Neutral Citation Number: [2005 IEHC 13]

THE HIGH COURT

JUDICIAL REVIEW

[No. 2004 361 JR]

IN THE MATTER OF THE REFUGEE ACT, 1996 AS AMENDED
THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000
BETWEEN

NELLY MOKILI BITI

APPLICANT

AND

JOHN S. RYAN ACTING AS THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 24th day of January, 2005

This is an application for leave to issue judicial review brought pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 seeking to quash a decision of the first named respondent dated 22nd March, 2004, upholding a recommendation of the Refugee Applications Commissioner that the applicant's claim for a declaration of refugee status be refused.

Background facts

The applicant is a national of the Democratic Republic of the Congo. She was married to her husband SM-N in the Congo on 7th March, 1998. Her husband, it is claimed, was wrongly suspected by the authorities of being involved with or providing information to rebel forces in the Congo and was subjected to a number of arrests, incarceration beatings and torture. The applicant did not directly suffer this suspicion or treatment. However, she claims that she was threatened and verbally abused when her husband was being arrested and also claims that it is well documented that in the Congo rape and sexual violence are perpetrated against women as a method of attempting to force women to betray their husbands and menfolk. It is claimed that her husband's life was believed to be in danger and as a consequence hers also and that for that reason they fled the Congo and arrived in Ireland in June, 2001.

Both the applicant and her husband made claims for refugee status in this country on 20th June, 2001.

The applicant's husband was granted refugee status on 4th April, 2002 at first instance.

For reasons which have not been explained the applications of her husband and the applicant were dealt with separately. It appears that in August, 2002 the Refugee Applications Commissioner issued a recommendation that the applicant be refused a declaration of refugee status. An appeal dated 21st August, 2002 was lodged in which an oral hearing was requested.

The oral hearing was first listed for 18th November, 2002 and attended by the applicant, her husband and legal advisors but adjourned because of the unavailability of the presenting officer.
The appeal hearing was rescheduled for 7th January, 2003 and heard on that date notwithstanding that the applicant's husband was unavailable due to illness.
On 28th October, 2003, a letter was written by the then solicitors for the applicant enquiring as to the availability of the decision of the first named respondent.
On 11th December, 2003, an officer of the Refugee Appeals Tribunal wrote to the solicitors enclosing certain country of origin information dated between 1st July, 2003 and 9th December, 2003, which had been consulted by the first named respondent in connection with the appeal and inviting submissions thereon. An initial response was sent on 22nd December objecting to the member of the Tribunal considering any such information which arose after the date of the hearing and complaining about the delay in making the decision which it was contended was prejudicial to the applicant. A detailed response was sent from the Tribunal on 8th January, 2004, justifying the approach of the tribunal and indicating that if the applicant's solicitors wished to make a submission orally to the Tribunal member that they could do so by indicating same within seven days or in the alternative could send written submissions within twenty one days. On 26th January the then solicitor for the applicant submitted a short set of written submissions and declined the invitation to make oral submissions.
The Tribunal member made a decision dated 22nd March, 2004. This was communicated to the applicant with a letter dated 13th April, 2004.
The notice of motion seeking leave was issued on 28th April, 2004 and is grounded on an affidavit of the applicant sworn on 26th April, 2004 and on an affidavit of Justin Sadleir solicitor now acting for the applicant sworn 26th April, 2004. Mr. Sadleir was instructed on 23rd April, 2004. He had not previously been involved in the proceedings before the tribunal.

Application for leave

The decision of the first named respondent is a decision to which s. 5 of the Act of 2000 applies and hence to obtain leave the applicant must establish that she has "substantial grounds" for asserting that the decision is invalid. In accordance with the decision of the Supreme Court in *In Re Article 26 of the Constitution and the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360 to constitute substantial grounds the alleged grounds must be equivalent to "reasonable" "arguable" and "weighty" and must not be "trivial or tenuous".
Where, as in this application certain of the grounds rely upon assertions of fact, the application must also in relation to those facts meet the standard set out by the Supreme Court in *G v. Director of Public Prosecutions* [1994] 1

I.R. 374. In that case the test set out by Finlay C.J. at p. 378 for an application for leave *ex parte* included establishing:-

> "(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review,
> (c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks."

