck when it stopped to pick up other protestors. Following his escape he ran to a friend's house and stayed there for a few days before going to Ghana, where he stayed for six months before travelling through London and on to Dublin. The applicant claimed that he had had some contact with his family and that they had advised him that police had come regularly to look for him. They further advised him that they believed he would be at risk if he returned to Togo.

**Decision of the RAT**

**12.** The decision of the Tribunal member, after setting out the grounds of appeal at s. 3, deals with the factual basis for the applicant's claim. There is no complaint that the facts therein recited exclude any material evidence submitted by the applicant. In particular, the Tribunal member noted that the applicant had become caught up in demonstrations in Bé when he went back there to collect money to take his son to hospital. She noted that he was beaten, that his ID card was taken from him and that because of the address on his card, he was thought to be a demonstrator. She also records the applicant's claim that he was considered to be amongst those responsible for the injury of a government soldier on that date. She also referred to the fact that his family had told him that the military had come looking for him but recorded her concern that he had not provided any arrest warrant or other proof that he had been accused of the injury to the particular soldier concerned.

**13.** The Tribunal member, having set out the submissions presented on behalf of the applicant, went on at s. 6 of her report to analyse the applicant's claim. The major conclusion she reached may be stated as follows:-

(i) The Tribunal member found the applicant's case to be consistent and coherent. She concluded that if he was perceived to be an opposition supporter that there was a possibility that he would be persecuted if returned to Togo as the situation there for government opposition supporters was appalling.

(ii) The Tribunal member concluded that she was not satisfied that the applicant had established that he had a well founded fear of persecution based upon political opinion that would be imputed to him if returned to Togo. She relied, *inter alia*, upon the fact that the applicant had produced no corroborative or objective evidence to establish that he was wanted by the authorities for injuring a soldier in the course of election demonstrations. She concluded that he had not discharged the burden of proof notwithstanding the provisions of Article 5.3 of the 2006 Regulations. In this regard, the Tribunal member stated as follows:-

"To re-stress, I am simply not satisfied on the basis of the evidence provided, which is effectively only verbal testimony that this applicant is someone who is perceived to be an opposition supporter simply by virtue of being in Bé at the time of a clash with opposition supporters and that he is subsequently being searched for by the authorities because he is believed to have been involved in the injury of a soldier. The Tribunal must be entitled to feel comfortable in coming to a conclusion based on the evidence provided, I do not and if I were to simply elect to apply the benefit of the doubt based on the evidence that has been presented which falls far short in my view of satisfying the standard of proof, I would be doing so purely on the basis of a desire not to have my decision judicial reviewed by the High Court.

I appreciate that this applicant may indeed have a subjective fear of return based on the events that he outlined, however, I do not believe the evidence as such as to warrant a conclusion that it is objectively justified and in the circumstances I cannot conclude that there is a reasonable likelihood that this applicant would be persecuted on the basis of perceived political opinion were he to be returned to Togo. In relation to the other claim raised, I note that absolutely no evidence was presented to substantiate a claim that a failed Togolese asylum seeker is in danger of persecution on the basis of being a Togolese failed asylum seeker if returned to Togo, and in the absence of such evidence I cannot draw any such conclusion."

Accordingly, the Tribunal member concluded that any fear of persecution expressed by the applicant was not objectively justified on the evidence.

(iii) The Tribunal member concluded that the applicant had made two inconsistent statements. The first of these was a statement by him that his house in Bé was never raided because it was well known in the area that he had no political affiliations. On the other hand, he was claiming that the police or military in Togo were looking for him "simply because he lived in Bé".

(iv) The Tribunal member concluded that there was "absolutely no evidence" to substantiate a claim that a failed Togolese asylum seeker was in danger of persecution merely because they had failed in the asylum process, if returned to Togo.

**The Applicant's Submissions**

**14.** The applicant's submissions were manifold but can perhaps be telescoped under the following major complaints namely:-
(i) That the Tribunal member acted *ultra vires* in conducting the hearing in the absence of the presenting officer representing ORAC.

