

THE HIGH COURT

JUDICIAL REVIEW

2009 122 JR

BETWEEN

R. M. K.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL (DENIS LINEHAN) AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT OF MS JUSTICE M. CLARK, delivered on the 28th day of September, 2010

1. The applicant seeks to quash the decision of the Refugee Appeals Tribunal dated the 18th December 2009 which affirmed the recommendation of the Refugee Applications Commissioner that he should not be declared a refugee. Leave to challenge the decision was granted by O’Keeffe J. on the 25th February 2010 on the grounds that the Tribunal Member had failed to take into account relevant considerations, made findings which were irrational and made errors of law in his decision. These grounds will be further outlined later as it is first necessary to understand the nature of the case and then the challenge. The hearing took place on the 27th, 28th and 29th April 2010. Mr. Anthony Collins, S.C. with Mr. Colm O’Dwyer, B.L. appeared for the applicant and Mr. Anthony Moore, B.L. for the respondents.

Background

2. According to the applicant, he is from the Democratic Republic of the Congo (DRC). While not married he is the father of two young sons who he was raising himself with the help of his younger brother as he had separated from their mother. They remain in the DRC and the Red Cross is endeavouring to find them. The applicant applied for asylum in July 2003 at the Refugee Applications Centre, claiming to fear persecution by reason of his political opinion. His account of why he seeks refugee status is as follows:- he is a graduate electrical engineer who since his graduation in 1998 worked with the DRC State-controlled national television station (RTNC) as a maintenance engineer. On two occasions the reporting of political events by the broadcasting authority led to his arrest and detention for short periods. As he then played no role in editorial policy and had no executive powers he was released after he had explained his situation.

3. Later, due to his high qualifications, he acquired some management and editorial authority and in pursuit of his belief in journalist integrity, he authorised the broadcasting of a number of news programmes which dealt with politically sensitive

issues. These included discussions on President Joseph Kabila's ethnic origins, an interview with a high profile critic of the government and a report on the massacre of Rwandan refugees in a camp in Eastern DRC during the civil war. These broadcasts without governmental clearance led to the applicant's arrest, detention and torture for a period of 63 days after which he fled to Ireland and sought asylum.

4. The particular event which led to his arrest occurred on the 14th May 2003 when he and others of the editorial staff had authorised the broadcast of a news programme showing previously unseen photos which placed Joseph Kabila when he was serving in the military at the *Tingi Tingi* refugee camp. The photographs had been given to the TV station editors who in turn gave them to the applicant. On the night of the 14th / 15th May 2003 as he was completing his shift at work at around 12.30am he was arrested by the special police force and was brought to a police detention centre.

5. The next day, he was brought to the GLM (*Group Litho Moboti*) Centre in Gombe, Kinshasa. He was held there in an underground cell for approximately 63 days in conditions of extreme cruelty. The soldiers subjected him to various forms of ill-treatment including severe beatings with wire, sticks and military belts and burning with cigars. His limbs were restrained and he was beaten and kicked. He was in constant fear of execution, was made aware of the execution of other prisoners and witnessed the execution of two of the prisoners. He was beaten regularly, a finger was broken and he suffered a rectal prolapse and sustained marks and scars on his body. He was interrogated on the subject matter of the news programmes which had been broadcast and he has since learned that other RTNC station employees were brought to trial and eventually convicted and sentenced.

6. On the night of the 17th / 18th July 2003 he was taken out of his cell under guard in the GLM by a Colonel and believed at the time that he was going to be executed. He was taken to the Colonel's office where his file was on the desk. He was then driven to the Colonel's home and then to Congo-Brazzaville where he remained for four days while arrangements were made for his onward travel to Dublin via Paris. The Colonel said that he would not identify himself in order to protect his own position but he told the applicant that his father who had been a politician had been helpful to him when he was a young soldier in getting him into the army officers' training unit and that this motivated his desire to help the applicant to escape.

7. The applicant who had never held a passport was furnished with a red passport which his travel facilitator presented at the various airports they passed through. Although he did not have a visa to enter Ireland he says he did not experience any difficulties passing through Irish immigration. He did not apply for asylum at the airport but instead went to the offices of the Refugee Applications Commissioner. He presented his national television ID card as evidence of identity.

