

THE HIGH COURT

2007 1411 JR

BETWEEN

E. K.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL (OLIVE BRENNAN)

RESPONDENT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 11th day of June, 2009.

1. This is an application for judicial review of the decision of the Refugee Appeals Tribunal ("RAT"), dated 10th September, 2007, to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner ("ORAC") that the applicant should not be granted a declaration of refugee status. The applicant is seeking an order of *certiorari* quashing the RAT decision and a declaration that the Tribunal Member may have made errors of fact so basic that it deprived her of jurisdiction to adjudicate on the matter.

2. Leave was granted by Charleton J. on 4th March, 2009 on the following ground:-

"The Respondent made a basic and fundamental error of fact in stating that "correspondence with the Commercial Farming Union of Zimbabwe indicates that a Reed Farm did not exist", when this correspondence clearly indicated, originally that in relation to the farm that was been referred to and at which location the Applicant had specified that "there was a strong possibility that this was Bill Reed's property" and finally that the correspondence confirmed that this "is the farm owned by William (Bill) Reed."

3. The substantive hearing took place at the Kings Inns, Court No. 1, on 14th May, 2009. Mr Hugo Hynes S.C. appeared for the applicant and Ms. Siobhán Stack B.L. appeared for the respondents.

Background

4. The applicant is a national of Zimbabwe and a member of the Shona ethnic group. She applied for asylum in the State on 23rd May, 2006. Three weeks later she gave birth to a daughter in the State. An individual application for asylum was made on behalf of the daughter soon after her birth. The applicant completed an ASY-1 form and questionnaire and attended for a s. 11 interview. Her biographical information indicates that she was born in 1979. She grew up in Harare and had four years of education. After

finishing school she lived with her aunt in Harare. In 2001 she married J.K., who was from Malawi. In 2002 she gave birth to a son, T.. She had another child from a previous relationship.

5. Her asylum application was based on the following circumstances: in 2004 she and her husband moved to a farm near Bindura with their son. Her husband worked as a supervisor at a farm which had been confiscated from its original white owner and taken over by the Zanu-PF ruling party who in turn granted it to a black businessman who supported the Zanu-PF. The new owner knew very little about farming and sought the assistance of another white farmer (Mr. Peterson), a member of the MDC whose land had also been repossessed but who was willing to help the new owner with his expertise and advice. His presence on the farm became known to Zanu-PF party supporters in the area who opposed the involvement of white farmers on reallocated farms. This resulted in attempts by these supporters to enter the farm, intimidate and cause damage. One day when Mr. Petersen was at the farm a large group of Zanu-PF members came to the farm, singing and shouting that they wanted to come in. They carried rocks, sticks and whips. The applicant's husband refused to open the gate and warned Mr. Peterson who escaped through another exit. The group broke through the gate, beat up the applicant's husband and took him away. They also threatened the applicant.

6. The husband did not return that night and when three days had passed without any sign of him the applicant went to the police who told her that her husband should not have been working with a white man and deserved what happened to him and said he was he was an MDC supporter. That evening, five Zanu-PF youths came looking for her husband at the farm. They treated her roughly and started pushing her and using threatening words but they stopped when they noticed that she was pregnant. They threatened to return after she had the baby. After that she heard footsteps outside every night and people threatening her and causing her to be very frightened. She claims that Mr. Peterson then assisted her to leave Zimbabwe. She left her son behind with a pastor because Mr. Peterson said it was only she who could go. She has not been able to contact her husband since she left. She says she flew to Ireland via Gatwick with a white man named John.

7. In support of her application the applicant furnished ORAC with a medical certificate compiled by a G.P. in October, 2006, which indicates that the applicant is depressed and was taking anti-depressants, had been referred to a consultant psychiatrist and had arranged counselling. The certificate stated that she was suffering from post traumatic stress.

