

THE HIGH COURT

2008 625 JR

BETWEEN

E. S.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL

RESPONDENT

JUDGMENT of Mr Justice Cooke delivered on the 15th day of July 2009

1. The applicant is a 30 year old single woman who arrived in the State on 6th February 2005, having travelled from South Africa on a South African passport which she said was false and which she had bought from a man. She applied for asylum here on 26th April, 2005.

2. The applicant claimed that she had Zimbabwean nationality and that she had been forced to flee Zimbabwe because she had found out in December of 2002 that her father had arranged to force her to marry an older man, a Mr. L., who already had three wives. Shortly before the wedding in June 2003, her father died and the wedding was postponed. In spite of efforts to repay the bride price already received by her father, Mr. L. refused and the village elders decided that the marriage should proceed. She decided to leave Zimbabwe and when she had saved enough money, she left for South Africa in February 2004. She stayed with a friend from school and got a job in a shop. She went back a few times to Zimbabwe to visit her mother during the following year. Sons of Mr. L. discovered her whereabouts, came to see her, and threatened her with death if she did not return to marry their father. She said she decided to leave South Africa and come to Ireland where her sister, P.S., was already living.

3. In a report dated the 15th August, 2005 the applicant's claim to refugee status was recommended for rejection by the Refugee Applications Commissioner, essentially upon the ground that the story she told was not credible. In particular, the Commissioner's authorised officer had doubts as to whether the applicant was a national of Zimbabwe, as she claimed, for the following reasons:

- a) In 2001 in her Section 11 interview on her asylum application her alleged sister, P.S., had said her sister was 16 years old, which would mean that the applicant's age was 20 and not 26;
- b) P.S.'s documents relating to her parents have no authenticated link to the applicant;
- c) The applicant was unable to place her home town on an unmarked map of the Bulawayo region;

d) She could not correctly describe the national flag of Zimbabwe;

e) Research did not confirm the existence of the church she said she attended and had named in the Bulawayo diocese.

4. In addition to doubting credibility, the report relied on a number of other factors as undermining her claim to a well-founded fear of persecution in Zimbabwe as follows:

a) In view of the fact that at that point the Irish authorities considered her South African passport to be authentic, she came from a designated safe country;

b) She failed to apply for asylum between her arrival here on 6th February and 26th April, 2005 because she said she was unaware that she could do so although her sister was here and had done so and she was in contact with her sister;

c) Her failure to apply for asylum in France suggested her intention was always to go to Ireland, which undermines her claim to fear persecution;

d) Country of origin research disclosed no references to arranged or forced marriages in Zimbabwe while legislation made such marriages illegal in South Africa;

e) She had never reported her problems in Zimbabwe to any authority and country of origin information indicated that both in Zimbabwe and South Africa there were agencies which helped women in such circumstances;

f) The applicant stated she had no problems with the authorities so she had the option of relocating within Zimbabwe or of going to South Africa;

g) Her return trips to visit her mother in Zimbabwe suggested an absence of any concern about being forced into marriage there.

5. The report made an express finding by reference to paragraph c) of s. 13 subs. 6 of the 1996 Act, - failure to apply for asylum as soon as practical on arrival, - thereby excluding an oral hearing on appeal.

6. On the 1st September, 2005 a notice of appeal was lodged against that report. The notice was accompanied by a ten page schedule headed "grounds of appeal" which curiously bears the date 9th June, 2004 and is devoted extensively to the alleged failure of the authorised officer in the report to consider adequately the applicant's reasons for fearing persecution in Zimbabwe in the form of being forced to undergo female genital mutilation, something which had never been mentioned by the applicant herself.

7. It is evident to the Court from the emphasis placed on this ground and on the other submissions made in the schedule that these grounds of appeal had been drafted or lodged without any or only minimal regard to the actual circumstances of the applicant's case and to the contents of the report under appeal. Thus, submissions were also made as to a fear of persecution on grounds of religion and

ethnicity which had never been mentioned by the applicant. It is difficult to avoid the impression that these grounds of appeal constitute some form of standard generic appeal capable of adaptation from case to case but which has not actually been adapted to this case. Thus there are general submissions of an abstract nature with references to case law on the subject of credibility and the burden of proof but without any attempt to link them to the details of the Contested Report. Even in the one section which might be said to have a connection to a real grievance advanced by the applicant namely, the matrimonial threats of Mr. L., the ground is phrased at one remove from the precise issue in the case: "Applicant has been denied her fundamental right to marry a person of her own choosing and compelled to marry a person not chosen by her." The applicant has never married.