Applying "the substantial grounds" standard in s. 5 in the Act of 2000 to the above test it appears that the applicant herein must establish, in relation to those grounds which rely upon factual assertions, *inter alia*
(i) that the facts averred to in the affidavits would be sufficient, if proved, to support substantial grounds for the form of relief sought by judicial review; and
(ii) that on those facts substantial grounds in law can be made out that the applicants are entitled to the relief which she seeks.
The affidavits herein and in particular the affidavit sworn by the solicitor for the applicant reflect a misunderstanding of the proper purpose and role of an affidavit in support of an application for leave to issue judicial review. Order 84 r. 20 (2) (b) of the Rules of the Superior Courts requires "an affidavit which verifies the facts relied on". The affidavits should be confined to this purpose. It is not appropriate that submission, comment or argument be included in such affidavits. The affidavits must also comply with the requirements of O. 40 r. 4 of the Rules of the Superior Courts which provides:-

> "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof may be admitted.

Decision under challenge
The decision sought to be quashed is a decision of the first named respondent of the 22nd March 2004. Counsel for the respondents submitted that the decision should be approached and construed in the following way:-

- The decision raises no issue as to the creditability of the applicant.
- The decision reflects implicit acceptance by the first named respondent of the story told by the applicant.
- The decision reflects implicit acceptance by the first named respondent that the applicant is a person with a past fear of persecution.
- The implication of the decision is that it was accepted that the applicant has a subjective fear of persecution if returned to the Democratic Republic of the Congo.
- The rationale of the decision is the finding that there is no reasonable likelihood that the applicant would face persecution if returned to the

Democratic Republic of the Congo by reason of changes therein since April 2003 as reflected in the Country of origin information which became available after 7th January 2003 and in particular the fact that the former rebel forces are now stated to be participating in Government and hence by implication the subjective fear is not well founded.
For the purposes of the leave application it appears to me that the decision of the first named respondent should be so approached.

Grounds advanced

The statement of grounds submitted on behalf of the applicant seeks to rely upon 24 separate grounds. This is not helpful to identifying the real issues. Counsel on behalf of the applicant sought to group the grounds and identified those grounds which he was particularly pursuing. It is not my intention to go through each and every ground. I have considered all the grounds pursued at the hearing. I have concluded that applying the tests set out above to the grounds advanced and the facts verified by the applicant that leave ought to be granted upon a limited number of grounds.
I will grant leave on grounds (e) (ii) and (iv). These relate to the alleged breach of fair procedures in failing to grant an adjournment by reason of the non-availability of the applicant's husband due to illness on the second hearing date of the 7th January 2003. The applicant's husband had been present and available to give evidence on the 18th November 2002. I have formed the view that the applicant has made out substantial grounds under this heading on the facts of this case by reason of the fact that the applicant's claim was dependent to a significant extent upon the persecution and torture suffered by her husband; the fact that the applicant was not present when all of this was perpetrated on her husband and therefore could not give direct evidence of same; the "shared burden of proof" which rests on a investigator (which a member of the Tribunal hearing an appeal) with an applicant in an application for declaration of refugee status and the undisputed averment of the applicant that her husband was available to give evidence on the 18th November 2002.
Counsel for the respondents sought to argue that as the creditability of the applicant was not in issue and her story was effectively accepted that on the facts of this application and the decision made there was no substantive breach of fair procedures by reason of the absence of oral testimony from the applicant's husband. I cannot accept this submission as defeating the existence of substantial grounds at the leave stage. The question as put by the member of the Tribunal and which he answered was "is there any reasonable likelihood that the applicant would face persecution . . . should she return to the Democratic Republic of the Congo?". The answer to that question must or should have involved a consideration of the nature of the persecution feared by the applicant and the past events giving rise to that fear. The evidence of the applicant's husband appears directly relevant to that issue.

