

THE HIGH COURT

JUDICIAL REVIEW

[2006 No. 291 J.R.]

BETWEEN

M.K.

APPLICANT

AND

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

RESPONDANTS

Judgment of Ms. Justice Clark delivered on the 30th day of November, 2007.

1. This is an application for an order to extend the time within which to bring an application for judicial review pursuant to s.5(2)(a) of the Illegal Immigrants(Trafficking) Act, 2000 and for leave to quash the decision of the Refugee Appeals Tribunal which was notified to the applicant on the 31st January, 2006. The time for bringing such an application expired on the 13th February, 2006. These proceedings were issued on the 10th March, 2006.

Section 5(2) of the Act of 2000, provides:-

"5(2) An application for leave to apply for judicial review under the Order in respect of any of the matters referred to in subsection (1) shall –

(a) be made within the period of 14 days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the Order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and

(b) be made by motion on notice (grounded in the manner specified in the Order in respect of an ex parte motion for leave) to the Minister and any other person specified for that purpose by order of the High Court, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed."

2. It has been determined by the Supreme Court in *G.K. v. Minister for Justice* [2002] 2 I.R. 418 and *C.S. v. Minister for Justice* [2005] 1 I.R. 343, as had earlier been held by the High Court in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561, that when deciding such an application to extend time, some consideration of the merits of the arguments proposed to be advanced is appropriate to the court's decision. The applicant must have an arguable case before the application to extend time will be considered.

3. What constitutes an arguable case has been defined in *G. v. DPP* [1994] 1 I.R. 374 by Finlay C.J. as where:-

"(b) the facts averred in the affidavit will be sufficient, if proved to support a stateable ground for the form of the relief sought and

(c) on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.

4. This Court has therefore conducted an overall examination of the facts to determine the strength of the applicant's case for such extension of time and finds that the applicant does not have an arguable case in law for judicial review and therefore the determination of the extension of time is unnecessary.

5. To see this decision in context it is necessary to outline some of the facts which preceded this application as the case was determined on the issue of credibility. M.K, the applicant, sought asylum in the State on the 4th May, 2005, on the basis that he was persecuted as a member of the Berti tribe living in the village of Armo, in the western Darfur area of Sudan. In his application form, which was completed in Arabic and translated into English, he claimed that he was born on the 15th June, 1984, that he was recently married to a wife who was seventeen years old, had no children and was a shepherd by occupation. He claimed that he left Sudan on the 18th March, 2005, having paid seven million shillings to an agent. He arrived in Dublin Port on the 3rd May, 2005. His stated reason for seeking asylum was race.

6. In his later narrative in the questionnaire provided by the Office of the Refugee Applications Commissioner (ORAC) he described persecution at the hands of the Janjaweed militia who captured him and kept him as a slave for approximately six weeks. He described how during a period of intense gunfire people were running towards the noise and he noticed that the officer who had maltreated him was not around so he escaped and returned to his village. He said that two weeks later, on the 17th March, 2005, his village was attacked and burnt out by the Janjaweed. His brother and sister were killed in the attack. He lost all his belongings including his birth certificate. He then decided to escape to a safe place outside Sudan through Port Sudan.

7. This later form at para. 26(a) contains the questions which are set out below together with the applicant's answers:-

"Have you ever moved to a different town or village or to another part of your country to avoid the persecution you fear?

Answer: no

Q. if no, please explain why not

Answer - I come from a tribe of African origin, and so it is not easy to live among the Arab tribes. There is no security in Sudan.

Q. 39. What travel arrangements did you make and how did you make them? Did you have to pay anyone and how much did you pay?

Answer: I went to Port Sudan and met a fellow called Anwar Mohamed Adroub and paid him 700,000 Sudanese dinar."