8. Almost two years later, on 9th August 2007, the applicant's solicitors lodged with the Tribunal a new schedule headed "further submissions" together with a large volume of documentary country of origin information relating to conditions in Zimbabwe together with copies of a series of previous decisions of the Tribunal. In the opening lines of this document the Tribunal was requested to note that the references to female genital mutilation in the papers already lodged were in error. The relevance of the references to religious and ethnic grounds was not explained. The Court appreciates that mistakes can occur. It is also alive to the reality of the cases in this list, namely that their volume and urgency are such that practitioners are often under considerable pressure and that efficiency in managing a case load requires that administration is streamlined by all reasonable methods available.

9. Nevertheless the Court feels obliged to draw attention to the dangers that arise in this regard because it appears to have become a regrettable characteristic of proceedings in this area that undue reliance is placed on the "cut and paste" approach to legal draftmanship. In the first place, extensive submissions which are wholly irrelevant to the actual circumstances of the case not only waste the time of the Court and the other parties but run the risk of creating doubts in the mind of the Court as to the seriousness of the case presented as well as undermining the credibility of any remaining submissions even when relevant to the real issues in the case. Secondly, reliance on standard form legal submissions not linked to the facts and issues of a case incurs the risk, especially where there is no oral hearing before the Tribunal, that the appeal may well be determined promptly before any further submissions are lodged with the result that the applicant's true case is not fully presented.

10. In the present case the further submissions presented a series of new arguments and grounds as follows:

a) The applicant is said to fear persecution by reason of a membership of a particular social group, namely women and/or women perceived to be supporters of the MDC opposition party in Zimbabwe;

b) The applicant fears persecution if returned to Zimbabwe as a failed asylum seeker associated with opposition to the ruling Zanu PF regime;

c) The applicant fears persecution by reason of her membership of a particular social group comprising people who are HIV positive; and,

d) The applicant fears persecution by virtue of her nationality *per se*.

11. Apart from stating these assertions of fears of persecution for these reasons, the further submissions are made up exclusively of references to accompanying country of origin information designed to illustrate how government opponents, returned asylum seekers and HIV sufferers, are mistreated in Zimbabwe. Other than stating that the applicant is HIV positive and supports the MDC party, these further submissions offer the Tribunal no evidence or other proof to substantiate the application of these conditions to the applicant.

12. It will be noted therefore that in neither set of appeal grounds and submissions is any attempt made to address and to challenge the substantive content and findings of the appealed report. In particular, no challenge is raised to the factors identified as giving rise to the doubts as to whether the applicant is in fact from Zimbabwe and a national of that country. Thus, apart from furnishing the single article from the "Mail and Guardian on line" of 17th May, 2006 entitled "Hunger Forces Zimbabwe Girls into Forced Marriages," no attempt is made to address the specific matters which form the basis of the report's negative recommendation as summarised in paras. 3 and 4 of this judgment. The grounds and arguments advanced are entirely new and do not appear to be based upon any personal information or evidence furnished by the applicant herself in the asylum application form, in the questionnaire or in the Section 11 interview.

13. Following the lodging of the further submissions and before the determination of the appeal, an exchange of correspondence took place between the applicants and solicitors and the Tribunal. Further representations and documentation were submitted on her behalf on 14th December, 2007. These included a directory of parishes in the Bulawayo diocese including a listing of the "Ugandan Martyrs" church the applicant claimed to have attended. It was submitted that the Refugee Applications Commissioner had therefore erred in drawing the adverse finding of credibility on that basis.

14. By letter of 12th November, 2007 the Tribunal asked the applicant to confirm the date on which she left Zimbabwe. By letter of 8th February, 2008 the applicant was advised that the Tribunal had requested that her South African passport be submitted to technical examination for verification of its authenticity. The results report from the Garda Technical Bureau concluded

"I examined the questioned Republic of South Africa passport and observed that the holder's signature is not incorporated over the photo image. This document has been checked on the Interpol database and it has been reported as a stolen document by the South African authorities."

