

**THE HIGH COURT**  
**JUDICIAL REVIEW**

**BETWEEN**

**2007 1677 JR**

**K. K.**

**APPLICANT**

**AND**

**THE REFUGEE APPEALS TRIBUNAL (BEN GARVEY)**

**RESPONDENT**

**AND**

**IRELAND AND THE ATTORNEY GENERAL**

**NOTICE PARTIES**

**JUDGMENT OF MS. JUSTICE M.H. CLARK, delivered on the 15th day of June, 2010**

1. The applicant is a national of the Democratic Republic of the Congo ("DRC") who seeks **leave** to apply for judicial review of the decision of the Refugee Appeals Tribunal, dated the 25th October, 2007 which affirmed the recommendation of the Refugee Applications Commissioner that he ought not to be declared a refugee.
2. The application was heard on the 28th January, 2010. Mr Robert Haughton S.C. appeared for the applicant and for his wife H.M.W., whose leave application [2008 No. 33 J.R.] was heard on the 18th March, 2010. Ms Fiona O'Sullivan B.L. appeared for the respondent in the husband's case. The Court will also deliver judgment in his wife's case today.
3. The applicant challenges the validity of the RAT decision on the basis that the decision contained errors of fact, deficiencies in the assessment of documents furnished and in the assessment of credibility, flaws in the assessment of medical evidence proffered and for failing to consider the future danger to the applicant if he were to be returned to his country of origin.

**Background**

4. The applicant applied for asylum at Dublin airport on the 25th August, 2004. His wife had previously applied for asylum also at the airport on the 6th July, 2004 with their two infant daughters. She says she was unaware at the time that her husband was alive as she had not heard from him in almost 18 months. Although his ASY-1 form is not before the Court and so it is not clear what he said when he first arrived in Ireland, he has since said that he did not know that his wife and daughters were already in Ireland. The husband's account in his questionnaire was that he was born in 1967 in Kinshasa. He was in education for 13 years and then worked as a trader at Matete market in Kinshasa. While he had been raised a Catholic he had ceased to practice. In late 1998 he joined the BDK (Bundu dia Kongo) in Kinshasa because he liked their political opinion and religion. Following a period of nine months training in the philosophy of the party he was sworn in as a member in 1999. He was in charge of propaganda and distributing leaflets and papers. The BDK is described in country of origin documents as an ethnically-based spiritual and political movement seeking political autonomy in the Bas-Congo province of western DRC, on the border with Angola. A UK Home Office Report of April, 2005 describes the BDK as a politico-religious organisation which demands that its adherents renounce western and eastern religions and seeks to promote ancient ancestral traditions.

5. He married his wife who lived in Bas Congo in October, 1999. He continued to work in Kinshasa until February, 2002 when - following a complaint about what he considered to be unfair taxes on traders (retailers) - he was arrested at his home in Matete, Kinshasa and taken to the police station where he was described as a trouble maker. His brothers secured his release by bribing a policeman who permitted his escape during a planned transfer to Makala prison. He then left Kinshasa and went by truck and ship to join his wife, daughter and mother-in-law in Luozi, some 350 km away. He stayed in Luozi, worked as a trader and continued his political activities. No explanation was given (nor were any questions asked) on how the marriage was conducted between October, 1999 and February, 2002 when he moved to Luozi.

6. In Luozi on the 40th anniversary of the creation of Central Congo he took part in a march organised by the BDK. This was on the 22nd July, 2002 when he and others were beaten up and arrested and he sustained eye injuries. Other people around him were killed and many were injured. His recital of events differed from that of his wife in that he did not mention any incident at a prayer meeting two days previously nor did he mention the alleged disappearance of his mother-in-law. Following his arrest he says that he was taken to a named camp where he was held to await trial in Kinshasa. He claimed that he was "tortured, beaten up, raped" while in captivity.

7. On the 20th January, 2004 he was transferred to Wing 4 of Makala Central Prison in Kinshasa where he was relatively well treated and was not tortured. However he developed typhoid in August, 2004 and became very ill. He was admitted to intensive care in Kinshasa General Hospital where he spent five days. In the meanwhile his family in Kinshasa had been contacted by the authorities and told of his detention in Makala and his subsequent move to the Hospital. They visited him and bribed a doctor to secure his escape when being taken for an x-ray on the 10th August, 2004. His brother and sister were waiting outside and they took him to a place to hide and receive treatment for two weeks while his brother arranged for him to leave for Ireland. On the 28th August, 2004 he flew to Dublin via Johannesburg and London using a borrowed Irish passport bearing a photo which resembled him. When he got to immigration at Dublin airport, he applied for asylum.