8. In her questionnaire the applicant described herself as a person of limited education and an underprivileged social background from the shanty towns of Harare. She gave the address of the farm where her husband worked as "*Reed Farm Box 50 Mahonaland Province Bindura*". She stated that she was not a member of any political party but her uncle was a member of the Zanu-PF and the police considered her husband to be an MDC supporter. At her s. 11 interview she said the new farmer's name was Rob Chanaka and the previous owner was called William. She said the farm was 7km from Bindura and the nearest other big town as Shamua. She did not know the local telephone code or the names of any hotels in Bindura but named some nearby small towns. She said her husband had an MDC card but he did not attend meetings because they took place while they were at church. She said she did not have a card.

9. On 17th August, 2006 a separate s. 11 interview took place in respect of the asylum application of the applicant's daughter. The applicant spoke on behalf of her daughter. She did not claim any individual fear of persecution on behalf of her daughter and she said she wanted the baby's application to be joined to her own. When asked to clarify the location of the farm where the trouble took place, she gave very specific directions

as to how to reach it from Bindura. When asked to name the farm she answered "*Reed farm. They still use the old names*".

The ORAC Inquiry

10. On 15th August, 2006 an ORAC caseworker contacted the Commercial Farmers' Union (CFU) in Harare and asked them to answer a number of queries as follows:-

- Is there, or was there a farm named Reed farm, which would be about 7km outside Bindura in Mashonaland Province?
- If this farm exists, has it been taken over / expropriated by the Government?
- Would it be possible to find the name of the current occupant of the above farm?

11. The CFU replied on 16th August, 2006 and requested further information, saying:-

"There is / was a well known cotton farmer in Bindura called Bill Reed. Is this perhaps the person whose farm you are enquiring about? I don't know of a farm actually called Reed Farm. I think there is a strong probability that it is Bill Reed's property you are referring to. Please come back to me giving directions as to exactly where the farm is located ... on which road out of Bindura is it and how far out on that particular road?"

12. On the same day a further request for information was made to the CFU by the ORAC caseworker, who said:-

"I was led to believe that the first name of the (former ?) farm owner was William, which would seem to indicate that it was Bill Reed who was being referred to. Unfortunately I do not have a surname, nor do I have any details [as] to the specific location of the farm, only that it is 7km from Bindura town. I was also told that the farm had been allocated to a businessman named Rob Chanaka and that this would have happened at least two years ago."

13. The caseworker wrote again the following day (following the s.11 interview of the applicant's daughter), giving further information about the whereabouts of the farm:-

"Apparently as you leave Bindura you pass the police station, then the hospital. The road then forks, which the right fork going to Shamva, the other road is called the Matepatepa Rd and that is where the farm is."

14. On 22nd August, 2006 the CFU responded as follows:-

"I can confirm the farm you have given "general directions" to is the farm owned by William (Bill) Reed ... it is known as Matlou Farm but I have not been able to confirm to whom it has now been given. Bill Reed was one of this country's top cotton growers. He produced consistently top grade cotton and achieved about the highest yield per hectare achieved by anybody. He was for years the cotton commodity representation for the Mashonaland Central Region and was also the National Commercial Cotton Growers Chairman and this produced a considerable quantities of bananas ... but, when the Land Reform Programme was launched in 2000, he together with the vast majority of Commercial Farmers in Zimbabwe had their farms taken away, without a cent being paid in compensation ... so far anyway. Sorry I cannot be of more help. Bill's present whereabouts are not known"

15. On 22nd August, 2006 the CFU replied again, stating:-

"... continuing to make enquiries about Bill Reed ... I am told he is now living in Ramsgate on the Natal South Coast, South Africa. The farm he was actually living on in Bindura was about 7km on the road out of Bindura towards Mt Darwin. That farm is also called Melfort. Matloui would have been another farm of his. Also he was producing large quantities of bananas, as I have said, as well as mangos before leaving. And yes, he has not received compensation ... for the farms."

16. Thus the information confirmed that the farm in the location as described by the applicant was owned by William or Bill Reed; it had been expropriated and had a name Matloui.

