

**THE HIGH COURT
JUDICIAL REVIEW**

[2009 No. 388 J.R.]

BETWEEN

D.L.A.

APPLICANT

AND

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND FERGUS O'CONNOR SITTING AS THE REFUGEE APPEALS
TRIBUNAL**

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 27th day of February 2013

1. In this telescoped application to quash a decision of the Refugee Appeals Tribunal of 27th February 2009, the applicant has abandoned approximately seventeen paragraphs of grounds and now pursues a single complaint alleging that medical evidence relative to deficient memory was disregarded.
2. The claim for a declaration of refugee status was rejected exclusively on credibility grounds. One of the significant credibility findings refers to the implausibility of an inability to recall certain facts. This finding is central to the complaint advanced in these proceedings because the applicant says that the Tribunal Member ought to have carefully considered the medical evidence which addressed the applicant's poor memory, and had this been done, a different result might have been achieved.
3. I will approach the issues by describing the rather complex account of events which led to the asylum application in Ireland and the nature of the medical evidence which was allegedly disregarded by the Tribunal Member.

The Applicant's Background

4. The applicant is a Nigerian national who claims to have led a taskforce to investigate commercial abuses at State level. Irregularities were uncovered amounting to fraud and corruption of well known officials and politicians. The applicant says he was targeted, imprisoned, tortured, raped and mistreated by the police as a result of reporting this corruption. He was infected with HIV and contracted Meningitis. He has spent considerable time in the United Kingdom prior to arriving in the State. While there, he obtained a National Health Service Medical Card and was treated for medical conditions in the United Kingdom. It appears that he has used numerous aliases and various dates of birth.

5. In August 2007, the applicant was interviewed pursuant to s. 11 of the Refugee Act 1996, as amended. Approximately 109 questions were asked of the applicant. At times, the applicant was unable to answer questions because he could not remember details. For example, he was asked who was the Minister of State for Health in Nigeria and he could not remember. The applicant maintains that a person by the name of Chief Ribadu employed him in the Ministry of Health but he could not remember who this man worked for. When it was suggested he should be able to remember a detail like this, he replied, "I have a problem with my memory". This is clarified in a handwritten addendum to the interview sheet, where the applicant says, "I have a problem with my memory because of my Meningitis infection".

6. Later, he was asked when did he collect his Medical Card (in the United Kingdom) and he said he could not remember. Later still, there was another example of failing to remember a name. Towards the end of the interview, he was asked to name the body of which Chief Ribadu is the Director General and he could not remember.

7. The Office of the Refugee Applications Commissioner prepared a report pursuant to s. 13(1) of the Refugee Act 1996. That report gives a detailed account of the applicant's history and does not record any difficulty or problem associated with memory deficiency. Failing memory simply did not feature at first instance.

8. The Medical Evidence

9. The applicant's solicitors sent a report to the Refugee Appeals Tribunal in December 2008 compiled by the Centre for the Care of Survivors of Torture (SPIRASI). Dr. Mona Sayegh examined the applicant in June 2008. She records the applicant's version of his plight in twelve paragraphs of text. She does not say that memory deficiency impeded the applicant in recounting his story to her. She records that the applicant reported to her "that his concentration and memory were not as good as they had been before his episode of torture. He said that his memory was not as good as it had been so that when he was under pressure, he would not be able to remember things he would normally have no problem remembering."

10. Dr. Sayegh records in the final line of her report that the applicant's present state of depression will impact his ability to recall events. She states: "Mr. A is fit to appear in court. However, I would respectfully suggest that the court take his present mental health difficulties into account when he is being questioned. His present state of depression will impact his ability to recall events." (I am assuming the reference to the court is meant as a reference to the Refugee Appeals Tribunal)

11. An addendum to this report was produced which asserted that the applicant was receiving counselling for mental health symptoms.

12. Professor McConkey also produced a report in January 2008, saying that the applicant had been referred to the Centre (SPIRASI) for specialist counselling regarding Post Traumatic Stress Disorder. Professor McConkey went on to say:

"He has a poor memory for events in the past and appears to have some cognitive deficit perhaps related to his

underlying HIV or perhaps related to his cryptococcal meningitis, both of which have left a legacy of brain dysfunction. [sic]"

13. In the final sentence of his report, the Consultant says:

"I would like to support his application for asylum and would like to point out that he has some cognitive impairment and memory deficiency, possibly related to his medical condition"

14. My opinion is that the references in the medical reports to difficulties with memory are fleeting. Memory deficiency was not in any way central to the examinations conducted by these doctors and my reading of the references to memory problems is that the doctors mainly record the applicant's assertion of the problem and do not record an objective assessment following testing and examination of the strength or weakness of memory in the applicant. In other words, the memory issue was entirely peripheral in these medical reports.