(ii) That the Tribunal member twice took into account matters which were extraneous to her considerations and which were material to her decision namely that her decision was likely to become the subject matter of subsequent challenge to the High Court.

(iii) That the Tribunal member made a material mistake in concluding as fact that there was "absolutely no evidence" presented to substantiate a claim that the applicant was in danger of persecution on the basis of being a failed asylum seeker if returned to Togo.

(iv) That the Tribunal member failed to consider previous relevant decisions of the Tribunal which were ten in number.

(v) That the Tribunal member's approach to the credibility of the applicant was flawed. In particular, it was asserted that having found the applicant's account to be consistent and coherent, she then fell into error in basing her finding on a gut feeling or instinct due to the fact that she was uncomfortable regarding the absence of corroboration.

(vi) That the Tribunal member had arguably applied the incorrect standard of proof to the applicant's claim.

(vii) That the Tribunal member had made a significant error which was material to her decision insofar as she recorded the applicant's fear of persecution was one which stemmed from the fact that he had an address in Bé which was considered to be an area populated by opposition activists. The applicant submitted that his fear of persecution also stemmed from the fact that the authorities were looking for him because he had been identified wrongly as having been involved in the demonstrations in the course of which a soldier had been injured.

(viii) That the Tribunal member had made a significant error in concluding that the applicant had made the two inconsistent statements referred to at 13(iii) above and that this error had been material to her decision such that it was arguable that the decision as a whole was flawed.

**The Respondent Submissions**

**15.** The respondents submitted that there was no legal basis upon which it could be alleged that the Tribunal Member acted *ultra vires* by reason of the fact that the hearing proceeded in the absence of the representative of the ORAC. He submitted that there was nothing in s. 16 of the 1996 Act, (as amended) or in the regulations which required the presence of the Commissioner's representative. Counsel for the respondent submitted that no prejudice had occurred to the applicant by reason of the absence of the Commissioner's representative and if anything their absence inured to the benefit of the applicant. If the Commissioner's representative had been present, the applicant might have been cross examined.

**16.** Counsel for the respondents submitted that the decision should not be reviewed on a piecemeal basis but should be looked at in terms of its totality. He submitted that it was open to the Tribunal Member to conclude that the evidence of the applicant was weak and was entitled to take into account the lack of objective evidence and corroboration. He submitted that it was open to the Tribunal member to conclude that the applicant's account was credible whilst also concluding that having considered all of the evidence, which was uncorroborated and to a large extent undocumented, that the burden of proof had not been discharged by the applicant. He submitted that it was open to the Tribunal Member to conclude on the one hand that the applicant had a subjective fear of persecution but for her to conclude that objectively this was not justified. Counsel for the respondents relied upon the analysis of the applicant's claim by the Tribunal Member. He submitted that whilst the Tribunal Member was satisfied that there was a possibility of persecution that she was not satisfied that there was a reasonable likelihood of persecution and that in such circumstances she was entitled to find against the applicant. He submitted that the decision was made within jurisdiction and was sustainable on the evidence and that it was not for the court to substitute its own view for that of the Tribunal member.

**17.** Counsel for the respondent submitted that the Tribunal Member did not fail to consider any material facts. Even though the Tribunal member had placed emphasis on the fact that the applicant lived in Bé, she clearly had taken into account his alleged involvement in the post election protest and also his contention that he was being sought in respect of an assault on a soldier.

**18.** Counsel for the respondent submitted that the investigation by the Tribunal member of the risk of persecution to the applicant as a returned asylum seeker had to be viewed against her conclusion that no adverse political opinion would be imputed to him in such circumstances. He submitted that there was no evidence

to suggest that the Tribunal member did not consider the other decisions of the RAT which had been submitted as part of the appeal.

