Neutral Citation Number: [2012] IEHC 101

THE HIGH COURT

JUDICIAL REVIEW

2009 978 JR

BETWEEN

S.A., L.D., S.M. (A MINOR),

E.D. (A MINOR SUING BY THEIR NEXT FRIEND AND MOTHER S.A.)

APPLICANTS

AND

REFUGEES APPEAL TRIBUNAL

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Kevin Cross delivered the 1st day of March, 2012

1. This is an application for leave to seek judicial review of a decision of the first named respondent ("the Tribunal") dated 13th August, 2009, in which the Tribunal Member affirmed the reports and negative recommendations pursuant to s. 3 of the Refugee Act 1996 (as amended) of the Office of the Refugee Applications Commissioner ("ORAC").

2. Ms. Saul Woolfson, of counsel appeared for the applicants and Mr. Anthony Moore, of counsel, appeared for the respondents.

Background

3. The applicants in this case are a family comprising of a mother, father and their two dependent children. The children were included in their mother's claim while the father applied separately. They are nationals of Georgia who upon arriving in this State made an application for asylum on 19th April, 2007. Their claim is based upon the alleged persecution they suffered following the defeat of the Georgian Citizens Union, the former ruling political party, of which the first named applicant was a member.

4. The first named applicant asserted that after the "Rose Revolution", members of the Ministry for the Interior attacked her outside her home, shot bullets through her window, made threatening phone calls and attempted to abduct her son. She asserts that while she was hiding in a remote region of Georgia, her husband disappeared. It later transpired that he was detained by unknown men, who beat him and injected him with drugs, as a result of which he apparently developed Hepatitis C. He managed to escape in April 2006, and underwent treatment for his injuries. The applicants left Georgia together with the assistance of a trafficker in April 2007 after paying him $30,000.

The Decision of the Tribunal

5. The findings of the Tribunal which led it to uphold the decision of ORAC can be summarised as follows:-

(a) The applicants fail to seek protection from the police in circumstances where the country of origin information indicated that State protection was available.

(b) As the first named applicant would be categorised by the country of origin information as a low to medium level member or activist affiliated with the previous government, she was not likely to encounter persecution by the State authorities and her fear was therefore not well founded.

(c) Adverse credibility findings were made in relation to an alleged discrepancy in the first named applicant's evidence as to whether she had been summonsed to the Interior Ministry or not.

(d) Adverse credibility findings were made in relation to the first named applicant's apparently inconsistent statements regarding her rank or position within the party.

(e) Adverse credibility findings were made in relation to the first named applicant's entrance passes to a citizen's union meeting as they were different versions of her name.

(f) Adverse credibility findings were made in relation to the applicant's account of travel to and arrival in the State and s. 11B(c) of the Refugee Act 1996 (as amended) was invoked.

(g) As the medical reports produced by the first and second named applicants were not in line with the Istanbul protocol, they were not considered to corroborate or support their claims and hence did not alter the Tribunal's views of the applicants' credibility.

The Submissions

6. I have been furnished and have considered the affidavits herein and the exhibits as well as submissions and authorities of both the

applicants and the respondents.

The Applicants' Arguments
7. Mr. Saul Woolfson, of counsel, argued on behalf of the applicants that the negative credibility findings made in respect of them were incorrect and unfair and irrational. He argued that the Tribunal Member came to negative determinations because he failed to properly or adequately consider the body of documentation submitted by the applicants in support of their claim. Instead, he allegedly cherry picked a number of documents that supported his conclusions to the absolute exclusion of other relevant documentation.

8. Furthermore, Mr. Woolfson argued that everything that has a bearing on credibility must be considered in credibility determinations. Drawing on the decision of Cooke J. in *I.R. v. RAT* [2009] IEHC 353 (Unreported, High Court, 24th July, 2009), he stated that when documents that had a bearing on credibility are rejected by a decision maker, he is obliged to "set out on a rational and cogent basis the reasons for rejection of such documentation".

9. Counsel also argued that the Tribunal Member incorrectly relied on demeanour in circumstances where he failed to outline what it was about the first named applicants that caused him to view her demeanour in a negative light and this reliance on demeanour was further compounded by the delay in determining the appeal.

10. The applicants argue that they were not obliged to seek assistance from the State as the State was responsible for their persecution.

