Neutral Citation Number: [2011] IEHC 181

THE HIGH COURT

JUDICIAL REVIEW

2008 995 JR

BETWEEN

A.N.L.

APPLICANT

AND

BEN GARVEY ACTING AS THE REFUGEE APPEALS TRIBUNAL

RESPONDENT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

AND

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Mr. Justice Herbert delivered the 8th day of April 2011

The applicant, A.N.L. seeks leave of this Court pursuant of the provisions of s. 5(2)(b) of the Illegal Immigrants (Trafficking) Act 2000, to apply for an order of *certiorari* by way of judicial review that the decision of the respondent made on the 27th June, 2008, affirming the recommendation of the Refugee Applications Commissioner made on the 19th September, 2007, that the applicant should not be declared to be a refugee, be delivered up and quashed and, the matter remitted for re-consideration by the respondent. This subsection provides that such leave shall not be granted by this Court unless it is satisfied that there are substantial grounds for contending that the decision of the respondent is invalid or ought to be quashed. *In Re. Ref. S.S. 5 and 10 Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 394/5, Keane C.J. adopting the earlier definition by Carroll J. ([1995] 2 I.L.R.M. 125) held that the Court must be satisfied that reasonable, arguable and weighty grounds and, not just trivial or tenuous grounds have been shown.

It was submitted on behalf of the applicant that the decision of the respondent, that the applicant lacked personal credibility which brought into question the legitimacy of her claim to a well-founded fear of persecution in her country of nationality for reasons of political opinion, (actual and inferred) and membership of a particular social group, to wit, ex-partners of leading political persons who can abuse power, was made in excess of jurisdiction as based upon speculation, errors of fact, failure to properly consider and weigh the evidence and selective use of country of origin information. It was submitted on behalf of the respondent and the notice parties that the decision of to the respondent was *intra vires*, reasonable, rational and, in accordance with common sense and, that the applicant had failed to demonstrate reasonable, arguable and weighty grounds to the contrary.

The member of the respondent set out extensively in his decision the reasons why he had concluded that the applicant was not personally believable. The member of the respondent correctly noted that available country of origin information established that A.M. is a leading member of the political party now in power in the applicant's country of nationality and origin. That A.M. is a member of the Presidential Guard and was a former aide-de-camp to the President. The member of the respondent further correctly found that the available country of origin information established that S.B. was a leading member of a different political party which had a share of power prior to July 2006 and was a very senior ranking officer in the armed forces of that country. The member of the respondent also correctly noted that the available country of origin information recorded that S.B. had died on the 4th July, 2006, and had been buried without an autopsy being carried out. The court is quite satisfied that each of these findings was made *intra vires*.

The applicant claims to have had an intimate relationship with A.M. from September 2002 to a date in 2005. She asserts that in December 2003, she became friendly with S.B. who paid court to her. They became lovers in May 2004 and this had continued up to the date of his death on the 4th July, 2006. They did not live together, but the applicant states that S.B. enabled her to set up in a business importing products from Dubai for sale in the city in which they both resided. She had travelled to Dubai on business between November 2004 and January 2005 and had returned home in February 2005. She had a passport and had obtained a visa for the purpose of travel to Dubai. The applicant claimed that when she ended her relationship with A.M. he had threatened her.

In his decision the member of the respondent noted that the applicant when asked by the Refugee Appeals Tribunal about the nature of these threats was unable to elaborate and had simply stated that A.M. was jealous. The member of the respondent further noted that the applicant had told the Refugee Appeals Tribunal that her relationship with A.M. had ended early in 2005. The member of the respondent noted that it had been put to her by the Presenting Officer during the course of the oral hearing before the Refugee Appeals Tribunal, that in the course of her interview conducted in accordance with the provisions of s. 11 of the Refugee Act 1996 (as amended) she had told the interviewing officer that this relationship with A.M. had ended at the end of 2005. The member of the respondent noted that the applicant had responded that this was an error on the part of the interpreter. The member of the respondent noted that the applicant was unable to explain why she had not corrected this alleged error when this answer had been read back to her at the time as she had certified by her signature at the foot of the relevant page of the Record.