**19.** Finally, counsel on behalf of the respondent conceded that the Tribunal member was in error in her statement that there was no evidence to demonstrate that a failed asylum seeker was at risk of persecution. However, he submitted that the preponderance of the country of origin documentation indicated that only those with imputed political opinion were likely to be at risk and that these did not include the applicant.

**Decision**

**20.** Applying the standard of proof appropriate to the present application, the court concludes that the applicant has made out a reasonable case to argue that the Tribunal member acted *ultra vires* in embarking upon the decision making process in the absence of the ORAC representative. In particular, Regulation 9 of the Refugee Act 1996 (Appeals) Regulations 2003 and the provisions of s. 16(11) of the Refugee Act 1996 as amended by s. 11 of the Immigration Act 1999 give good grounds for permitting the applicant to urge that it was mandatory, in the absence of the applicant's agreement, for the appeal to proceed in the presence of the Commissioner's representative. It is certainly arguable that the statutory scheme, which includes the right of the Tribunal member to request the Commissioner to make further enquiries or to furnish further information to the Tribunal, mandates the presence of the Commissioner's representative in the course of the appeal and that an appeal conducted in his absence particularly in circumstances where the appellant raises an objection to their absence, might well be *ultra vires* the powers of the Tribunal.

**21.** The court rejects the applicant's submission that the respondent's reference to potential judicial review proceedings on two occasions in the course of her judgment provides any arguable grounds to contend that the decision of the Tribunal member should be quashed. Whilst it might be somewhat regrettable that the Tribunal member referred to her concerns that her decision might well be the subject matter of judicial review proceedings, the court believes that there is no evidence to demonstrate that her concerns in this regard in any way impacted upon her judgment. Indeed, in giving her decision, she was clearly cognisant of the fact that her decision was likely to be subjected to scrutiny by the High Court in subsequent judicial review proceedings.

**22.** The court concludes that the applicant has established an arguable case to contend that the Tribunal member omitted from her considerations relevant country of origin documentation when considering whether or not there was any risk to the applicant as a failed asylum seeker to whom no political opinion could be imputed if returned to Togo.

**23.** The Tribunal member concluded that if the applicant were to be returned to Togo that he would not be a person to whom any adverse political opinion would be imputed. Accordingly, she assessed the risk to the applicant of being persecuted if returned to Togo purely on the basis that he would be considered a failed asylum seeker. The Tribunal member concluded that there was "absolutely no evidence" to substantiate a claim that a failed Togolese asylum seeker was in danger of persecution.

**24.** It is common case that the Tribunal member was incorrect in her finding as a fact that there was "absolutely no evidence" to suggest that a failed Togolese

asylum seeker without imputed political opinion was in danger of persecution. In this regard, an Amnesty International Report for 2005 reports as follows:-

"There were reports that security forces arrested returned asylum seekers on their arrival in Togo. Some were release after a few days whilst others remained in unlawful detention for several weeks."

**25.** Whilst counsel for the respondent accepted that the Tribunal member had before her the Amnesty International report for 2005 referred to above, he submitted that the court should overlook the error made by the Tribunal member having regard to the content of what he referred to as a subsequent report of Amnesty International dated 20th July, 2005. That report, counsel submitted made no mention of any danger to returned asylum seekers who had no imputed political opinion. He urged the court to view this report of 20th July, 2005 as a report which in someway superseded the Amnesty International report of 2005 referred to above.

**26.** The Court cannot accept the respondent's submission in this regard particularly in circumstances where this is a leave application. Mr. Woolfson has pointed out that the first of the two reports from Amnesty International refers to the whole year for 2005 whilst the latter article relied upon by Mr. Colon Smyth refers only to one particular type of human rights problem in Togo, namely risks to the population in the course of elections in Lomê. Mr. Woolfson urged the court to pay significant attention to the risk to return failed asylum seekers with no political opinion as was advised by Amnesty International in the annual report for 2005. Mr. Woolfson also relied upon other country of origin documentation including a report of Amnesty International dated 2007 which referred to a Togolese refugee who was living in Ghana who was arrested at their work place and handed over to Togolese security forces and who apparently at that time remained in detention in Lomê Central Prison.