8. The applicant provided much detail of the events which led to his three arrests at his s. 11 interview with the Commissioner in September 2004. However he did not at that stage have any medical evidence to support his claim. The Commissioner did not find his narrative credible and a negative recommendation followed. Among the negative credibility issues outlined in the s. 13 report was the finding that no evidence could be found of an actual massacre at the Tingi Tingi camp or of any link between Mr. Joseph Kabila and events at that refugee camp. Considerable importance was attached to the fact that country of origin information (COI) indicated that the DRC government had closed the GLM detention centre in 2001 thus raising serious credibility issues relating to the applicant's core claim that he had been detained and tortured there in 2003. The applicant's account of his role in the television station and his escape and travel were found to be neither credible nor plausible. A number of discrepancies in his account of

how he received the photographs of the alleged massacre and the time of his asserted arrest were outlined.

The First Appeal

9. The applicant appealed to the Refugee Appeals Tribunal. The Notice of Appeal addressed a number of the credibility findings made by ORAC. The previous deficit relating to medical reports was remedied by the provision of an unusually strongly worded report from SPIRASI which supported the applicant's claim that he was tortured, together with reports from his GP and a consultant psychiatrist. The key credibility issue highlighted by the Commissioner in relation to the alleged closure of the GLM detention centre in 2001 was addressed by COI which suggested that although the President had ordered extra judicial camps to be closed, some of them continued to operate in secret and it was argued that it was therefore possible that the GLM was one of these. Further information was provided confirming the massacre of Rwandan Hutus at the Tingi Tingi camp.

10. Notwithstanding this additional information, the appeal was not successful. An initial decision issued in June 2005 which was quashed by order of Gilligan J. in 2007 on the basis that the Tribunal Member failed to adequately consider the medical evidence furnished. The appeal was then remitted for fresh consideration.

11. The medico-legal reports which were determined by Gilligan J. not to have been appropriately considered by the previous Tribunal Member were:-

(i) A medical report prepared by his GP which indicated that the applicant had been attending for 16 months, had serious physical problems and had been diagnosed with various illnesses. He was subjectively and objectively depressed and had a number of scars on his body including a linear scar on his skull with a corresponding depression indicating a blow. The GP recorded the applicant's account of how he came to have those scars. He found that the applicant appeared to be suffering from *quite severe depression and post traumatic stress disorder* and referred him for formal psychiatric examination and to SPIRASI for counselling;

(ii) A report prepared by a consultant psychiatrist at Cork University Hospital which confirmed the diagnosis of depression and signs of post traumatic stress disorder and that his symptoms had deteriorated since he was first referred. The fact that he had lost contact with his two sons and the ongoing stress of his asylum application were said to be exacerbating his depression. He was deemed a high suicide risk and was on anti-depressants. He was referred to SPIRASI;

(iii) A SPIRASI medico-legal report, prepared by a Senior Examining Physician which briefly records the applicant's account of his overnight detention in a military camp and thereafter in a prison. It then records the history provided of detention underground for 63 days where he was kicked and beaten often with many things including belts. His finger was broken after he was beaten on the hand. He was suspended by his hands and beaten. Other prisoners would be taken out of the room and executed and the soldiers would make this known to the other prisoners. He complained of difficulty in sleeping because of nightmares about prison and said that he becomes anxious when he sees military personnel. It was noted that he became tearful during the interview.

On examination, he had restricted movement due to lower back pain. He had a scar on his sternum "*which would be **typical of a cigarette burn***".

He had tenderness on both sides and several scars were noted. He had marks on his lower back which he claimed were the result of the beating he sustained and which "would be **highly typical**" of such abuse. He had various marks on his scalp which he said were attributable to the various abuses he sustained as well as from his daily life. He said his left ring finger had been broken when he was beaten with a stick.

The Examining Physician concluded:

*"Upon examination there were many physical findings of scars that were **highly consistent or typical of** the abuse he experienced in prison [.....] It is the opinion of the physician that the abuse he sustained would come within the definition contained in the UNCAT." (Emphasis added)*

The Second Appeal

12. These reports were re-submitted for consideration by a different Tribunal Member who conducted a fresh oral hearing on the 22nd September 2008 at which the applicant was represented by a solicitor with wide experience in asylum law. After the hearing the Tribunal Member was furnished with up-to-date COI reports from both the Presenting Officer and the applicant. The focus of those reports was whether the GLM was still functioning as a prison / detention centre in 2003. Those reports included a U.S. Department of State report and a report by a prominent human rights NGO in the DRC, *La Voix des Sans Voix*. The applicant's solicitors also furnished an unofficial translation of an extract from a book written by a Belgian journalist published in February 2003 which placed both the former President Laurent Kabila and his son Joseph, the current President, near the scene of the Tingi Tingi massacre.