8. At his interview before a member of the ORAC more details were provided. He said that he had lived all his life in the village of Armo, in western Darfur with his family of two sisters and four brothers and his parents. He described Armo as a big village of 1,000 to 1,300 people. He said that he was unaware of his family or his wife's current whereabouts. He said that he attended school up to third class in primary school in El Geneina. He named some of the villages around Armo and described Armo as being two hours from Thalinja by car and four hours by car from Nyala. He described the location of his village as being southeast of Nyala. He also described his people as being involved in crop trading and cattle trading, some of them farm and some of them are shepherds. He described how he was attending to his sheep when armed men appeared from nowhere. They took his personal belongings and food and started beating him while the others took his sheep. He was blindfolded and taken to a military camp where he was put in a room by himself. He was further beaten and asked questions and accused of assisting the rebels. He was kept in the room for a week and thereafter he was required to clean large parts of the camp. He was taken out in the morning and returned in the evening. One evening he heard gunshots around the camp, a commotion. He stated:-

"We all went out to see what was going on. There were no guards and it was my chance. I dashed out and ran away amidst the commotion and went back to the village of Armo."

He said that did not see any other prisoners there during the six week period of his detention. Everyone was wearing green uniforms but he did not know to which military grouping they belonged. His jobs consisted mainly of cleaning floors and washing clothes. He described how he was taken to the camp blindfolded so he did not know where it was located and said he was able to find his way back to his own village because as a shepherd he knew the area very well. When he walked for a while he started to see some landmarks that he identified. He then described an attack on his village where it was totally burnt down and many people were killed including his brother and sister and his home was destroyed. He described that in the middle of the chaos he saw a lorry moving out of the village and he jumped onto the lorry which took him to a neighbourhood in the city of Thalinja. He said that the lorry was owned by his father, a fact which he had not known when he jumped on it. In fact his father was the lorry driver and he took him to a friend of his and advised that he should go to a safer area because his village was no longer safe. His father's friend knew someone who traded in cattle from a different area and he said that he would take him to a safer place for a certain amount of money. His father paid the money; he was put in a lorry with sheep and other people. The lorry journey took about six days. They took him to an area called Port Sudan. He paid 700,000 dinar for the journey.

9. When asked how he did not know that the lorry was owned by his father he answered:-

"I was just looking for something to grab. It was spur of the moment. I couldn't identify anything at that moment. It was like someone drowning and someone throws a rescue tube."

He said that there were a few other people in the lorry. When asked why his father did not bring any of his family with him in the lorry. He answered:-

"in a moment like this when death is hovering over you loose focus you just want to get out".

When asked what do you think would happen if you returned to Sudan he answered:-

"everything bad would happen to me anything related to death, persecution and anything nasty."

10. The process by which a person is declared to be a refugee is determined by statute. Following a request for asylum to the immigration authorities or to the Minister for Justice, the applicant is required to fill in a number of standard application forms. The purpose of these forms and the interview which follows some time later is to recognise and protect those applicants who, under the Refugee Convention, have an objective fear of persecution in their home country and cannot be relocated to another safe part of that country. It is also a process for filtering out genuine refugees entitled to protection and asylum from those who seek to enter the country for economic or other reasons and who utilise the system illegally to enable them to stay.

11. The asylum process is designed to be user friendly and forms are available in several languages. There are guidelines for the completion of the questionnaire and the applicant is directed towards the assistance of professional legal advisors in the Refugee Legal Service where a free phone number is provided together with an information leaflet which includes details on legal advice. The applicant is reminded that:-

"It is important that you answer all the questions in the questionnaire truthfully."

The applicant is also reminded that the information provided in the application form will form the basis of the investigation at the interview. The applicant is reminded:

"That false or misleading information or withholding information at this stage may affect your credibility and disadvantage your claim."

12. The applicant is told in a form described as "Information regarding your interview for refugee status" that:-

"You have applied for a declaration as a refugee in this State and have provided this office with information. The purpose of this interview is to investigate the full details of the claim from the information already provided. This will require detailed questioning in relation to the issues raised by you in your questionnaire and any other matters which the interviewer considers relevant. You should seek clarification from the interviewer of any question put to you that you do not understand. You should explain clearly and precisely your fears and provide all the information and details relevant to your particular circumstances. The interview is your opportunity to explain in detail why you fear returning to your country of origin."