11. The applicant further asserted that the Tribunal was incorrect to rely upon one report to the exclusion of a fair and balanced assessment of all available country of origin information. The applicants asserted that the UK Home Office Guidance Note was unreliable as it was a policy document of a foreign government.

12. The applicants then argued that the Tribunal Member completely failed to consider or assess the minor applicants' applications that were independent and distinct from their parents.

The Respondent's Arguments
13. Mr. Anthony Moore, of counsel, on behalf of the respondents, argued that one credibility error (if there was one) on behalf of the Tribunal Member was not "sufficient to see the decision being quashed having regard to the accumulative effect of the other adverse credibility findings". In this respect, he relied on the decision of Cooke J. in *ORJI* [2010] IEHC 374, when he made a similar finding.

14. Mr. Moore then proceeded to outline why the Tribunal Member was correct in making the adverse credibility findings in relation to the applicants. For example, regarding the different names on entrance passes, he argued that this was not something that could be explained by translation difficulties.

15. The respondents stated that a decision maker does not have to refer to all the evidence before him when deciding a case. In this he relied on Clarke J. in the decision of *Zada v. Refugee Appeals Tribunal* (Unreported, High Court, 7th November, 2008):-

> "where certain keys assertions underpinning the applicant's claim were internally inconsistent and where the claim was actually at odds with country of origin information, the Tribunal was not obliged to set out discursive reasons where certain documentation did not resolve the doubts it had about the plausibility of the claim in the applicant's favour."

16. Mr. Moore argued that regarding the minor applicants, their mother did not represent them as having any persecution over and above the one advanced by her and her husband.

17. The respondents fully disputed the allegations of the applicants relating to the use of country of origin information. The respondents urged that these documents are essential to the asylum process as they provide clear guidance in the main types of claims that are likely to justify the grants of asylum, humanitarian protection or discretionary leave.

The Court's Assessment
18. It is clear that the within proceedings turned on the issue of credibility. The applicants were denied refugee status because of the fact that their credibility was at issue and doubted. In order to successfully overturn the decision of the Tribunals, the applicants must establish that the adverse credibility findings made in respect of them were incorrect and irrational. In such circumstances, the legal hurdle which they faced is outlined by Cooke J. in *D. v. Refugee Appeals Tribunal* [2010] IEHC 125, where at para. 3, he stated:-

> "…The appraisal of the personal credibility of an asylum seeker is the function of the administrative decision makers. The determination as to whether a claim to a well founded fear of persecution is credible falls to be made under the Refugee Act 1996 by the administrative decision makers and not by the Court. The High Court on judicial review must not succumb to the temptation or fall into the trap of substituting its own view for that of the primary decision makers. On judicial review, the function and jurisdiction of the High Court is confined to ensuring that the process by which the determination is made is legally sound and not vitiated by any material error of law, infringement of any applicable statutory provision or of any principle of natural or constitutional justice. Any finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation; and the reasons drawn from such facts must be cogent and bear a legitimate connection to the adverse finding."

Cooke J. went on to state at para. 17:-

> "The issue before the Court upon the present application, therefore, is whether a conclusion thus based upon an appraisal of the applicant's evidence can be said, in terms of the usual test, to be fundamentally at variance with reason or common sense bearing in mind, of course, that the Tribunal Member has had the benefit of observing the applicant at the hearing and listening to her answers to questions. The Court must also be wary of falling into the mistake of regarding a finding as unsound because, when its basis is dissected, questions can be raised as to the reasonableness of individual steps by which it has been reached. What is at issue is the soundness of the overall appraisal that has been made of the asylum seeker's personal credibility. That is not necessarily impugned by questioning separately isolated elements in the analysis exposed in the decision. It remains true, however, that the cumulative effect of a series of undoubted errors in the process of analysis leading to the conclusion may be sufficient to jeopardise the overall soundness of the decision."

19. In other words, and to paraphrase Cooke J., this Court is tasked with ensuring that the Tribunal Member based his credibility

findings on correct facts and that ultimately his decision does not fly in the face of reason or commonsense. Furthermore, in assessing the decision, this Court must ever be mindful that it does not supplant its own judgment for that of the Tribunal Member. Applying these principles to the applicant's case, I concluded that the adverse credibility findings were incorrectly formed calling into question the overall soundness of the decision.