The Impugned Decision

13. A second negative decision issued to the applicant on the 18th December 2008. That decision is challenged in these proceedings. The Tribunal Member made credibility findings which were very similar to those originally made by the Commissioner even though the Tribunal had been furnished medical reports containing objective findings of injuries on the applicant's body which the SPIRASI physician described as "highly typical" and "highly consistent or typical of" the maltreatment he described and despite the fact that, contrary to what had been held by the Commissioner, there was no longer a dispute that a massacre had occurred at the Tingi Tingi refugee camp. The Tribunal Member noted the same inconsistencies between the applicant's questionnaire and his s. 11 interview as had been noted in the s. 13 report. These relatively minor inconsistencies involved the exact time of Mr. K's final arrest and his account of how he came to have the photographs used in the news programme which purported to show the Kabilas at or near Tingi Tingi. The Tribunal Member also attached significance to the applicant's evidence that when he was released he did not seek medical treatment. As a result he attached little weight to the applicant's description of how he had sustained his injuries or to the content of the three medical reports furnished. While the decision refers to medical reports on file which indicate that the applicant suffers from post traumatic stress, no mention was made of the SPIRASI examining physician's view that the injuries found on the applicant's body were "highly consistent with or typical of" torture or of the GP's report which referred to the applicant's general ill health for the period of 16 months..

14. Key to the assessment of the applicant's credibility was the assertion that the applicant had been held and tortured in GLM which he claimed was opposite the presidential palace and was under the command of the presidential police. The Tribunal Member addressed that key issue as follows:-

"I note from paragraph 5.21 of the Country Report on the Democratic Republic of the Congo that the GML (sic) detention centre was, apparently, closed by order of the authorities some time in the year 2001. However, I note from the same paragraph that security services, especially the ANR and Demipi (sic) operated numerous illegal detention facilities in 2002 despite the March 2001 presidential decree to close all such detention facilities. However, paragraph 5.21 states "the GLM detention centre, however, remains closed". This centre appears to have been officially closed at the time this man says that he was detained there. I accept that the security services operated a number of illegal detention facilities and there may be a possibility that the GLM is still open as an illegal detention centre. However, there is at least a possibility that this detention centre may have been closed since 2001 and, in the cumulative sense, I feel that I am entitled to take this factor into account in assessing the overall credibility of the claim when I take other items of credibility into account that I have already dealt with."

15. While the Tribunal Member accepted that the examining physician had found scars and marks on the applicant's body he observed:-

"I have been presented with a spirasi report which issued arising from an evaluation on the 19th day of March 2005. I accept that on examination Dr. Patrick O'Sullivan found scars and marks on this mans body. Obviously, Dr O'Sullivan is dependent on the Appellant as to the source of those scars and marks. Undoubtedly, the scars and marks were present but in view of the issues of credibility that I have raised in this decision and I am not satisfied that these scars and marks were as a result of the treatment afforded to this Applicant by members of the security forces in the Democratic Republic of the Congo.

Taking all factors into account and especially the items of credibility, I am not satisfied that the Applicant is a refugee within the meaning of Section 2 of the Refugee Act 1996."

16. The Tribunal Member therefore affirmed the Commissioner's negative recommendation.

THE ISSUES IN THE CASE

17. As noted above, the applicant obtained leave on three grounds which may be summarised as follows:-

a. Failure to take into account relevant considerations

The Tribunal Member failed to properly consider the SPIRASI medical report submitted by the applicant in assessing his credibility.

b. Irrationality

The Tribunal Member's finding that *"there is a possibility that the GLM detention camp (where the applicant claims he was detained) may have been closed since 2001 and, in the cumulative sense, I feel I am entitled to take this factor into account in assessing the overall credibility of the claim when I take other items of credibility into account that I have already dealt with"* lacks clarity and is irrational.

c. Errors of Law

The Tribunal Member erred in law and in determining the overall credibility of the applicant's account of being tortured by the security forces before considering the SPIRASI medical report. The Tribunal Member conducted his examination of the said medical evidence at the wrong forensic time.

18. The main thrust of the challenge centred on the manner in which the Tribunal Member dealt with the medical evidence furnished and the rationality of the Tribunal Member's finding on the GLM closure.