**27.** Having heard the arguments of counsel, the court concludes that the applicant has established an arguable case to contend that the Tribunal member omitted from her considerations relevant material regard country of origin documentation when considering whether or not there was any risk to failed asylum seekers to whom no political opinion could be imputed. Conclusions must be based upon correct findings of fact and if a factual error is of sufficient importance, it will cast doubt upon the integrity of the decision making process as was stated by Peart J. in *Da Silveria v. Refugee Appeal's Tribunal* (Unreported, High Court, 9th July, 2004).

**28.** Having considered the submissions of both parties in relation to the decision of the Tribunal member, the court is further satisfied that the applicant has made out an arguable case that the Tribunal member did not consider those earlier decisions of the Refugee Appeal's Tribunal which were forwarded by the applicant's solicitor on 11th February, 2008 in advance of the appeal hearing. The court notes the applicant's reliance upon the Tribunal member's reference in her decision to one of the ten cases submitted for the Tribunal member's consideration which related to a decision of the Tribunal in relation to Zimbabwe which the Tribunal member deemed to be irrelevant. The Tribunal member did not mentioned the decisions in two other cases which the applicant maintains were of relevance in terms of the decision to be made by the Tribunal member in relation to the applicant's risk of persecution as a returned asylum seeker namely those decisions bearing reference numbers 69/2651/02 and 69/10323/00A.

**29.** Whilst the court is mindful of the decision of O'Leary J. in *Fasakin v. Refugee Appeal's Tribunal* (Unreported, High Court, 21st December, 2005) and of Geoghegan J. in *Atanasov v. Refugee Appeal's Tribunal* (Unreported, Supreme Court, 26th July, 2006), this is a leave application and it appears to be arguable, in circumstances where a previous decision of the Tribunal in relation to Zimbabwe was specifically mentioned and which was deemed to be irrelevant, that the Tribunal member in failing to refer to the two decisions relied upon by the applicant can be stated to possibly have overlooked these decisions in coming to her conclusions. Accordingly, the court will grant leave for the applicant to maintain a claim in this regard.

**30.** The court rejects the applicant's contention that an arguable case can be made out to the effect that the Tribunal member applied the incorrect burden of proof when recommending that the applicant would be refused refugee status. Whilst the court notes that the Tribunal member accepted that the applicant gave a consistent and coherent account of events she was, in the court's opinion, quite entitled to weigh up all of the evidence presented to her in the course of the hearing including the fact that the applicant's claim was "entirely unsubstantiated" and that his evidence that he was being sought by government authorities as being "merely hearsay". She was entitled, having heard all the evidence to come to the conclusion that she did not have a sufficient weight of evidence or "objective proof" to be satisfied that the applicant had a well founded fear of persecution should he be returned to Togo. The fact that the Tribunal member used language such as she did not "feel comfortable in coming to a conclusion based upon the evidence provided" or felt herself unable to "jump to the conclusion" that the applicant was at risk from the authority does not mean that she decided the case on the basis of a gut instinct. Her decision clearly sets out all of the relevant material which she weighed in the balance when deciding whether or not the appropriate standard of proof had been met. The court does not accept that the applicant has made out an arguable case that a higher standard of proof than that which was justified was applied by the Tribunal member in the present case. The court believes that it was perfectly open to the Tribunal member to conclude that the applicant's account was credible whilst also concluding that having considered all of the evidence that the weight of that evidence including the lack of objective or corroborating evidence was such that the burden of proof had not been discharged by the applicant.