The member of the respondent noted that even though the applicant claimed to have been involved in intimate relationships with these two very powerful men between September 2002 and July 2006, she had offered nothing at all to substantiate this claim, for example some keepsake or note or photograph. The member of the respondent further noted that when asked at the oral hearing before the Refugee Appeals Tribunal about the passport on which she claimed to have travelled to Dubai on business the applicant

had stated that it was at her home, but could not be found by the persons who had forwarded her citizenship-nationality documents to her in Ireland in advance of the oral hearing before the Refugee Appeals Tribunal.

The applicant claims that the acquaintance of her aunt in the city where the applicant had been hiding following her assisted escape from a Military Detention Centre had, for the sum of US$5,000, provided travel documents which had enabled her to pass through three different countries and to enter this State. She claims that she returned all these documents together with the travel tickets to this man. The member of the respondent noted that the applicant had not, as required by s. 11B of the Refugee Act 1996 (as amended), provided any satisfactory explanation as to why she had not sought asylum in any of the three countries through which she had travelled before arriving at the borders of this State.

The member of the respondent noted that in the A.S.Y.1 Form for Seeking Asylum, completed by the applicant on the 30th March, 2007, after her arrival in this State on the 23rd March, 2007, the applicant had stated that she was a sympathiser but not a member of a political party. However, in the course of the s. 11 Interview she claimed that she was a member of a named political party which she claimed to have joined in 2005. She knew when this political party had been founded and she knew the name of the then current party leader. The applicant said that she was a "simple member" who supported them and went to party meetings when she was free. She did not have any party duties and did not have a membership card. This was the political party of which S.B. had been a leading member.

The applicant claimed that when she told A.M. that S.B. was showing an interest in her, he had urged her to spy on S.B. She had refused. The applicant stated that she had stopped seeing A.M. because he was already married and she decided that her relationship with him had no future. She claimed that she had been with S.B. on the night of the 30th June, 2006. She said that he had been in good health on that night. She claimed that S.B. had told her that things were worsening and they might have to leave the country after the Presidential Elections which were then pending. The applicant claimed that S.B. had told her not to telephone him because of serious security concerns. The applicant claimed that on the 4th July, 2006, a bodyguard of S.B. had telephoned her and told her that he had died. The applicant stated that there was a general belief in her country of nationality that S.B. had been poisoned prior to the elections. In the course of her s. 11 Interview the applicant stated that she believed that an autopsy was carried out on S.B. but the results had not been published. The member of the respondent noted that it had been put to the applicant that country of origin information subsequently obtained stated that S.B. had been buried without an autopsy having been carried out. The Court notes that at para. 28 of her affidavit grounding this Application, the applicant avers that she gave evidence that she had been informed that an autopsy was certainly carried out but that the report remained unpublished because of its contents. The source of this alleged information is neither named nor identified and, the circumstances in which this information was imparted to her are not revealed.

The applicant claims that the member of the respondent unfairly makes an adverse credibility finding against her because of this one entry in a country of origin document and had failed to consider the matter in the context of other country of origin information which indicated that politically motivated assassinations occurred in her county of nationality. This of course is to miss the point at issue which is whether or not her credibility as a narrator is called into question by this conflict as regards the carrying out of an autopsy on S.B.

The member of the respondent noted that the applicant had given three different reasons why she believed that A.M. had caused her to be arrested, as she claims, on the 15th February, 2007, taken to a Military Intelligence Centre and detained there in prison without access to a lawyer, without her family being notified, without being charged with any offence and, without being brought before a court. The applicant claimed that an adherent of A.M. with whom she had a good relationship had told her that A.M. was going to have her arrested. She stated that she believed that A.M. wanted her out of the way in case she talked about his having asked her to spy on S.B. She felt that he would have her arrested and killed on a charge of spying on the State and leaking information to rebels. She also said that she felt that A.M. was going to have her killed for refusing his demand that she spy on S.B.