Secondly, I will grant leave upon the grounds set out at paras. (e) (vii), (viii) and (xviii) of the statement of grounds. These grounds relate to the allegedly unreasonable and inordinate delay of the first named respondent in making his decision subsequent to the oral hearing.
I have formed the view that such grounds constitute substantial grounds on the facts of this case by reason of the legal principles set out in a judgement given by me on the 29th July 2004 in *AM v. The Chairperson of the Refugee Appeals Tribunal and Ors. and GE v. The Chairperson of the Refugee Appeals Tribunal and Ors.* In that judgment I concluded that a member of the Tribunal to whom an appeal is assigned, under the Refugee Act, 1996, has obligations which include "a duty owed to the applicant to determine the appeal within a reasonable time". Further there appear substantial grounds for asserting that the period of 15 months approximately after the oral hearing as in this case is longer than any such reasonable time.
Counsel for the respondents accepted that on the reasoning set out in the English authorities referred to in the above decision, if the creditability of the applicant or her story were in issue in the application, then there would be substantial grounds for contending that the decision was unsafe and invalid by reason of the delay in making the decision after the oral hearing. However she sought to distinguish that line of authority from the facts of this application where creditability was not in issue and also it appears to have been accepted that the applicant was a person with a subjective fear of persecution.
Whilst I accept credibility does not appear to have been in issue I have concluded that does not preclude substantial grounds existing by reason of the delay on the facts of this case. Firstly, the conclusion in *AM v. The Chairperson of the Refugee Appeals Tribunal and Ors. and GE v. The Chairperson of the Refugee Appeals Tribunal and Ors* .that there exists a duty to determine the appeal within a reasonable period of time is not dependent on the nature of the issues to be determined. It derives from the construction of the Act of 1996 in accordance with the principles of constitutional justice.
In addition in that decision I considered a line of authority (relied upon by counsel for the respondents therein who were contending for potential invalidity by reason of delay)from the Court of Appeal of England and Wales as set out in *Sambasivam v. Secretary of State for the Home Department* [2000] Imm AR 85. In that case the Court of Appeal considered the practice of the Immigration Appeals Tribunal as explained by, Judge Pearl in *Mario v. Secretary of State for Home Department* [1998] Imm AR 306, at p.312.
"In an area such as Asylum, where evidence requires anxious scrutiny, the Tribunal will usually remit a case to another adjudicator where the period between the hearing and the dictation of the determination is more than 3 months."

This approach of the Immigration Appeal Tribunal was considered by the Court of Appeal in *Sambasivam v. The Secretary of State for the Home Department* [2000] Imm AR 85. Potter L.J. (with whom the other members of the Court agreed) considered a number of the authorities and then stated at para. 16:

> "In my view, the decision in Mario was no more and no less than a useful statement of guidance to practitioners upon the usual attitude and likely decision of the IAT in a case where an issue essential to the disposition of the claim for asylum depends upon a careful weighing of the credibility of the applicant and yet it appears that the delay between the hearing date and the preparation of the determination exceeds three months. In the absence of special or particular circumstances, that is plainly a useful and proper rule of thumb which, in the experience of the Tribunal, it is broadly just to apply, for the twin reasons that substantial delay between hearing and preparation of the determination renders the assessment of credibility issues unsafe, and that such a delay tends to undermine the loser's confidence in the correctness of the decision once delivered. No doubt that is the reasoning which underlay the memorandum referred to in *Waiganjo*.
>
> That said, I also consider it plain that the reference in *Waiganjo* to the 'particular circumstances of the case' in which the Tribunal may properly think it appropriate to depart from the rule of thumb is likely to cover a broad spectrum of individual cases. Apart from the cases already mentioned, i.e. where the delay may be administrative or the findings on credibility contemporaneously recorded, such circumstances would for instance cover the situation where, by reason of the terms of the findings and reasons of the Special Adjudicator, it is plain that his decision was justified on grounds which did not simply depend on this recollection and assessment of the oral testimony of the applicant, or where by reason of the nature of the applicant's evidence, or other material before the

> adjudicator, its falsehood or absurdity were plain."

Having considered the above I stated:-

> "I do not disagree with the general principle underlying the above English decisions, namely that in an appeal which turns upon the credibility of the applicant, if there is a significant gap between the oral hearing and the determination of the appeal, it may become unsafe such that either party may be entitled to have same quashed as being invalid. However, that entitlement will depend upon the relevant facts of the appeal."

Counsel for the applicant contends that the principle should also cover appeals such as this. I have already indicated that I have concluded that a proper assessment of the applicant's claim herein, even in the light of the changed country of origin information required an assessment by the Tribunal member of the nature of the events described by the applicant and alleged to constitute persecution and her fears in relation to a repeat of same if she were returned to the Democratic Republic of the Congo. It appears to me that in line with the reasoning in the English cases which concern the assessment of creditability of an applicant there exist for the purposes of a leave application substantial grounds for asserting that where, as in this case the assessment of the applicants claim depends upon careful scrutiny of the evidence given by the applicant in relation to past events and her description of her fear and the reasons therefore that where a decision is not given within a reasonable period of time of the oral hearing it may be unsafe as the impact of the oral testimony may have dimmed. This is particularly so as I was informed that there is no transcript taken of an oral hearing before the Tribunal member.