8. The husband attended for two s. 11 interviews in March and May, 2005. He submitted documents forwarded to him by his brother including a national identity card bearing his photo and biographic details; a letter from the BDK dated the 20th October, 1999

attesting his membership; an "attestation de perte de pièces d'identité"; and a handwritten letter from his brother stating "they have come to look for you". He said his BDK membership card was lost when the police searched his belongings.

9. Unlike his wife, the husband provided extensive information about the BDK organisation and of his training before he was admitted as a member. He provided details on the objects of the organisation and he gave a detailed description of the appearance of BDK membership cards.

10. The Refugee Applications Commissioner made a negative recommendation basically because a series of country of origin information (COI) reports on the BDK did not support the applicant's account of being imprisoned until 2004 as a Presidential amnesty in April, 2003 had effected the release of all BDK members arrested following the march. In addition, there was no evidence to indicate that BDK members were persecuted after the amnesty.

### **The Appeal**

11. The husband appealed and challenged the decision on 10 grounds including the validity of the Commissioner's reliance on COI which stated that all persons held in prisons in the DRC were released. It was asserted that many prisoners continued to be held in secret detention centres after the amnesty. It was also submitted that the Commissioner failed to consider whether the applicant would face persecution on his return to the DRC i.e. failed to apply a forward looking test. A series of COI reports on the BDK together with medico-legal reports from SPIRASI outlining his injuries and psychological condition accompanied the appeal documents. He also asked the Tribunal Member to consider seven previous RAT decisions concerning applicants from the DRC who had successfully appealed negative ORAC recommendations.

12. A joint oral hearing took place on the 3rd September, 2007 at which the husband and wife were separately heard but represented by the same counsel. An attendance note of the hearings is before the Court. The nature and difference in quality in the husband and the wife's evidence is apparent and may possibly be explained by age and education differences or because one or both of them are untruthful. There are very considerable inconsistencies between their evidence especially as to their level of awareness of the BDK organisation and the husband's knowledge of the organisation appears of a very different quality to that of his wife.

13. At the hearing, the husband described how during his detention at the military camp he was accused of inciting tribal hatred, tortured, given hard work, forced to stand naked and dance for soldiers, whipped and raped. The Tribunal Member in error believed that this was the first time the issue of the rape was raised and asked why. The applicant explained that he was ashamed of what happened but that his counsellor advised him that he should raise the matter. As he had not yet received this advice when he was examined by the SPIRASI doctors who prepared the medico-legal reports, he did not raise the issue with them.

14. He explained that his family had located him in Makala because they assumed he would be there and were later officially informed. No explanation was provided for the authorities' failure to inform his wife of his whereabouts or his family's failure to inform her that he was alive. He suggested that perhaps his family might have "been trying to keep it secret because they knew something would happen in the future". He disagreed that there had been an amnesty in 2003 or that it would be safe to return to the DRC. He stated that the BDK continued to be persecuted, referred to COI reports relating to events in 2007 and disagreed with the Presenting Officer's suggestion that the BDK had brought the 2007 attack on themselves as they were responsible for beating to death some police officers and civilians.

### **The Tribunal Decision**

15. The Tribunal Member rejected the applicant's appeal and affirmed the negative recommendation of the Commissioner. He was critical of the husband for raising the issue of rape for the first time at his oral appeal. He stated that he was taken by surprise by this assertion and that it was difficult to assess its veracity. He then outlined a number of problems on credibility and highlighted a series of inconsistencies between the husband's evidence and that of his wife. While each incident of inconsistency outlined would not necessarily stand on its own as a reason for rejecting credibility, cumulatively they were considered to put "a question mark over whether in fact, he was ever in the BDK". It followed that if the husband was not believed about his membership of the BDK, then his recital of the persecution he alleged also fell away.