The Decision of the Refugee Appeals Tribunal

15. The Tribunal Member sets out the applicant's claim in a reasonably lengthy passage (about 2,000 words). It is recorded that the applicant did not remember the full name of the Minister of Health at the relevant time and the fact that the applicant could not remember all the names of the persons who had benefited from corrupt contracts. Apart from these matters, no other particular difficulty with memory is identified or is identifiable in the account given of the applicant's evidence. The Tribunal Member indicates that a submission was made to the effect that the applicant had a difficulty with his memory.

16. In analysing the applicant's claim, the Tribunal Member says that inconsistencies and credibility issues arose which were not properly explained by the applicant and "are such that I do not believe that this Applicant ever had any difficulties in his Country of Origin as he alleges, or has any fear of returning there as he claims".

17. In relation to the applicant's description of his activities in Nigeria, the Tribunal Member says as follows:

"I find his account of his activities and his alleged difficulties in his Country of Origin to be incredible. He demonstrated little or no insight into what he claims to have been involved in. He was able to give nothing other than a few names of the individuals he claims to have been involved in corrupt contracts, despite claiming that there were up to fifty people involved in this corruption and that they now hold positions of power in Nigeria. He attributes this to problems with his memory, but it is considered that if the applicant had come across the information he alleges and that there were such a number of persons who he now claims hold positions of power in Nigeria that he would have been able to provide more details to the Tribunal."

18. From the applicant's perspective, this is the most important finding by the Tribunal Member because the applicant's credibility is discounted based upon the implausibility of not remembering certain facts.

19. The applicant has referred to a series of cases which deal with inadequate consideration of medical evidence in asylum claims. The thrust of these cases is that proper consideration of medical evidence might have tipped the balance in favour of an applicant against whom credibility findings had been made.

20. In *Khazadi v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, MacMenamin J., 2nd May 2006), the applicant challenged a Tribunal decision on the basis that medical evidence had not been properly considered in circumstances where multiple negative credibility findings were recorded by the Tribunal Member. As for the medical evidence which described scars on the applicant as being consistent with his story of torture, the Tribunal Member said this was not evidence of torture.

21. In his ex tempore judgment on 2nd May 2006, MacMenamin J. stated at page

"*Prima facie*, the signs of mistreatment or torture tended to support the applicant's account of events. It has been contended that there were relevant considerations which went to the issue of credibility. However it is arguable that what is absent is any indication that relevant medical material and evidence helpful to the applicant's case was taken into consideration or weighed in the balance in the determination of the Tribunal. It is also arguable that it is insufficient for a tribunal member in rejecting important evidence to fail to give reasons for such rejection and that is insufficient merely to state that such evidence is being disregarded because the tribunal member has had the benefit of an oral hearing and being given copies of country of origin information and documents submitted by the applicant and the commissioner ... [sic]"

22. At the substantive hearing in *Khazadi* (Unreported, High Court, Gilligan J., 19th April 2007), Gilligan J. quashed the decision and said:

"Now, I take the view in the circumstances that arise that the Tribunal Member in considering any assessment of the Applicant's credibility was required to consider, as part of his deliberations, the medical evidence in total that was before him and was obliged as part of a rational analysis to explain having considered the medical evidence along with the other evidence that was before him why in the view of the Tribunal Member, the Applicant was not telling the truth and his credibility was undermined."

23. At page 9, Gilligan J said the following:

"I take the view that as regards the content of paragraph 36 of the decision where the Member refers to the fact that the decision had been reached in the light of records and reports that were submitted to the Tribunal, it is not sufficient on the vital issue as to the applicant's credibility and the vital issue of the totality of the medical evidence that was before him for the Member, simply, to say without rationalising the basis of his decision that the decision was made in light of certain reports which, in effect, are unidentified.

My overall conclusion is that the medical evidence that was before the Tribunal Member should have been considered, weighed in the balance and a rational explanation given as to why it was being rejected in circumstances where the Tribunal Member was making a finding that the applicant was not credible."

24. Similarly, in *N.M. v. The Minister for Justice* (Unreported, High Court, McGovern J. 7th May 2008), a decision on a leave application, the judge was dealing with a complaint about the manner in which SPIRASI medical reports had not been dealt with by

the Tribunal and the learned judge said:

"10.... In general, the medical reports tend to support the applicant's account although they are not conclusive. But it seems to me that the Tribunal member approached the medical reports on the basis that certain words such as "consistent with" or "not consistent with" were used, whereas, in fact, these words were not used except in the single context I have outlined above. The Tribunal member is entitled to weigh up the account of the applicant and his credibility in deciding whether to accept medical reports. But where the medical reports appear to support the applicant's claim, I think that it is incumbent on the Tribunal member to specifically deal with the medical reports and state why he does not accept them.

11. It is no doubt true that the applicant's anxiety or Post Traumatic Stress Disorder which was found by the doctors, could be due to reasons other than torture. But it seems to me that where the medical evidence is significantly supportive of the applicant's claim, that cogent reasons for rejecting it should be furnished and, in my view, the Tribunal member has failed to do this."