19. The first criticism of the way in which the medical evidence was considered and assessed was that it was not considered at the appropriate stage with all the other evidence. This it was argued amounted to an error of law and involves the application of what has become known as *forensic timing*, an expression which does little to advance the substance of such a challenge. It is usually the case that the probative value of any medico-legal report cannot be assessed until the primary facts are determined. It seems to this Court that the slavish application of the *forensic timing* principle may lead to absurd results and requires some caution as even in cases where torture is asserted and medical evidence supports the claim, the medical evidence is secondary to the preliminary determination of whether the applicant's asserted identity, origins and reasons for seeking asylum are found credible. Medical evidence is not determinative of a fear of persecution for a Convention reason and must be viewed in the round with those preliminary circumstances but does not by itself neutralise negative credibility findings. To take an extreme example, an applicant may present with scars and old injuries which suggest that the bearer suffered greatly in the past but his narrative of being from a particular conflict zone where resort to torture is well known might be found to be simply not credible. This may be for example because he displays no knowledge of specific geographical features of the area, is unaware of well-known local customs or historical events, or is unable to speak the local language. If the primary finding is that he is not from that area, then the probative effect of injuries consistent with torture for the purposes of assessing whether he has a well-founded fear of persecution for the reasons alleged is regrettably nil. While such medical findings might and indeed should cause a Tribunal Member to hesitate before rejecting such a claim, he is nevertheless entitled to do so. There would be little practical advantage in assessing the probative value of medical evidence that an applicant has injuries highly consistent with torture before carrying out a basic credibility assessment in relation to the asserted fear of persecution for a Convention reason.

20. The appropriate manner of assessment is to consider all facets of the evidence in context and not to come to any conclusion until all available evidence is reviewed. Where an applicant provides a story which might be true and the medical evidence tends to confirm his story then it is axiomatic that an overall assessment of the evidence should weigh in his favour. The difficulty however is when, notwithstanding very compelling and supportive medical reports which outline objective findings, the applicant's narrative is not found credible and is not supported by reliable COI. It is entirely possible that a person seeking asylum could have been injured and maltreated in legitimate combat, in criminal activity or from an accident. While the Court has serious misgivings relating to the treatment of the content of the three medical reports in this case, it finds no merit in the applicant's arguments relating to the alleged artificial separation of the medical evidence from the credibility assessment and makes no criticism of the timing of the consideration of the medical reports in this case. However the Court's assessment of the treatment of the medical evidence is affected by later findings.

21. The applicant's next challenge was to the rationality of the Tribunal Member's rejection of the compelling and supportive medically opinion furnished in this case where the strong personal opinion of the SPIRASI physician well versed on the Istanbul Protocol and the UN Convention against Torture (UNCAT) was that Mr. K had suffered torture. In

the applicant's contention, it follows therefore that a report of such weight could only be disregarded if the primary credibility findings were of such force as to outweigh the medico-legal report. The applicant is correct in his contention.

22. There is a long line of authority on the general subject of the weight to be accorded to medical reports in asylum cases. While it is always a matter for the decision maker to assess the probative value of the contents of such reports, it is incumbent on the decision maker to provide reasons for rejecting the contents. A report which is general in terms has obviously little weight requires no great explanation for its rejection. However while medical reports are rarely capable of providing clear corroboration of a claim, it is well recognised that there are occasions when examining physicians report on objective findings and use phrases which attach a higher probative value to those findings. Such reports are capable in an objective way of supporting the claim. Obviously, in such cases the need for reasons to be given for rejecting the probative value of the report must be more fully addressed. The judgments of Gilligan J. in *R.M.K. v. The Refugee Appeals Tribunal* (Unreported, High Court, 19th April 2007); McGovern J. in *N.M. v. The Refugee Appeals Tribunal* [2008] I.E.H.C. 130 (7th May 2007); Edwards J. in *D.v.T.S. v. The Refugee Appeals Tribunal* [2008] 2 I.R. 476 (4th July 2007); and Cooke J. in *T.M.A.A. v. The Refugee Appeals Tribunal* [2009] I.E.H.C. 23 and *M.J.P. v. The Refugee Appeals Tribunal* (Unreported, High Court, 19th May 2009) and the decisions of English High Court in *Virjon B v. Special Adjudicator* [2002] E.W.H.C. 1469 (Admin) and the Court of Appeal in *Mibanga v. Secretary for State for the Home Department* [2005] E.W.C.A. Civ 367 are all authorities for that now well established proposition.

23. There can be little doubt that the impugned decision outlines the Tribunal Member's reasons for attaching low weight to the medical reports. He found the applicant personally not credible and the physician's findings of injuries "*highly consistent or typical of*" torture did not alter his view on the lack of credibility of the applicant's evidence. The assessment of that credibility issue must therefore be addressed. While there were certainly credibility matters relating to the applicant's travel arrangements and his arrival in Ireland, the Court considers that the key issue in determining the weight to be attached to the unusually unequivocal SPIRASI medical report supported by two earlier reports is the rationality of the Tribunal Member's assessment of the primary fact of whether the applicant could in fact have been a prisoner in the GLM for 63 days or indeed at all in 2003.