The applicant had, of course, from the outset acknowledged that the passport was not hers and had been bought from a man.

15. The decision on the appeal was given on 14th April, 2008. In its introduction it refers to the further submissions of August 2007 and records that her fear of persecution is claimed for the reasons of nationality, political opinion, membership of a particular social group, and the fact that she is HIV positive. Under the heading the "Applicant's Claim" the Tribunal member summarises the story she had told and the events which followed from the threat of a forced marriage in 2002 up to her flight from South Africa after the threats from Mr. L.'s sons.

16. In the analysis at s. 6 of the decision, the Tribunal member deals first with the claim based on the threat of forced marriage to Mr. L. and refers to the country of origin information submitted on behalf of the applicant but expresses the view that this relates to a father giving away underage daughters for food. The applicant, she says, does not fall into that category.

17. The Tribunal member then considers aspects of the credibility of the applicant's claim to be of Zimbabwean origin and points, as had the Section 13 Report, to the disparity between her age and that which her alleged sister had given for her at interview in 2001. The Tribunal member expresses the view that this put in question her true relationship with P.S. She also points to the evidence of her inability to describe the Zimbabwe flag and her apparent difficulty in locating her home area on the Bulawayo map. The correction of the Refugee Applications Commissioner's report in relying on the name of the church is not mentioned but neither is that relied upon by the Tribunal member.

18. As regards the claim based on political opinion, the Tribunal member points to the fact that in her ASY1 form she had said that she was not a member of a political party and that at her interview she had said the only group she was in was a choir. None of her family is a member of any political or religious organisation (page nine of the questionnaire) and none had ever been arrested, detained, or imprisoned by the Zimbabwe authorities. At question 46 of her interview, the only fear she had expressed was that of a forced marriage. The Tribunal member points out that the applicant had visited Zimbabwe on several occasions from South Africa which she would hardly have done had she feared the authorities on account of her nationality or political affiliations. On that basis the Tribunal member finds her fear of persecution as a perceived supporter of the MDC or opponent to the Zanu PF regime is not well founded.

19. The Tribunal member points out next that the applicant had been living in South Africa and had fled to France. She finds that the applicant did not claim asylum as soon as practicable in France, as would be expected if she was fleeing persecution. She also points out that South Africa is a signatory of the Geneva Convention and that she could have sought protection there. The Tribunal member questions her explanation for not claiming asylum in Ireland until 26th April, 2005 when her sister had claimed asylum in 2001. Finally the Tribunal member states that she has also considered the claim to fear persecution as a failed asylum seeker if returned and the applicant's medical status. In relation to the latter, the Tribunal member says "The applicant's access to medical treatment in Zimbabwe and/or in South Africa is an issue which relates to an application for leave to remain. Such an application is a matter for another forum."

20. It is in these circumstances that the applicant now seeks the leave of the Court under s. 5 of the Illegal Immigrants (Trafficking) Act 2000 to apply for, *inter alia*, an order of *certiorari* to quash the Contested Decision. The principal issue before the Court, accordingly, is whether any substantial ground is now proposed to be advanced which would warrant the annulment of that decision. An ancillary issue also arises as to the existence of sufficient reason to extend the time for the application by a period of approximately three weeks.

21. In the statement of grounds, something in excess of 20 grounds are proposed to be advanced; but in the case as presented, however, counsel for the applicant invited the Court to consider two grounds as follows:

“(i) The Tribunal member failed to consider the applicant’s claim to fear persecution if returned to Zimbabwe as a failed asylum seeker; and,

(ii) The Tribunal member erred in finding that her claim based on her medical status as a HIV positive person was a matter of access to medical treatment in Zimbabwe and/or South Africa and therefore an issue which related to an application for leave to remain, and as such a matter for another forum.”