25. A similar approach is apparent in *Ahmed v. Refugee Appeals Tribunal* (Unreported, High Court, Cooke J. 15th January 2009), where, in the course of general remarks on the duty to give reasons, the judge said:

"In this particular case, being, as I say, a borderline case, what is of concern to the Court today is, not only the basis upon which the conclusion as to credibility was reached, but also the way in which that conclusion is expressed in the text of the Contested Decision of the member of the Tribunal. It seems to me that the starting point in that regard is the fact that the obligation on a tribunal such as the Refugee Appeals Tribunal when making a determination of this kind to give reasons for its conclusion has, in effect, two purposes."

26. Cooke J. went on to say:

"It is clear of course the mere presence of the lesions and their being judged medically to be "typical of cigarette burns" does not in itself prove the truth of the applicant's claim that they were sustained as a result of the violence of the three men who interrogated her.

20. But the exercise which the adjudicating authority is required to carry out and to explain is to evaluate the totality of the information available; to weigh in the balance the different elements that tip in one direction and the other and to come to a conclusion as to the credibility of the evidence as a whole. It seems to this Court that where there is a physical piece of evidence that is capable of being related to the events claimed to have happened by the applicant, the obligation is, first of all, to take that into account and then secondly, to explain in the decision whether any significance was thought to attach to it at all and if not, why it is discounted as against the other factors that are taken into account as elements that embellish a story otherwise based upon public events."

27. In *M.E. v. Refugee Appeals Tribunal* (Unreported, High Court, Birmingham J. 27th June 2008), the Tribunal made negative credibility findings in an appeal where the applicant had advanced a medical report which described the presence of scars, some of which were said to be consistent with lacerations caused by beating with a thin rod or a stick: "The Tribunal Member commented that the medical report was "of no probative value, in the sense - as she put it - "that it does not assist as to how the Applicant received the injuries as therein specified"." Birmingham J. refused leave to challenge the decision based on the complaint about the manner in which the medical report had been dealt with and the court distinguished *Khazadi* on the basis that the medical evidence in that case was of an altogether different quality and quantity. Birmingham J. stated with regard to the *Khazadi* decision:

"More fundamentally, the Tribunal Member had, in that case, reached an adverse finding *before* going on to consider the medical evidence. In contrast, in the present case the Tribunal Member had the assistance of submissions on the medical report, was clearly aware of its possible significance, weighed it, but concluded that it was not of probative value."

28. In *A.M.N v. Refugee Appeals Tribunal* (Unreported High Court 3rd August 2012, McDermott J.), the applicant claimed that the Tribunal Member had failed to have due regard to the contents of a SPIRASI medical report which gave a detailed account of the manner in which the injuries observed were consistent with the history recounted. The Tribunal Member, having recited the relevant medical findings, said:

"While medical practitioners are capable and competent in giving a medical report on the *sequelae* as presented to them by an applicant, they are in the same position as that of the Tribunal in that they cannot say with any particularity how and in what circumstances such *sequelae* came about. The SPIRASI report has to be considered in the light of the applicant's overall account to the Tribunal."

29. McDermott J. concluded that the Tribunal had erred in law in failing to describe what significance was attached to the medical report and if significance was attached to it, why it was discounted. He said:

"It was incumbent on the Tribunal to deal specifically with the medical report and state reasons as to why it was not accepted. The report is discounted on the basis of the applicant's "overall account to the Tribunal". The medical report was an objective piece of evidence that required more careful consideration. The mere recital of its terms does not amount to a sufficient consideration of its contents...The Tribunal failed to provide cogent reasons for rejecting a piece of evidence that was significantly supportive of the applicant's claim. The Tribunal's failure in this respect renders its decision fundamentally flawed."

30. These cases have common facts. Medical evidence which corroborated critical details of an applicant's account of torture was inadequately addressed by the Tribunal but the cases are of no assistance to the applicant in these proceedings. Had the applicant suffered the disadvantage of significant memory loss and if such memory loss had been diagnosed and explained in medical reports commissioned for that purpose, it would be unfair to reject an asylum claim based upon the inability of such a person to remember facts. In this case the applicant displays a very strong recall of complex details over very many years. There was some evidence of an inability to remember certain matters. Whilst the medical reports refer to certain difficulty with memory, these professional opinions are directed at other matters and they were not tendered at the RAT in support of a case that the applicant's inability to remember matters was caused by medically diagnosed memory loss. In my opinion, no such case was ever sought to be made on behalf of the applicant.

31. The Tribunal Member does not refer to the mentions in the medical reports of memory loss or memory difficulties. It is true that

the inability of the applicant to remember names of persons said to have been involved in corruption is found as a basis for not believing the applicant. However, I find no fault with the Tribunal Member. It cannot be said that the applicant's asylum claim was advanced on the basis of diagnosed bad memory being the explanation for an inability to remember certain facts. This is a construction which has been created after the asylum claim was presented at first instance and to the appellate Tribunal.

32. I refuse leave to seek judicial review.