

THE HIGH COURT

Record Number: 2005 No. 29 JR

BETWEEN

DEOGRATIUS MBAYO SANGO

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, AND DAVID MCHUGH, TRIBUNAL MEMBER, REFUGEE APPEALS TRIBUNAL

RESPONDENTS

Judgment of Mr Justice Michael Peart delivered on the 24th day of November 2005

1. The applicant is a national of the Democratic Republic of Congo and sought asylum here on the 8th May 2003. His application was refused by the Refugee Appeals Commissioner, from which refusal he appealed to the Refugee Appeals Tribunal. A decision was made on the 11th November 2004 wherein the 2nd named respondent herein made a finding that the applicant was not a refugee within the meaning of s. 2 of the Refugee Act, 1996 as amended, and he affirmed the recommendation of the refugee Appeals Commissioner, and dismissed the appeal.

2. At the absolute heart of this application is the fact that the applicant states that although born in DR Congo and a Congolese of the Hemba tribe, he has suffered persecution at the hands of the authorities in DR Congo because he has what are described as "Tutsi features" and the authorities believe that he is not therefore of Congolese origin, but rather a member of the Tutsi tribe of Rwanda. He states that he was beaten while in prison. It appears also that when he was about to be married the authorities became suspicious also about the origin of his proposed wife, and that her mother was in fact Rwandan, but that her father was Congolese. There was also the difficulty that apparently that some ordnance and ammunition was found in the house of one of her cousins. She was arrested and when the applicant went to look for her, he also was arrested but managed to escape apparently with the assistance of a guard who the applicant thinks was also of Himba origin. The applicant stated that he managed to escape by asking to go to the toilet, that there was only one soldier on duty and that this soldier assisted his escape.

3. The applicant states that he left DR Congo and went to Zambia in 2001, where he got work as a labourer on farms. He remained there until 2003. In his interview at Q.7 he stated that he was paid very little for this work because he was working on the Black Market. However at Q.20 he was asked where he had got US\$1000 which he paid for his trip to this country he replied: "When I was in Zambia I worked on farms. It was very hard to earn that money. I saved the money during the time I spent in Zambia."

4. He also stated that he was arrested in Zambia also but was offered the option of claiming asylum which he declined, and he stated that the reason why he declined that option was that after the rebellion in Zambia which resulted in the death of Laurent Kabila, all Tutsis were suspected of being involved in the war and would be targeted, and that because of the fact that he has the physical features of a Tutsi he would be targeted also.

5. Given the basis of the decision of the Tribunal Member, namely on the ground of lack of credibility on three specific grounds, it is for the moment at least unnecessary to set out the facts of this case in any further detail.

6. In his decision, the 2nd named respondent found the applicant not to be credible for three particular reasons which are set out in the decision. He states:

"I have great difficulty in believing the whole of the applicant's story. The applicant's evidence must be coherent and plausible, but I do not find the applicant credible for the following reasons:

The applicant stated before the Tribunal that he had managed to escape as a result of a guard identifying him to be a member of the Hemba tribe. The applicant believes that the guard, who may have been Hemba, or a Hemba sympathiser, allowed him to go. I do not find it credible that a guard would expose himself to such danger such as allowing the applicant to flee, especially when the applicant claims to have been a stranger and unknown to the guard previously.

The applicant claims to have paid US\$1,000 to an agent to fly him from South Africa, via Paris, to Ireland, and also \$50 to get him from Zambia to South Africa. It was put to the applicant by the Presenting Officer that the monthly minimum wage in Zambia was about \$15. The applicant stated that he had worked on various jobs, to include selling maize and fish, and several other little jobs, as well as working on the Black Market, in order to amass this money. I do not find it credible that the applicant would have been capable of saving these funds during his one and a half years in Zambia given this country of origin information.

The applicant told the Tribunal that he had been arrested in Zambia following a survey and was given an option to claim asylum. The applicant stated, however, that he feared staying in Zambia because the diplomatic links between the DR Congo and Zambia were very strong and the Zambian authorities were returning asylum seekers to the DR Congo. After his arrest, the applicant fled to South Africa. Following a search of country of origin information, there is no information supporting the applicant's claim that Zambia forcibly repatriates refugees to the DR Congo. This further undermines the applicant's claim.

For these reasons I find that the applicant is not a refugee within the meaning of Section 2 of the Refugee Act, 1996 (as amended). Accordingly, I affirm the recommendation of the Refugee Applications Commissioner and I dismiss the appeal."

7. I just refer in passing to one feature of these paragraphs. It is that each of the first two paragraphs contains a reason why the applicant was found not to be credible. The third paragraph contains a third reason which was found to further undermine the applicant's claim. It seems clear from this phraseology that the first two reasons (i.e the means of escape and the source of the money) were considered sufficient to undermine the claim, and that the remaining reason (the absence of country of origin information to support the applicant's reason for not claiming asylum) went to "further undermine" the claim.

8. Mel Cristle SC for the applicant has submitted that the Tribunal Member has, in error, engaged in mere speculation and conjecture in arriving at his conclusions as to lack of credibility regarding the applicant's method of escape and that these conclusions are not based on any detailed analysis or material or country of origin information; and further that the finding that the applicant could not have saved the money in question is unreasonable and irrational in that it relies on irrelevant country of origin information about the level of the minimum wage in Zambia and fails to take account of the testimony of the applicant that he was working on the Black Market as a labourer. In relation to the finding of lack of credibility regarding the reason why he did not claim asylum, namely that "asylum seekers" were being returned to DR Congo by the Zambian authorities, Mr Cristle submits that the Tribunal Member has made a fundamental error in giving that reason since the applicant in his evidence to the Tribunal and in his submission in fact stated that he would be classed as an *illegal immigrant* and that the Zambian authorities were repatriating illegal immigrants, as opposed to asylum seekers. It is further submitted that the Tribunal Member has not made any adequate effort in the Decision to set out in a coherent way the reasons for the finding of the lack of credibility.