22. There is in the Court’s view an ambiguity and therefore an uncertainty as to the exact basis upon which the Tribunal member in this case finally decided to affirm the recommendation of the Section 13 Report. Like the Commissioner, the Tribunal member expresses a serious doubt for the reasons summarised at para. 16 of this judgment as to whether the applicant was in fact a national of Zimbabwe and even as to her identity in that she reiterates the doubts expressed by the authorised officer as to whether P.S. is the applicant’s sister. Nevertheless, no distinct conclusion or finding is reached on that issue and one is left to read it as one of the factors together with the failure to seek protection in South Africa and to apply for asylum in France, which form the basis cumulatively for the rejection of the appeal. The reader must also infer that this rejection was on the basis that the Tribunal member did not consider that the claim to a well-founded fear of persecution had been established because no explicit statement to that effect is made in the decision.

23. It is axiomatic that the establishment of the country of origin of a claimant to refugee status is fundamental to the assessment of the claim because it is otherwise impossible to determine whether the claimant is outside that country owing to a Convention based fear of persecution. That is not infrequently an extremely difficult exercise and while the onus of establishing refugee status is on the claimant, the UNCHR handbook points out at paragraph 196:

“While the burden of proof in principle rests with the applicant, the duty to ascertain and evaluate all relevant facts is shared between the applicant and the examiner. Indeed, in some cases it may be for the examiner to use all means at his disposal to produce the necessary evidence in support of the application.”

(This reference to the “examiner” is primarily to that of the Commissioner in the Irish process but where the Tribunal member is reaching the same conclusion on credibility as the authorised officer in a case where there is no oral hearing the duty also applies at the appeal stage in the Court’s view.)

24. The ambiguity and uncertainty in the Contested Decision in this case lies in the fact that on the one hand it gives the clear impression that the Tribunal Member comes to the same view as the authorised officer in the Section 13 Report namely, that the applicant is not a national of Zimbabwe, but the decision contains no conclusion to that effect in express terms; on the other, it also and somewhat inconsistently proceeds to examine and to rule in express terms on the claims to fear of forced marriage in Zimbabwe as well as the claim first raised in the further submissions that the applicant feared persecution as an opponent to the ruling Zanu PF regime in Zimbabwe, notwithstanding the absence of any basis for that fear in the applicant’s own evidence.

25. If the Tribunal Member was not satisfied that the applicant had established her Zimbabwean nationality and was possibly a national of South Africa, it seems

to the Court that the Tribunal Member had an obligation either to consider whether further enquiries were possible to resolve that issue or, alternatively, to find that she was not a national of Zimbabwe, in which case an examination of the various reasons for fear of persecution in Zimbabwe, including those in the two grounds now advanced, was irrelevant and unnecessary.

26. In this regard it is to be borne in mind that so far as the issue of credibility as to country of origin was concerned two matters had changed since the Section 13 Report when the issue was before the Tribunal Member. As mentioned above, the applicant had proved that the church she had named did exist and she claimed, albeit belatedly, that this showed that the authorised officer had erred in fact in assessing credibility. More significantly perhaps, when the matter was before the Refugee Applications Commissioner, it was understood that the Irish authorities had considered the South African passport to be valid. That was clearly a crucial factor for the authorised officer's doubt as to the country of origin because it gave a concrete basis for establishing a different country of nationality, particularly when the applicant admitted to having lived in South Africa and to having travelled from that country. The Tribunal Member took the step - correctly in view of the duty referred to in paragraph 196 of the handbook - to obtain a definitive verification of the authenticity of that passport and it transpired to be false.

27. It is remarkable therefore that, while the report of the Garda Technical Bureau is one of the documents listed in the section 7 "Conclusion" of the Decision, its actual effect and significance are not mentioned anywhere in the decision. The only reference to the passport is the somewhat ambivalent sentence in the section 6 analysis:

"Apart from the South African passport on file, other matters arise which call into question the applicant's origins."

The Tribunal Member does not appear to have averted to the possible implication of this for the reliability of the authorised officer's doubts about the applicant's nationality. If, as the applicant had claimed from the outset, she had travelled on a false South African passport, did that imply that she had no entitlement to a valid one as a South African national? If she was not a South African national, where else might she come from if not Zimbabwe?