The s.13 report

17. A s. 13 report was compiled in respect of the applicant in which a negative recommendation was made. It was accepted that the applicant had some knowledge of the Bindura area and that she knew about one of the farms referred to by the CFU in their correspondence but it was found that "*the CFU did not know of any farm called Reed Farm.*" Her credibility was impugned on that basis, among several others. A negative recommendation was also made in a s. 13 report compiled in respect of her daughter.

The RAT Decision

18. The applicant appealed the ORAC recommendation but in spite of the rather odd finding relating to the Reed Farm the Notice of Appeal relied mainly on extensive country of origin information (COI) reports relating to the general situation in Zimbabwe and no particular issue was taken with the finding that "*the CFU did not know of any farm called Reed Farm.*" Four previous RAT decisions where positive recommendations were made in respect of Zimbabwean nationals were also furnished. Her daughter's appeal was heard together with that of the applicant. They attended for an oral appeal hearing in March, 2007; no note of what was said at the hearing is before the Court.

19. A negative decision issued from the RAT on 10th September, 2007. When assessing the applicant's claim, the Tribunal Member noted a number of issues:-

a. The applicant left her son with her pastor and had no contact with them since or with Mr. Peterson, the white farmer who helped her to escape;

b. When asked why Mr. Peterson would have helped her even though she did not know him very well, she said he had his own problems;

c. In her questionnaire she said she was not a member of any political party but at her oral appeal hearing she said she was an MDC member attempted to submit an MDC membership card in support of her application; she said her response in the questionnaire was because she did not understand the question and insisted that her answer was a mistake. The Tribunal Member had "serious doubts" as to the veracity of the applicant's account of either her own or her husband's MDC membership.

d. Even though the applicant's husband was a member of the MDC he was employed by a member of the Zanu-PF and the applicant gave a "nonsensical" answer when asked to explain this;

e. The applicant could not tell the Tribunal why the Zanu-PF youths would return for her even though they had already taken her husband except that "they wanted to know more";

f. *"It was put to the Applicant that the correspondence with the commercial farming union in Zimbabwe indicated that a Reed Farm did not exist. The Applicant was asked if it had another name and was unable to assist the Tribunal in that regard";*

g. She said the Zanu-PF came to the farm on a regular basis but then said they did not actually come to the farm but just pinned up notices;

h. Notwithstanding the alleged visits of Zanu-PF youths, she remained on the farm for approximately two months after her husband's disappearance. It is "not believable" given her alleged fears for her own safety and that of her unborn child and son whom she left behind;

i. It is "not capable of belief" that she was not able to make contact with the pastor with whom she left her son or with anyone connected with the farm or with her husband;

j. It "defies belief" that the applicant could have travelled to Ireland on a passport that did not contain her name or photograph and not be stopped at any point of immigration;

k. She was unable to produce any evidence of her identity or her country of origin or any travel documentation.

20. The Tribunal Member came to the conclusion that the applicant was "making it up as she went along" and she noted that the applicant was unable to explain discrepancies in her account. She found that the previous RAT decisions submitted were not of sufficient relevance to warrant a conclusion that the ORAC recommendation be overturned and affirmed that recommendation.

21. A separate decision issued in respect of the applicant's daughter in which a negative recommendation was also made. That decision was subjected to judicial review proceeding which settled and the child is awaiting a fresh oral hearing.

22. The applicant sought to judicially review the RAT decision made in respect of her and leave was granted by Charleton J. on 4th March, 2009 on the ground that the finding in relation to the non existence of a Reed farm was an error so fundamental as to rob the Tribunal of jurisdiction.

SUBMISSIONS

23. The applicant submits that the Tribunal Member made an error of fact by finding that the correspondence between ORAC and the Commercial Farmers' Union indicated that a Reed Farm did not exist and that this was a fundamental error of fact going to the heart of the RAT decision.

24. Counsel for the respondent argued that the impugned finding was not an error of fact as the farm was called Matloui and not Reed Farm. The applicant gave that name as a formal postal address and not as a colloquial nickname for the farm, and when asked at her s. 11 interview who owned the farm she said only knew that the owner was called William; she never gave the full name "William Reed" although she said the farm was called "Reed Farm".