The member of the respondent noted her evidence that she had informed A.M. sometime in 2004 or 2005 that she would not spy on S.B. yet, by her own account, A.M. had taken no action against her until the 15th February, 2007. The applicant in the seven pages of handwritten notes which she appended to the Application for Refugee Status Questionnaire, stated that after the death of S.B. on the 4th July, and the victory of the political party in which A.M. was an important figure in the Presidential Elections, she felt that A.M. would have her arrested and killed but that as nothing happened she had relaxed. The member of the respondent took into consideration in assessing the applicant's story, what he considered was the ample opportunity which A.M. had between 2005 and February 2007 to have the applicant arrested or killed. The member of the respondent considered that it was improbable that A.M. would reasonably regard her as a risk: she had refused his demand that she spy on S.B. and she told the Refugee Appeals Tribunal that if she had complained to the police, they would have gone immediately to A.M. and sought his advice as to how to act. The member of the respondent considered that if the applicant was arrested and accused of spying for rebels, the very thing which she claimed A.M. was anxious to conceal would probably emerge.

The applicant claimed that she was assisted to escape from the military prison by a high ranking prison officer in return for sexual favours and a payment of US$3,000. By means of a letter written by her and smuggled by this officer to her aunt she had arranged for this sum of US$3,000 to be paid to this officer by or through her aunt who for some undisclosed reason was holding all the applicant's money for her. The applicant claimed that this officer had arranged for her to be smuggled out of the prison and brought into the bush in a car. She was allowed to go free and had eventually reached another city. In assessing this account of her alleged escape from the prison the member of the respondent considered whether, having regard to the fact that as the applicant claimed she had been arrested on the orders of A.M. a person of great power and status and, if as she alleged she was being held, accused of spying and of assisting rebels, it was likely that any prison official regardless of his rank would risk his career and even possibly his life by assisting the applicant to escape in return for this payment and sexual favours.

The member of the respondent noted that that the applicant told the Refugee Appeals Tribunal that the agent who had arranged her travel had told her that she was being brought to Europe. In her handwritten notes annexed to the Questionnaire, the applicant wrote that two days before departure, this agent had told her that her destination was Ireland and Dublin in particular. At para. 27 of her affidavit grounding this application the applicant accepts what she had stated in these handwritten notes, but alleges that she:-

> "Gave specific evidence that [she] did not know that it was in Ireland that [she] would claim asylum . . . [she] gave evidence that [she] expected that [she] would claim asylum in France or Belgium."

It was submitted on behalf of the applicant that the member of the respondent made a number of errors of fact in the course of his decision which taken together undermined the accuracy and credibility of that decision. Four such errors were identified. The member of the respondent employed a single incorrect letter in the acronym for the full title of the political party of which A.M. was a leading member. The member of the respondent incorrectly stated the date of death of S.B. as 24th July, 2006 when the correct date was

4th July, 2006. The member of the respondent did not correctly record the positions held by A.M. and S.B. in their respective political party organisations. The member of the respondent did not acknowledge the applicant's extensive knowledge of political parties, political events and the identity of influential politicians in her country of nationality.

I am satisfied that no substantial grounds have been shown for contending that these errors of fact either individually or collectively undermine the decision of the member of the respondent. Two appeared to me to be mere typographical errors. It is clear beyond question that the member of the respondent in his decision, when it is read as a whole fully accepts the immense prestige coupled with either influence or authority enjoyed by both A.M. and S.B. in that country. In such circumstances I am satisfied that no detriment was suffered by the applicant by reason of any alleged failure on the part of the member of the respondent to exactly identify and record the actual positions held by A.M. and S.B. within their respective party political organisations. The applicant claimed, - despite an earlier denial, - that she had joined the political party of which S.B. was an important member in June 2005, even though she did not have a membership card. She claimed that she was an "ordinary member" who attended meetings of the party when she could, but had no actual party duties. Knowledge of any of the matters referred to in the submission on her behalf would not in my view confirm the applicant as a member of that or of any other political party or cause her to be considered a party member or a party political activist so as to support her claim that she had a well-founded fear of persecution by reason of political opinion. In any event the conclusion of the member of the respondent was based upon the applicant's conflicting statements regarding her membership of a political party and not on anything else.