20. The credibility points that were most disagreeable to this Court are as follows.

21. Firstly, regarding the discrepancy over whether the applicant was summonsed to the Interior Ministry or not, it appears as stated by Mr. Woolfson that the Tribunal Member and the first named applicant were entirely at cross purposes; the former misused the term of the correct Ministry and the latter, while seeking to correct him, did so in a manner that implied that she was altering her story. However, the first named applicant was correct in her denial to the Tribunal Member and the adverse credibility finding that she suffered was simply wrong.

22. Secondly, regarding the Citizen's Union of Georgia, the political party and the entrance passes, this Court agrees with the explanation as proffered by Mr. Woolfson that "Sopiko", "Sopo" and "Sopio" may well be as interchangeable as "Paddy", "Pat", "Patrick" and "Podge". It may not be obvious to someone not from Georgia that all these differences of spellings would amount to the same person. The names are largely colloquial in nature. To hold that the applicant is not credible because of such differences in her name is to leap to an unwarranted conclusion. Even more unwarranted is that the Tribunal Member used this credibility finding to doubt the first named applicant's membership of the Citizens Union of Georgia.

23. The respondent argued that given the first named applicant appeared for the most part to go by the name "Sopiko" it would not make sense for her to use an abbreviated form of her name on political entrance passes thus the Tribunal Member was, it was argued, entitled to doubt the authenticity of the documents and by inference to doubt the first named applicant's membership of the party.

24. The court cannot accept such an explanation for two reasons (i) there were other documents available that supported the first named applicant's membership to the party; and (ii) the applicant's own birth certificate and that of her children list her as "Sophiko" while her marriage certificate lists her as "Sopiko". Nowhere as a result of this discrepancy, was it ever suggested or could it ever be suggested, that the first named applicant was not married to the second named applicant or that she was not the mother of the third and fourth named applicants. It appears that the Tribunal Member placed too great an emphasis on the importance of two entrance passes in circumstances where it is quite clear that the first named applicant went by different versions of her name on official State documents. The Tribunal Member then proceeded to cast doubt upon the first named applicant's membership of her party which as stated is clearly a conclusion that is unwarranted.

25. Thirdly, regarding the applicants' travel and entry to the State, this Court would again disagree with the determination of the Tribunal. The first named applicant provided a very detailed account of the condition of the ship, her interaction with the agent (the trafficker) and the environment in which she travelled, in fact she went so far as to vividly described odours and the colour of the blankets in the sleeping quarters. This could not be described as "vague and unspecific".

26. Fourthly, regarding the first named applicants allegedly inconsistent statements regarding her position within the party, the court does not accept that these statements were in fact inconsistent and were anything other than a miscommunication as opposed to a calculated intention to mislead the Tribunal.

27. An ancillary but related issue of credibility was the Tribunal Member's reliance upon the demeanour of the first named applicant. This Court accepts the necessity for a decision maker to rely upon demeanour when assessing the credibility of an applicant. However, this reliance, particularly in the asylum process must be approached with caution. In *H.R. v. RAT* (Unreported, High Court, Cooke J. 15th April, 2011), Cooke J. in his judgment at para. 7 stated in the context of reliance on demeanour by a Tribunal Member the following:-

> "There is not doubt, of course, but that the Tribunal member is perfectly entitled to base a finding as to lack of credibility and plausibility upon the manner in which an asylum seeker gives evidence and on his or her demeanour when answering questions in relation to the details of facts and events which form the basis of the claim. Indeed, in many cases where such facts and events are incapable of any independent corroboration, the personal credibility of the claimant may be crucial. At the same time, however, the decision-maker must be careful not to misplace reliance upon demeanour and risk construing as a deliberate lack of candour a demeanour which may be the result of nervousness, of the stress of the occasion and even of the embarrassment of being an asylum seeker. An apparent hesitation and uncertainty may well be attributable to difficulties of language and comprehension. In the judgment of the Court, before a decision maker in the asylum process bases a rejection of a claim upon lack of credibility based mainly on the personal appearance and demeanour of the claimant, the decision-maker ought to be fully confident that the basis of the claim and all relevant facts and circumstances recounted have been fully and correctly understood and that there is no possibility that the decision-maker and claimant have been at cross purposes on any material point."