I have concluded that the applicant is not entitled to leave on ground (e) (v). This relates to an allegation of unfair procedures by reason of frequent interruptions by the first named respondent of the evidence of the applicant and the concentration of counsel. The only relevant factual averment in the applicant's affidavit is "as the hearing went on I was questioned by my counsel and I noticed particularly that he was constantly interrupted by the first named respondent breaking his line of questioning and I expect disturbing his concentration". No lawyer present at the hearing has sworn an affidavit. Counsel who appeared for the applicant at the hearing before the first named respondent is now the counsel instructed in the proceedings and therefore it is assumed that he is not intended to be a witness in the proceedings. The applicant makes no allegation that there was any evidence which she wished to give and which she was unable to give by reason of the alleged interruptions. Accordingly, it appears to me that the applicant had not met the factual test set out in *G v. Director Public Prosecutions* [1994] 1 I.R. 360 in relation to this ground.

I have also concluded that the applicant is not entitled to leave upon ground

(vi) as sought to be amended. This ground as sought to be amended reads:-
"The first named respondent was obliged to determine the appeal on the basis of evidence available at the oral hearing on the 7th January 2003 and to deliver a decision thereon."

I have concluded that the applicant has not made out substantial grounds in law for such an obligation. I have carefully considered the statutory scheme in Ireland in relation to persons such as the applicant and in particular the provisions of the Refugee Act, 1996 and the wider international approach in relation to the assessment of applications for declarations of refugee status. There is nothing in the Irish legislative scheme which expressly fixes the date upon which a person must fulfil the relevant criteria in order to obtain a declaration of refugee status. Section 8 of the Act of 1996 applies to a person who arrives at the frontiers of the State "seeking asylum in the State or seeking the protection of the State against persecution or requesting not to be returned or removed to a particular country or otherwise indicating an unwillingness to leave the State for fear of persecution". Such a person is entitled to make an application for a "declaration of refugee status". Thereafter the statutory scheme commences and the person is entitled to be given leave to enter the State to remain in the State under s. 9 of the Act of 1996 until either the application is transferred to a Convention country, is withdrawn or deemed to be withdrawn or notice is given that the Minister has refused to give a declaration of refugee status. The initial determination of an application for a declaration of refugee status is by the Commissioner who makes a recommendation and s. 16 permits an appeal against such a recommendation to the Refugee Appeals Tribunal. Section 16 (10) obliges the Tribunal to hold an oral hearing where an applicant has so requested. Section 16 (6) obliges the Tribunal to consider certain documents and matters prior to determining an appeal. Included amongst those are:

> "The evidence adduced and any representations made at an oral hearing, if any".

The other matters referred to are all matters which as a matter of probability should be available prior to the oral hearing. It was submitted that this scheme implies that the decision by the member of the Tribunal should be made on the basis of the evidence available at the oral hearing. In addition reference was made to the requirement in the standard form notice of appeal that all documentation intended to be relied upon by the applicant must accompany the notice of appeal.

The issue to be determined by the member of the Tribunal on the appeal is whether the applicant is entitled to a declaration of refugee status. That issue must be resolved by determining whether the applicant is a refugee within the meaning of s.2 of the Act of 1996. If the member of the Tribunal so determines then he or she will make a recommendation that the applicant is entitled to a declaration of refugee status. In such event the Minister is obliged under s. 17 (1) (a) of the Act of 1996 to grant to the applicant a