25. In the alternative the respondent submitted that the impugned finding was not the sole reason for which the applicant's credibility was impugned and should not be viewed in isolation as there were other negative credibility findings made. She submitted that there were significant inconsistencies as to each aspect of the applicant's core claim and that the RAT decision indicates that the Tribunal Member was particularly exercised by the changing and escalating nature of the applicant's asserted political affiliation from the time at which she completed her questionnaire to the appeal stage. Counsel submitted that if the finding made with respect to "Reed Farm" was an error then it was a minor and insubstantial finding of fact which was not so fundamental as to invalidate the decision. She relied on *V.P. and S.P. v. The Refugee Appeals Tribunal & Anor* [2007] I.E.H.C. 415, where Feeney J. held that:-

"To intervene the court would be required to be satisfied that there was both a factual error and that error rendered the decision irrational."

THE COURT'S ASSESSMENT

26. The Court is of the view that the facts in this case come within the test adopted by Feeney J. *V.P. and S.P.* and that no rational decision maker having sight of the papers that were before the Tribunal Member and in particular the series of email correspondence between ORAC and the Commercial Farmers' Union in August, 2006 could have made the finding that "*the commercial farming union in Zimbabwe indicated that a Reed Farm did not exist.*" The Court has no doubt therefore that an error of fact has been made. The question then for the Court is whether that error was sufficiently serious and fundamental as to render the decision irrational and merit an order of *certiorari* being granted.

27. I have carefully considered all of the documents relating to the applicant's asylum application and I am satisfied that the applicant's claim that she and her husband moved to a farm near Bindura in Mashonaland province which was originally owned by a white man named William and known as "Reed Farm" is the core and fundamental aspect of that claim. The narrative which followed was that the farm owned by a white farmer called William had been given to a new owner who knew nothing about farming. This fits with known COI. Another white farmer (disposed of his own farm) agreed to provide crop advice to the new black owner and managed to turn the farm around. Resentment against the presence of the white farmer on the reallocated farm caused a transferred antipathy by locals in the area to the applicant's husband who as a Malawian was an outsider and they accused him of being soft on white farmers and allowing them back on the land.

28. This farm was found not to exist because the Commercial Farmers' Union in Harare who identified it as William Reed's former property said its name was Matloui so logically the events associated with the neighbouring farmer Peterson, his association with the farm, his presence which gave rise to the attack on the applicant's husband and the entry by the attackers on the farm, Mr. Peterson's escape from the farm because of the warning he received from the applicant's husband, his knowledge of the applicant's position as a young pregnant mother away from Harare without her husband and his intervention to assist her would all fall away.

29. Obviously, if it had been established, as the ORAC and RAT found, that there had been no expropriated farm owned previously by a man called William in the very area described by the applicant then the rest of her story, her demeanour and her explanations would be seen in a negative light. A fundamental error of fact was made with respect to the existence of that farm deriving from an unfair interpretation of the answers provided by the CFU to the ORAC. As it was very probable from that correspondence that the farm located as described by the applicant was in fact the farm

she knew as the Reed farm, it seems to me that an error was made with respect to the credibility of the very foundation of the applicant's story which had the potential to render unstable everything built upon it. If it was assumed that the applicant was credible with respect to her husband's work on the particular farm, it is possible that the Tribunal Member may have been disposed to give her the benefit of the doubt with respect to various other elements of her claim as well.

30. In the circumstances I am satisfied that the applicant has established the sole ground on which Charleton J. granted leave, namely that the respondent made a basic and fundamental error of fact in stating that "correspondence with the Commercial Farming Union of Zimbabwe indicates that a Reed Farm did not exist", when this correspondence clearly indicated, originally that in relation to the farm that was been referred to and at which location the Applicant had specified that "there was a strong possibility that this was Bill Reed's property" and finally that the correspondence confirmed that this "is the farm owned by William (Bill) Reed."

31. The decision of the Refugee Appeals Tribunal made on the 10th September 2007 is quashed.