I do not find that the applicant has shown substantial grounds for contending that the decision of the member of the respondent was based on speculation and selective use of country of origin information. The only example of the latter identified by the applicant relates to the apparent contradiction by country of origin information of the applicant's assertion that an autopsy had been carried out on S.B. but that the autopsy report was being withheld because of what it contained. This country of origin document is one of at least two documents which referred to the mysterious death of S.B. The document is dated the 13th March, 2007 and appears to be an extract from, the first edition of a large book or report dealing with barriers to a lasting piece in the applicant's country of nationality. The passage (redacted) is in the following terms:-

> "Things took a major turn in early July. On the night of July 4th . . . S.B. was admitted to [a] Clinic with acute symptoms of illness. S.B. was 35 – years-old with no known chronic illnesses. Doctors who monitored him said that there were no problems with his blood pressure or his cardiac status. He died mysteriously later that night and was quietly buried without an autopsy. The public was not notified until two days after his death. . . . Less than two months earlier [another senior military officer] was rushed to a hospital in Europe with similar symptoms to S.B. Almost immediately, rumours spread that they were both poisoned . . . ."

Other reliable country of origin information before the member of the respondent with dates in 2005, 2006 and 2007 deal with arbitrary arrests, detentions, serious abuse and torture of individuals suspected of holding certain political affiliations by the police, security services and the military and of arbitrary and unlawful deprivation of life regardless of rank or status. In a UNHCR country of origin report dated the 28th - 29th June, 2002, it is stated that one can bribe one's way out of detention centres and prisons but that the possibility of so doing in many cases depended on the question of security risks. "For a high category prisoner it may be lot more difficult to buy his way out of prison". The report concludes that generally speaking it is possible to bribe one's way out of custody including in some cases, military custody. The report noted that it was possible to escape from a military detention centre after a riot or a fight with the guards or by having friends who were highly placed within the ministry and who might help a prisoner to escape.

All of this country of origin information was before the member of the respondent and I find that the applicant has not advanced substantial grounds for claiming that despite the assertion to the contrary in his decision, the member of the respondent failed to have regard to this information or had only selective or insufficient regard to it. As part of her story the applicant had claimed that an autopsy had been carried out on S.B. The author of this book or report dated the 13th February, 2007, and therefore published before the applicant had arrived in this State, states the contrary. The member of the respondent did no more than take this into consideration as part of the process of determining whether the applicant was to be considered personally credible: an essential task where her story is not supported by any form of supporting material either physical or documentary. In my judgment the member of the respondent was entitled to have regard to this matter in the proper discharge of the function vested in him by the Legislature of analysing the material, finding facts, drawing inferences and determining what weight, if any, to give to the various strands of the applicant's narrative. It is expressly provided by s. 11A(3) of the Refugee Act 1996 (as amended), that on an appeal from a recommendation of the Refugee Applications Commissioner to the Refugee Appeals Tribunal it is for the applicant to show that he or she is a refugee.

I am satisfied that the applicant has not shown substantial grounds for contending that all or any of the several reasons advanced by the member of the respondent for concluding that the applicant was not personally believable amounted to no more than mere speculation on his part.