**31.** The court further rejects the applicant's submissions that an arguable case has been made out that the Tribunal member failed to consider certain material facts or misunderstood the applicant's claim to the extent that the validity of the Tribunal member's decision should be impugned. It is certainly the case that the Tribunal member on several occasions in the course of her decision referred to the applicant's fear of persecution stemming from the fact that he resided in Bé. However, the core complaint made by the applicant is fully recorded on two occasions in the course of the Tribunal member's decision. The Tribunal member clearly refers to the applicant's claim for refugee status being based upon political opinion imputed to him by reason of the fact that he was caught up in post election demonstrations in circumstances where he was believed to have been involved in injuring a soldier and that the content of his identity card rendered him further at risk in this regard. It simply is not arguable that the Tribunal member did not take these matters into account when one looks thoroughly at the analysis of her decision.

**32.** It is not for the court to parse, compartmentalise and then analyse each sentence or statement made by the Tribunal member in the course of her decision. Such statements are not to be considered in isolation and then

individually scrutinised for procedural fairness or factual accuracy. All findings and statements must be viewed in the context of the decision as a whole. A judicial review application is not a full appeal on paper. What the court is principally concerned with is firstly whether or not the hearing was one which was conducted in a manner which complied with natural and constitutional justice. Thereafter the court will confine its considerations to satisfying itself that the decision was sustainable on the evidence and that in coming to that decision, the Tribunal member considered all relevant facts and excluded all those irrelevant to its deliberations.

**33.** Finally, counsel for the applicant argued that the Tribunal member must have misunderstood the nature of the applicant's claim having regard to her conclusion that she found two aspects of the applicant's claim to be at odds with each other. She referred to the applicant's evidence that he was well known in the area of Bé and that his house had never been raided by government forces because he was known not to have any political involvement. She contrasted those facts with his assertion that the police or military were looking for him "simply because he lived in Bé" and stated that the two claims were mutually incompatible. Counsel for the applicant has submitted that this was not the evidence. The evidence was that up until the date of the post election demonstrations the applicant was not believed to have had any involvement in politics. However, after the post election demonstrations in which the applicant had become unwittingly involved, he was then at risk of persecution because of political opinion that would be imputed to him by reason of such involvement.

**34.** Having considered the arguments of counsel, the court concludes that in circumstances where this is a leave application that the applicant has made out an arguable case that the Tribunal member's statement that the applicant had made two mutually incompatible claims was factually incorrect. Even though the Tribunal member then went on to recite the fact that the applicant maintained that he had a well founded fear of persecution based upon his alleged involvement in the injury of a soldier in post election demonstrations, she nonetheless arguably took into account in deciding whether or not the applicant had met the required burden of proof, her conclusion that he had made two inconsistent claims. It is therefore certainly arguable that the Tribunal member relied upon an incorrect finding in reaching her decision thus giving the applicant reasonable grounds to suggest that the decision might be impugned on this basis.

**35.** To conclude, the applicant has not made out any arguable case to suggest that the Tribunal member acted in breach of natural justice or fair procedures. The applicant has failed to establish an arguable case that the Tribunal member applied an incorrect standard of proof to the applicant's claim for refugee status. Further, the applicant has failed to establish any reasonable grounds to argue that the Tribunal member reached her decision based upon any gut feeling or instinct. The Tribunal member did not include amongst her considerations matters which she should have excluded and neither did she include matters which she should have excluded. However, the applicant has satisfied the court that it should grant leave to him to seek the relief claimed at paras.(a), (b), (c) and (d) of the notice of motion solely on the grounds:-

(a) That the Tribunal member acted *ultra vires* in proceeding with the applicant's appeal in the absence of the representative of the Refugee Applications Commissioner;

(b) That the Tribunal member failed to take into account, when coming to her conclusions as to whether or not the applicant, as a failed asylum seeker had a well founded fear of persecution on his return to Togo:-

(i) relevant country of origin documentation; and

(ii) previous decisions of the Tribunal in relation to the risk of persecution to failed asylum seekers if returned to Togo.

(c) That the Tribunal member based her decision upon a material factual error namely that the applicant had made two inconsistent claims, the first of which was that his house in Bé was never raided because it was well known in the area that he had no political affiliations and the other being that he was claiming that the military or the police were looking for him "simply because he lived in Bé.