### **The Court's Assessment**

16. The Court has some concerns that the accumulation of credibility findings that led to the rejection of the applicant husband's appeal may in fact lie in the wife's claim. Had the wife's story not been so bizarre and inconsistent, there is a possibility that the husband's narrative might, if considered on its own, have been considered more credible. The Tribunal Member's error in believing that the applicant complained of being raped for the first time at the oral hearing may have taken on more importance in the assessment of the husband's credibility than such an error would normally warrant. Had the husband been recounting his own experiences in the BDK and the persecution that followed because of such membership, there may not have been such a comprehensive rejection of his recital of events, of his documents and of his medical report. There remains the lingering doubt that had he been believed in his assertion that he was a BDK member, the medical report may not have been rejected as being "contingent upon whether the Tribunal believes the applicant's story about how he came to suffer the injuries he claims to have sustained at the hands of the authorities in the DRC".

17. The documents he furnished were undoubtedly secondary evidence to be weighed in the light of his other testimony. However, if the Tribunal Member had not rejected the husband's credibility because of the inconsistencies with his wife's evidence, those documents may have been considered supportive of his identity and his membership of the BDK. The reasonableness of the assessment of the documents clearly depends on the validity of the assessment of his credibility. The documents which were ignored by the Tribunal Member relate to the key issue of the husband's BDK membership. While the oddly-worded 1999 letter from the BDK may have required some explanation, no questions seem to have been raised in that regard at the hearing and no assessment of its content or relevance was made. Similarly no assessment or comment was made on the other documents being the "attestation de perte de pièces d'identité" or the note from his brother. As the Tribunal Member did not find the applicant credible in relation to his membership of the BDK at all and therefore did not believe that he was imprisoned and tortured because of adherence to the BDK, the weight he attached to the documents produced was minimal.

18. Credibility findings are exclusively within the remit of the Tribunal Member as the decision maker and it is not the function of the High Court in judicial review to conduct a fresh assessment of credibility or to substitute its own view for that of the Tribunal Member. The same Tribunal Member conducted the appeals of the husband and the wife on the same day. It was he and not this Court who heard each appellant's version of events and formed a view on credibility and he had the advantage of seeing and hearing the parties. However, the Court harbours misgivings as to possible unfairness to the husband in the process whereby his credibility was assessed. The Court remains concerned that major discrepancies in the separate stories infected the evidence of both parties where the evidence of the husband on his own may have been credible. The Court has not granted leave to the wife to challenge the negative credibility findings in her case notwithstanding a strongly worded and supportive medical report, as the primary credibility findings

were entirely rational having regard to her evidence. This is a different situation because the husband was well able at every stage to describe how he joined the BDK and to describe the aims and objectives of the organisation. The SPIRASI medical report which noted that the husband's *"scars and the marks have the random appearance of repeated physical abuse which would be consistent with the story that he gives"* may have taken on a greater weight if the applicant's basic credibility had not been rejected. Leave will be granted to challenge the way in which credibility of his membership of the BDK was assessed.

19. This brings the Court to the last point in the applicant's challenge which is that the Tribunal Member failed to apply a forward-looking test and to assess whether, if the applicant is returned to the DRC, he would face a risk of persecution by reason of his BDK membership. COI before the Tribunal Member referred to the death of 100 BDK members at the hands of government forces at a post-election demonstration in Bas-Congo in January / February, 2007. The respondents argued that because the applicant's asserted religion / political opinion was not believed, there would have been little reality in applying a forward looking test. This is unarguably correct but if there is any frailty in the assessment of credibility in relation to membership of the BDK then the failure to assess the possibility of future risk might also be impugned. The ground relating to a forward looking test was not mentioned in the applicant's statement of grounds or in the written submissions filed on his behalf, and was raised for the first time at the hearing of the leave application. For this reason, leave will not be granted on this ground but if the hearing of the substantive action is successful then this point should be addressed at the rehearing.

### **Conclusion**

20. In sum, while recognising that the assessment of credibility where major inconsistencies in the husband and wife's evidence must have presented a challenge for the Tribunal Member, the Court has concerns that the husband's credibility was infected by the negative findings against the wife. Leave to argue will be granted on the following grounds:

- (i) The respondent acted irrationally and unreasonably in reaching his decision on credibility in that he was disproportionately influenced by flaws in the narrative given by the applicant's wife and ignored the husband's greater knowledge and awareness of the BDK; and
- (ii) The respondent's negative assessment of credibility led him to wrongly reject the medical evidence.