It has been judicially noticed that "speculation" is a word of very indefinite meaning. However, it seems clear that what the applicant means by it in the present case is that the member of the respondent formed a theory or arrived at a conclusion on mere conjecture. The only material before the member of the respondent in the instant case was the applicant's own account of events and certain country of origin information. In deciding whether it is possible that a particular event might have occurred, or an alleged person might have held a particular belief, or an alleged situation might have existed, or an alleged person might have acted in a particular way, the member of the respondent as the trier of fact, guided by the provisions of s. 11 of the Refugee Act 1996 (as amended), Regulation 5 of the European Communities (Eligibility for Protection) Regulations 2006 and, Part II of the U.N.H.C.R. Handbook on Procedures and Criteria for Determining Refugee Status, had to rely on his own knowledge and life experience and the application of ordinary common sense to guide him in deciding what conclusions were or were not justified on the material before him. This is an essential part of the task allocated by the Legislature to the member of the respondent (See *M.E. v. Refugee Appeals Tribunal and Others* [2008] I.E.H.C. 192, per. Birmingham J. citing *Da Silveria v. Refugee Appeals Tribunal* [2004] I.E.H.C. 436 per. Peart J.). The member of respondent, in the instant case also averted to a number of aspects of the applicant's account, which I have already set out in this judgment, which he considered relevant to assessing her credibility and, which he considered to be extraordinary and inherently improbable. I am quite satisfied that this was not speculation on the part of the member of the respondent. I adopt, as relevant in the instant case also the following statement by Birmingham J. in *M.E. v Refugee Appeals Tribunal and Others* (above cited):-

> "I am forced to conclude that in complaining that the decision was based on conjecture, what the applicant is really saying is that the Tribunal Member should not have reached the view that she did. While the Tribunal Member may have arrived at conclusions that are unwelcome to the applicant, this is not a court of appeal. In the light of the foregoing, I am satisfied that the conclusions reached by the Tribunal Member were ones which were open to her, and in the circumstances I am bound to refuse leave."

I am not satisfied that the applicant has shown substantial grounds for contending that the member of the respondent failed properly to consider or to weigh the evidence by failing to address the applicant's evidence in the context of the country of origin information available to him. It is claimed that the applicant's story is entirely consistent with this country of origin information. I am satisfied that there is compelling evidence on the face of the decision of the member of the respondent that he did have proper regard to the country of origin information in reaching his conclusion with regard to the personal credibility of the applicant. In his decision the member of the respondent expressly refers to the provisions of s. 16(16)(d) and (e) of the Refugee Act 1996 (as amended) and the provisions of Regulation 5(1) of the European Communities (Eligibility for Protection) Regulations 2006. In the course of his decision the member of the respondent accepts the necessity to examine the credibility of the applicant's account both subjectively and, if necessary, objectively having regard to country of origin information. The member of the respondent expressly notes that some statements made by the applicant with respect to A.M. and S.B. "are reflected in the country of origin [information] and are therefore in the common domain". The member of the respondent in his decision expressly states that, "the Tribunal has taken into account the individual facts in the instant Appeal and in addition the most up to date country of origin information relevant thereto, as it is required to". In stating his conclusions the member of the respondent expressly states that, "the Tribunal has considered all relevant documents in connection with this appeal including, . . . country of origin information . . .". In addition, most of the "problematic inconsistencies" identified by the member of the respondent in his decision as undermining the credibility of the applicant and thus, the "legitimacy of her claim", are matters entirely independent of, or very little influenced by country of origin issues.

The member of the respondent correctly found that it was the cumulative effect of the inconsistencies identified by him in his decision which rendered the applicant unreliable as a narrator. I am satisfied that it was reasonably and rationally open to the member of the respondent to reach the conclusion which he did as to the applicant's lack of credibility and that he did so in the correct manner (See *Imafu v. Minister for Justice, Equality and Law Reform* [2005] I.E.H.C. 182, *Kikumbi v. Refugee Applications Commissioner* [2007] I.E.H.C. 11 and, *I.R. v. Minister for Justice, Equality and Law Reform* [2009] I.E.H.C. 353). In these circumstances it would be a pointless and totally meaningless exercise for the member of the respondent to have gone on to consider whether the applicant's story generally could possibly be true having regard to the available country of origin information.

The court will therefore refuse leave to seek judicial review.