28. Given the significance of this issue in this case and having regard to the fact that two changes occurred in relation to the factors relevant to credibility as assessed in the Section 13 Report and having regard also to the fact that this was an appeal without an oral hearing, the Court considers that a substantial issue arises as to whether there has been an adequate determination by the Tribunal of the country of origin or nationality of the applicant. So long as that issue can be argued to be inadequately determined, the relevance of the two particular grounds now advanced remains impossible to assess.

29. If the applicant is not a national of Zimbabwe, claims to a fear of persecution there are irrelevant and it may well be that there was no obligation on the Tribunal to consider them, especially when they were raised for the first time after the appeal had been brought and they appear to have no support in any direct evidence or assertion on the part of the applicant herself. On the other hand, if it is considered that Zimbabwe is in all likelihood her country of origin, a substantial issue arises as to whether the two claims should have been determined explicitly by the Tribunal and whether it has in fact done so.

30. The claim based on persecution as a returned asylum seeker is referred to in the Section 6 of the Contested Decision as having been "taken into account and

considered" but nothing further is said as to why it was rejected. The claim based on her HIV positive status is expressly not ruled upon because, as the Tribunal Member says, "It is a matter for another forum." It is literally true therefore that neither of these issues was considered by it Tribunal in the sense of being examined and ruled upon.

31. For these reasons the Court will grant the leave sought but, subject to a reservation to be mentioned in a moment, the Court proposes to add to the two grounds given at para. 21 of this judgment, a further ground, to be listed first, as follows:

"The Tribunal erred in failing to investigate and to determine to an adequate degree of likelihood the country of nationality or origin of the applicant and to state its reasons for its determination."

32. The Court appreciates that this ground was not advanced on behalf of the applicant in the statement of grounds, even if the problem was indirectly mentioned in the course of argument. The respondents have not therefore had an opportunity to consider and to argue against the grant of leave on such a ground. The Court will therefore afford the respondents an opportunity to consider it and, if thought fit, to make submissions as to why it should not be allowed. The two grounds for which leave has been sought are based on the fact that while the two claims are mentioned in the Contested Decision and the first is said to have been considered, neither has been the subject of an express finding. The Court considers the validity of the Contested Decision by reference to those claims is necessarily bound up with the question as to whether Zimbabwe was or was not considered to be the applicant's country of nationality for the reasons explained above. Accordingly, if leave is to be granted to submit the Contested Decision to the scrutiny of this Court on a substantive application, the Court considers that the issue identified in this further ground should also be before the Court.

33. It is possibly unnecessary in these circumstances to emphasise that the Court is now holding only that a substantial issue has been raised by reference to these grounds. It expresses no view in this judgment as to whether upon full argument and examination any one of them is likely to succeed. In particular, the Court upon a hearing of the substantive application may well consider, for example, that the report of the Commissioner and the Contested Decision of the Tribunal can be construed only as determining that the applicant's claim to refugee status taken as a whole had not been established for lack of credibility for reasons independent of the passport issue or her limited knowledge of Zimbabwe. Further, the Court may well consider that even if the applicant is to be regarded as a national of Zimbabwe, there was in any event no obligation on the Tribunal to consider the claims to fear of persecution which were raised for the first time after the notice of appeal had been lodged and which were unrelated to any information given or assertion made by the applicant herself and therefore never investigated by the Commissioner.

34. Leave will therefore be allowed to seek the reliefs identified at paragraphs i), iii), vi) and vii) of the statement of grounds filed on 30th May, 2008. The remaining reliefs are not necessary.

35. The respondents have opposed the extension of time sought. The Contested Decision was sent to the applicant in Carlow under cover of a letter dated 24th April, 2008. Her affidavit does not mention the precise date on which she received it, but as 24th April, 2008 was a Thursday it seems probable that she would have received it after the weekend on Monday, 28th April, 2008. The 14 day time limit

would there have expired on 12th May. The proceeding was initiated on 30th May, a little over two and a half weeks later. Although the applicant does not give the dates on which she made contact with a solicitor after 28th April, having regard to the steps taken in consulting her solicitor, instructing counsel (with apparently some misunderstanding in that regard), and then having papers drafted, the Court is satisfied that it would be unreasonable not to extend the time for the necessary short period. Time will accordingly be extended to 30th May, 2008.