24. The applicant argues that it was irrational for the Tribunal Member to place so much reliance on the closure of the GLM in Kinshasa when in fact he made no determination on the particular issue. COI was before the Tribunal which indicates that the GLM either remained open or, if it had initially closed, had since been re-opened and there was ample evidence that some non judicial prisons in the DRC continued to operate despite the Presidential closure decree.

25. The issue of the continued operation or closure of the GLM is far from clear. The applicant's evidence as recorded by the Tribunal Member was that even if the centre had closed, the underground detention facility where he was held continued to operate. He described the GLM Gombe as being opposite the presidential palace and under the control on the presidential police. The location and control are confirmed in the US Department of State report of 2007 which also reveals that the centre may have illegally reopened and that torture and executions may have taken place there. The earlier U.K. Home Office COI report on the DRC (October 2002) relied upon by the Tribunal Member states at paragraph 5.2.1 that numerous detention centres were operated in 2002 but "*the GLM detention centre, however, remains closed*" and this is confirmed in other reports. Other reports suggest that notwithstanding the immediate closure of the GLM, other prisons paid no heed to the Presidential Decree and in defiance of that order began to reopen and detain people. The Tribunal Member seems to have taken this lack of

clarity on board when he found that *"there is at least a possibility that this detention centre may have been closed since 2001"*. He concluded that other credibility issues included the minor discrepancies – if they did in fact exist – on the time the applicant was arrested and how the photographs came to the applicant's hands were sufficient to reject the applicant's claim.

Decision

26. Ultimately the Court has found this a difficult case and has been particularly mindful that the assessment of credibility and the weight to be attached to documents is a matter entirely for the Tribunal Member. The three medical reports which are supportive of each other and of the applicant's history were not available to the Commissioner. The first occasion on which they were considered was on appeal. Those reports are consistent in describing the applicant as a traumatised and unwell man receiving treatment for post-traumatic shock and depression. All three physicians expressed personal views on his credibility and need for psychiatric and psychological treatment. While the applicant's unhappiness can, as suggested by the Psychiatrist, be partially attributed to his separation from his two young sons with whom he had lost contact and to a life of insecurity in an alien environment, the physical findings of a broken finger, prolapsed rectum, scarring and marks described as *"highly consistent or typical of the abuse he experienced in prison"* would require very strong countervailing evidence to negate their evidential impact. Equally, the Court accepts that there are undoubtedly some minor inconsistencies in the applicant's narrative and some areas, such as his travel to Ireland, which were lacking in credibility. However, it seems to the Court that those issues were not in themselves so compelling when seen in the context of language translation and cultural differences as to outweigh the medical evidence. In addition, much had changed since the negative recommendation of the Commissioner. The fact of the Tingi Tingi massacre was no longer in dispute and COI of the possible connection with the young Joseph Kabila at the location of the camp was before the Tribunal. Mr. Kabila had undoubtedly been in the army in the area in question at the relevant time thus bringing some resolution in favour of the applicant's narrative to two areas highlighted as lacking credibility by the Commissioner.

27. Those matters having been resolved in the applicant's favour the situation on appeal still remained that if the GLM had in fact been closed in 2001, the applicant's account would fall apart. The Tribunal Member did not come down on either side in relation to the closure of the detention facility and expressly allowed for the possibility that it remained partially open in secret despite the Presidential Decree. He did not in fact prefer one COI report over another. That being so, he allowed for the possibility that the applicant was a prisoner in the GLM and for his torture and ill treatment there. There can be no doubt that the GLM closure is inextricably linked to the importance and weight of the SPIRASI report when all the evidence is viewed as a whole. It seems to the Court that if the applicant could in fact have been a prisoner in 2003, then the countervailing evidence rationalising a rejection of the SPIRASI report is simply not strong enough to outweigh its acceptance. With some hesitation, the Court is obliged to find that the decision to reject the medical evidence in the manner expressed by the Tribunal Member is irrational.

28. The Court concludes that the Tribunal Member failed to adequately consider the medical evidence and that his decision on the GLM lacks the strength and clarity required to reject the contents of the SPIRASI medical reports. The Court will grant an order of *certiorari* quashing the Tribunal decision of the 18th December 2009 and the appeal shall be remitted for fresh consideration by a different Tribunal Member.