28. It remains, of course, that it is for the Tribunal Member to determine credibility and he may do so based upon demeanour. In coming to such a conclusion based on a demeanour, the decision maker must bear in mind the strictures of Cooke J. in *H.R.* (above) but such a demeanour based decision cannot of itself be said to be irrational or unreasonable. Indeed, in our system of laws, the vast majority of decisions in witness based actions are based upon credibility and frequently upon demeanour. As someone who learnt my trade as a barrister on circuit under an excellent judge, the late Judge Séan Fawsitt, who would hawk like observe the demeanour of witnesses before, during and indeed after they had given evidence, criticism of demeanour based findings do not sit lightly with me. Findings based upon demeanour are, in truth, usually based upon "gut instincts". This is not to undermine such findings. It is the expertise of decision makers in our system whether they be Tribunal Members or High Court Judges in witness actions that they must assess whether the person giving evidence before them is speaking the truth or not. Due deference must be given in our system to such decision makers making such decisions. These findings, of course, must not alone bear in mind the words of Cooke J. (*H.R.,* above) but they are clearly open to judicial review and must not stand if they are based upon erroneous factual assumptions (Cooke J., *D.* (above)).

29. Whereas credibility decisions must "have regard to" the criteria as set out in s. 11B of the Refugee Act 1996 and the findings must also be based on a rational analysis that explains why in the view of the decision maker the truth has not been told and must also be based on reasons which bear a legitimate nexus to the adverse findings, where credibility decisions are based upon demeanour, there is no requirement that the decision maker must specify the aspects of the witnesses demeanour e.g. "hesitation" or the "shifty appearance" that led him to the conclusion. Indeed, to impose such an obligation upon the decision maker would be to force a formalistic approach such as may be imagined in a witness giving evidence as to drunkenness reeling off "his eyes were bleary,

he staggered as he walked and there was a smell of drink from him…*etc*.".

30. In the present case, the Tribunal Member's use of demeanour when determining the truth of the summons to the Interior Ministry is an example of basing credibility and demeanour upon an erroneous assumption. The Tribunal Member stated:-

> "Having heard the evidence and observed the demeanour of the applicant while she provided this evidence, I reach the conclusion that she had not provided a plausible or credible explanation for the inconsistency in her evidence and I have reached the conclusion this is neither plausible nor credible and it undermines her credibility."

Here the Tribunal Member relied on demeanour in circumstances where he was clearly in error as to the truth of the matter – the applicant was correct in relation to her answers that she had not been summonsed to the Ministry in question. This one error on its own would call into question the other determinations as to the first named applicant's demeanour and credibility. In point of fact, as outlined above, there are a number of such errors which together are more than sufficient to grant the applicant the reliefs he seeks.

31. The Minister must rely upon the contents of the file without the benefit of any personal interaction with the applicant. For this reason, the RAT must take great care in reference to its findings on credibility and demeanour as adverse findings may only serve unfairly to influence the Minister.

32. The court does not accept that the contention on behalf of the applicant that a six months gap between the appeal and the delivery of the decision would be considered a sufficient delay so as to discredit any findings including those findings of demeanour. It is to be hoped that the court does not move in an unreal world. A decision maker, who is minded to make adverse findings based partly on demeanour would, if acting fairly and lawfully (as the court must assume to be the case unless the contrary is shown) have taken notes at the time of the hearing and would not be trying to recollect matters after a gap of six months. Clearly, to attempt to recollect demeanour after a six months delay with no notes or assistance would be entirely unfair and wrong.

33. The court is of the view that much was incorrectly made of the manner in which the applicant's evidence apparently conflicted with the country of origin information. It is for the Tribunal Member to determine what evidence he considers reliable and what he does not. In the instant circumstances, the decision maker preferred the "objective" report to what he considered were the applicants who wholly lacked credibility. In this regard, the decision maker concluded that as the first named applicant was a "low to medium" ranking member of the party that she and her family were not at risk. The decision maker apparently discounted the applicant's story of persecution because he had made adverse credibility findings against her and because her story conflicted with the country of origin information.

34. Whether country of origin information viewed in the light of credible candidates would result in a different determination is not for this Court to speculate. The first named applicant may well find it easier without wading through a number of adverse credibility findings to establish that she was sufficiently close to such medium to high ranking party officials and known to be associated with them so as to attract the alleged persecution which is of the core of her application.

35. Several other matters were raised before this Court that did not relate nor were impacted by the credibility determinations of the Tribunal and I would now address these accordingly.

36. It is the opinion of this Court that the applicants were correct when they asserted that the Tribunal Member did not consider the specific documentation submitted by them with the relevant care required by him during the course of his deliberations. In that regard, two instances come to mind.