declaration of refugee status. It is such declaration of refugee status which entitles the applicant to the rights set out in s. 3 of the Act of 1996. If the member of the Tribunal does not so decide then he must affirm the recommendation of the Commissioner under s. 16 (A) of the Act of 1996.
I am satisfied upon a full consideration of the legislative scheme that there is nothing in the scheme as enacted which constrains the member of the Tribunal to decide an appeal on the basis of the evidence available at the date of the oral hearing. On the contrary construing the legislative scheme in the context of the relevant case law and the guidelines of the UNHCR on the criteria for determining refugee status and in particular having regard to the inquisitorial nature of the procedure and the shared burden of proof it appears permissible and may in certain circumstances be obligatory for a member of a Tribunal to make further investigations or consider additional evidence which comes available after the date of an oral hearing. I have concluded that the member of the Tribunal is obliged to determine the question as to whether the applicant is entitled to a declaration of refugee status upon the basis of all the evidence and information available at the date or (for practical reasons) within a very short time prior to the date upon which he or she makes the determination. Support for the view which I have formed as to the relevant date for the assessment of the claim is to be found in MacDonald's "Immigration Law and Practice" 4th ed. at para. 12.58 at p. 397 cited with approval by Simon Browne LJ in the Court of Appeal in *Secretary of State for the Home Department v. Arif* [1999] Imm AR 271, which reads:-
"If the circumstances in the country of nationality . . . have so changed that refugees can no longer refuse to avail themselves of the protection of that country, Convention refugee status will cease [footnoted to that is article 1(c)(5) of the Convention] .. . A cessation of circumstances refers to fundamental changes rather than merely transitory ones. A refugee's status should not be subject to frequent review since this would jeopardise a sense of security which the Convention was designed to provide. Proof that the circumstances of persecution have ceased to exist would fall upon the receiving state. Cessation of refugee status will not automatically mean repatriation, since many refugees will have acquired settlement rights in their country of refuge. Problems can occur when the authority takes a long time to determine a claim and circumstances change in the meantime as the relevant date for the assessment of the claim is the date of the decision".
It is the last sentence in the above extract which is relevant to this decision. I have also concluded that the applicant has not made out grounds that there was any breach of fair procedures by the first named respondent in relying upon country of origin information which only became available after the date of the oral hearing. For the reasons set out above it appears to me that the first named respondent was entitled to do so provided he complied with fair procedures. Where, in an appeal an oral hearing has been held and the

member of the Tribunal subsequently either carries out further investigations or obtains new evidence or information, fair procedures may require that such information is made available to the applicant and that he and/or his advisors are given an opportunity of making submissions either in writing or possibly in certain instances orally thereon or adducing further evidence if they so require. Well known general principles in relation to fair procedures would appear to so require and in addition s. 16(8) of the Act of 1996 expressly obliges a member of a Tribunal to furnish reports, observations or representations in writing or any other document to the applicant and his or her solicitor and also "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".

On the facts set out in the affidavits I am satisfied that substantial grounds cannot be made out that the first named respondent did not comply with fair procedures. The applicant through her then solicitors was given copies of the country of origin information under consideration and submissions were invited. Following the objections made by the then solicitor for the applicant the approach being taken was explained and justified and submissions were re-invited including oral submissions. On the facts I am satisfied that the applicant cannot make out grounds that she was being constrained in some way as to the nature of the submissions being sought. For reasons which are not explained the invitation to make oral submissions was not taken up on her behalf. Very limited written submissions were made.

Finally I have concluded that the applicant is entitled to leave on the ground set out at para. (e)(xiv). This relies upon the failure of the first named respondent to consider country of origin information in relation to the period after the 9th December 2003. I will allow this ground insofar as it relates to policital issues and events in the Democratic Republic of the Congo and therefore amended to read-:

> "The failure of the first named respondent to consider material after the 9th December 2003 in relation to political issues and events in the Democratic Republic of the Congo and its peace process and the effective selection of this as a cut off date was arbitrary and unfair in circumstances where his decision was expressed to be made some three and a half months later."

As already indicated I have concluded that the first named respondent was obliged to assess the applicants claim as of the date of his decision (or a very short time prior to that). On the facts of this claim it is relevant that the applicant's husband was granted a declaration of refugee status in 2001 and that her claim is based upon a fear of persecution by reason of the persecution and position of her husband. Further whilst there is no express acceptance in the decision of the applicant's entitlement to a declaration of

refugee status at any earlier date the reasoning of the decision appears to be based upon a change of circumstances in the Democratic Republic of the Congo in particular by reason of events which took place between April and August 2003. In such factual circumstances I have concluded that there substantial grounds for asserting that the member of the Tribunal, having considered material which was available up to December 2003 and intending to rely on same when giving a determination in excess of three months later on the 22nd March 2004 was obliged to reconsider relevant up to date country of origin information to ascertain whether the changes and improvements in the situation which were stated to have taken place appeared to be continuing.

In forming this view I have taken into account the undisputed averment of the applicant at para. 15 of her affidavit that "the situation in my country was and is extremely volatile and changes on a daily basis". The applicant is entitled to have this application for leave determined on the basis that this fact will be proved at the hearing.

Insofar as I have not referred expressly to additional grounds included in the statement of grounds filed herein I have determined that the applicant is not entitled to leave in respect of same.

Accordingly, I will grant leave to seek the relief sought at para. I, VI and VII of the notice of motion upon the grounds set out at paragraphs (e) (ii), (iv), (vii), (viii) (xiv) (as amended as indicated above) and (xviii) of the statement of grounds.