9. Mr Cristle also makes the submission that in relying on these matters for the purpose of making a lack of credibility finding, the Tribunal member has also erred by relying on minor matters which do not go to the heart of the asylum application, namely that the fear of persecution is based on the fact that in DR Congo he is at risk of persecution because, although of Congolese origin, he has the physical features of a Tutsi. Mr Cristle submits that the lack of credibility finding does not address this issue in any manner whatsoever, and instead relates to peripheral or minor matters, and that it is an error so to do.

10. In support of his submissions Mr Cristle has relied on a number of authorities for the proposition that the Tribunal Member is not permitted simply to rely on conjecture, but must examine the evidence and base conclusions on an assessment of the objective country of origin information. Cases referred to include *Camara v. Minister for Justice, Equality and Law Reform*, unreported, High Court, Kelly J. 26th July 2000; *Traore v. Refugee Appeals Tribunal*, unreported, High Court, Finlay Geoghegan, 14th May 2004; *Kramarenko v. Minister for Justice, Equality and Law Reform*, unreported, High Court, Finlay Geoghegan J. 2nd April 2004; *Idiakheua v. Minister for Justice, Equality and Law Reform*, unreported, High Court, Clarke J., May 2005; *Memishi v. Refugee Appeals Tribunal*, unreported, High Court, Peart J. 25th June 2003. Many of these cases in turn refer to English authority such as *Horvath v. Secretary of State for the Home Department* [1999] I.N.R.7, and *R v. Immigration Appeals Tribunal, ex parte Ahmed* [1999] I.N.L.R. 473.

11. Since this is an application for leave, and since I propose granting leave, I see no need to review all these cases in detail. But I take from them, as submitted by Mr Cristle, certain principles, one being that it is incumbent on the Tribunal Member to refer to available country of origin information where this is possible and where such country of origin information may be relevant to the assessment of credibility, and further that it is not sufficient to make what has been described as a bald statement that the applicant lacks credibility. Further, the fact that the Tribunal Member does not find certain minor matters, or matters not central to the core issues, to be credible, is insufficient to found an adverse finding of credibility generally in order to refuse a declaration. In *Memishi* I put it this way:

"In relation to credibility, Mr Cristle referred to the Diaz decision and that in Cordon-Garcia, to which I have referred and quoted relevant passages. The principles which emerge from these decisions are that a Tribunal is not entitled to make adverse credibility findings against an applicant without cogent reasons bearing a nexus to the decision, that the reasons for any such adverse finding on credibility must be substantial and not relating only to minor matters, that the fact that some important detail is not included in the application form completed by the applicant when he/she first arrives is not of itself sufficient to form the basis of an adverse credibility finding, and finally that the fact that the authority finds the applicant's story inherently implausible or unbelievable is not sufficient. Mere conjecture on the part of the authority is insufficient, and that corroboration is not essential to establish an applicant's credibility. As general principles I agree."

12. On behalf of the respondent, Daniel Donnelly BL has submitted that the three matters upon which the Tribunal member found a lack of credibility are not minor matters, but are matters upon which the Member was entitled to rely when assessing overall credibility. He submits that both individually and cumulatively these matters are capable of undermining the applicant's credibility and his claim. He also points to the fact that in relation to the matter involving the escape of the applicant from his arrest, the Tribunal Member did in fact refer to country of origin information since the Decision refers to having considered country of origin information, which included information relating to an incident in the year 2000 in which some 200 prisoners escaped from a prison in the province of Katanga. Mr Donnelly also refers to the fact that the applicant did not produce any other country of origin information which might have been considered by the Tribunal. In general, Mr Donnelly submits that the Tribunal Member has stated the basis for the adverse credibility finding and that there was therefore a proper basis disclosed for that finding.

13. First of all, it is necessary to state again that this is an application for leave. The task of the applicant is to show that there are substantial grounds for arguing the grounds relied upon. I am satisfied that the applicant has overcome that hurdle.

14. It seems to me that the core of the applicant's claim is based on the alleged fact that he has the physical characteristics of a Tutsi, and that in Congo this results in persecution within the meaning of s. 2 of the Refugee Act, 1996, as amended. There is nothing in the decision of the Tribunal Member which suggests that this matter is found not to be established or found to be other than credible. There is no examination of that matter and there is no finding against credibility in the decision related to that core matter. In those circumstances, it seems to me arguable to the required standard that for the Tribunal Member to find that the applicant is not credible in relation to the question of his escape, the money which he saved, and the reason for not seeking asylum in Zambia, and then to go further and say that "for these reasons I find that the applicant is not a refugee..." is an error, since the three matters relied upon are arguably of too peripheral to the core issue to justify an overall adverse credibility finding. There must be a cogent nexus between the matters upon which the applicant has been found not to be credible and the core issue in the application.

15. I am also satisfied that it is equally arguable that in making the adverse finding of credibility on the three bases set out in the decision in the manner appearing, the Tribunal Member has relied upon some element of personal conjecture.

16. I am also satisfied that an extension of time to bring this application should be granted.

17. I will grant leave to seek the reliefs set forth in paragraph D, on the grounds set forth in paragraph E of the Statement of Grounds.