37. The first relates to the apparent discrepancy over the summonses to the Ministry. This apparent discrepancy could have been resolved in a positive light had the Tribunal Member reviewed the contents of the summonses, which at all times supported the evidence of the first named applicant. Instead he made a very damming adverse credibility finding. The second concerns the entrance cards which the Tribunal Member commented referred to the applicant by different first names and that it would have been preferable had the first named applicant validated her membership of the party in another way. In point of fact, the applicant did produce additional identity documents to verify her membership. Had these further documents been considered they could have fully validated her party membership and indeed could have led to a different finding in relation to credibility.

38. As we are only at the leave stage, the court will refrain from analysing the entire contents of the file for additional discrepancies or for determining what probative documents, if any, were discarded without reason or merit. It is sufficient for present purposes that this Court would find these two instances as described are enough to question and doubt the approach taken by the Tribunal Member when reviewing the documentation before him.

39. The court holds that the second named applicant had indeed a detailed and personal account separate and distinct from that of his wife, the first named applicant. The Tribunal Member failed to adequately or indeed at all, consider the second named applicant's particular set of circumstances and this is evident from the total lack of consideration the Tribunal Member played to his account of events in particular his abduction.

40. The court also holds that the Tribunal Member failed to consider the separate and distinct claims of the third and fourth named applicants. The substantive analysis carried out by the Tribunal Member was done exclusively by reference to the particular claims of the mother, the first named applicant and took no account of the independent claims of the minor children. This is demonstrated by the total lack of reference to either of them in the operative part of the decision.

41. It was argued on behalf of the respondents that the mother did not represent the applicant children as having any fear of persecution over and above the one advanced by her and by her husband. It is the view of this Court that this is not true. Their parents specifically spoke of their concerns for their children and also provided an account of the manner in which somebody apparently attempted to abduct their son. Furthermore, the important of having a separate and distinct determination was articulated by Cooke J. in *F.G.W. and F.S. (A Minor) v. RAT* (Unreported, High Court, 5th May, 2011) and [2011] IEHC 205 where at para. 9 he stated:-

> "It must be borne in mind that the appeal decision of the Tribunal constitutes the second stage determination of the examination of an asylum application and, together with the s. 13 Report, constitutes the basis upon which the Minister will be required to make his decision under 17(1) of the Act of 1996, as to whether to grant or refuse the declaration of refugee status…in the view of the Court, where there are two applicants for asylum who are dealt with together, it is incumbent upon the Tribunal member to state explicitly, if however briefly, why the claim of each applicant is rejected. It may be that the Tribunal member was of the view that no separate claim on behalf of the

daughter had been advanced, but it not sufficient that it should be left to the Minister to so infer in the absence of any express statement to that effect in either the s. 13 Report or the appeal decision."

42. Mr. Woolfson, further argued that as the UK Home Office Report, is a policy document of a foreign government, its contents cannot be divorced from UK foreign policy, therefore rendering it less objective and far less reliable. It is the view of this Court that type of blanket criticism is wholly without merit.

43. All reports whether they issue from an NGO or a government body or indeed a respected international organisation are, or may be, tapered by some form of bias and it is open to the Tribunal Member, as the decision maker, to accept or reject the contents of the report(s) before him. If this Court were to accept Mr. Woolfson's contention we would be left in the unhappy and very much unfavourable position of having no information not personal to the applicant to rely upon. This would result in an unworkable situation and in the opinion of the court, it was not unreasonable on the Tribunal Member to rely upon UK Home Office Reports. The difficulty in this case, however, was that these reports indicated that "low to medium" members of the previous ruling political party were not at risk and the decision maker used that fact in conjunction with other adverse credibility findings, to doubt the case being made by the first named applicant and led the Tribunal Member not to consider the case being made that she was targeted for harassment because of her association with a leading member of her party.

Conclusion

44. Further to my judgment above, I am satisfied that substantial grounds have been set out to grant leave on the following grounds:-

(a) that the cumulative effect of a series of credibility errors made by the Tribunal, in the process of analysis, sufficiently jeopardised the overall soundness of the decision;

(b) that the decision of the Tribunal failed to give adequate consideration to the relevant documentation before it;

(c) that the Tribunal failed to consider and/or adequately consider the second named applicant's personal circumstances in particular his alleged abduction; and

(d) the Tribunal failed to give separate consideration to the claims of the third and fourth named applicants.