Mustapha Khaled signed that document. He was interviewed on the 8th September, 2005, by Ms. Julie Bell of the ORAC. An interpreter in Arabic was present during the interview assisting the applicant.

13. Interviews follow a predetermined format where questions are put arising from the applicant's answers to the pre-printed application questionnaire. In pursuance of her statutory obligation to investigate the applicant's claim that he is a victim of persecution, the interviewer seeks to elucidate further information in relation to where the applicant went to school, where the applicant grew up, the name of the town in which he lives and the relationship of that town or village to other known centres. The interview by an officer attached to the Refugee Applications Commission is designed to establish the *bona fides* of the applicant and to assist a traumatised displaced person in recounting his story. Credibility is a very important part of this assessment especially as

with the absence of documents, it is frequently the only way to evaluate the genuineness of what is asserted.

15. In reviewing the notes of Ms. Bell's interview it is obvious that she had some knowledge of the geography of the western Darfur area. She raised specific basic questions in relation to the size of the village of Armo and its location relative to other villages and towns in the area. She sought to establish where Armo was and posed questions about whether for example it had a hospital and where the nearest hospital was located and whether there were rivers or mountains nearby. She asked how far the large town of Nyala was from the village and the direction in which Armo village was to be found in relation to Nyala or Thalinja, the town described by the applicant as having the nearest hospital. The applicant was asked questions in relation to s.11B of the Refugee Act, 1996, as inserted by s.7 of the Immigration Act, 2003, and in particular about his flight from Darfur and his journey to and arrival in this state and other core credibility issues.

16. As the ORAC is a statutory body, I believe that it can be safely assumed that the interviewer will have available to him/her a map of the region which is stated to be the former home country of the applicant and where the applicant has suffered the alleged persecution. I believe that I am entitled to assume expertise in asylum and immigration in the statutory office of the Refugee Applications Commissioner whose interviewers have developed some working knowledge of the areas of conflict from where refugee applicants originate.

17. On the basis of the responses given during the interview, the recommendation was that the applicant should not be declared a refugee. In the S13(1) Refugee Act, 1996 report the writer states:

"To examine the well foundedness of this claim it is necessary to detail the applicant's personal situation which allegedly places him in harms way, and to examine the credibility of his account with reference to relevant country of origin information. Given that the refugee process is a forward looking one, it is necessary to examine if the applicant would be likely to face persecution if he were to return to Sudan.the core of the applicant's case is his alleged ill treatment by the Janjaweed militia which are supported by the Sudanese government. The applicant's testimony in relation to his alleged abduction and ill treatment is vague and appears implausible and lacking in credibility....."

He states while attending to his sheep a group of armed Janjaweed appeared from nowhere and attacked him. He states that he was blindfolded and brought to a camp where he was held against his will. He describes the camp as a school like building surrounded by tents. He was kept in solitary confinement for a week and after that he was let out on a daily basis and forced to clean the camp."

18. The decision recites the attack by the Janjaweed while attending to his sheep, that he was blindfolded and brought to a camp where he was held against his will, where he was kept in solitary confinement for a week and after that he was let out on a daily basis and forced to clean the camp. It further recites that the applicant was unable to state where the camp was or how far it was from his village. He was unable to state whether there were any other prisoners in the camp and his responses to these questions seemed vague and brought into question the credibility of his claim. It was also stated that his testimony in relation to his escape was vague and when asked how he made his way home on foot from a camp whose location he did not know he said that as a shepherd he knew the area very well and this was found to contradict the assertions that he did not know how far the camp was from his village. The report goes on to make many findings which are described as "*not credible or not plausible*".

19. While it is not appropriate for me to impose or substitute my view or knowledge for that of the interviewer, I nevertheless note that the applicant answered that his village was four hours from Nyala and in the south eastern direction of that town. It is difficult not to observe that Nyala is not in Western Darfur but is the capital of South Darfur and is a very considerable distance from El Geneina where the applicant said he went to school for three years. It is also understandable that the fluent written Arabic used by the applicant in filling in his questionnaire was deemed unusual by the interviewer for a person having only three years formal education.

20. Mr. Khaled appealed this decision on numerous grounds both factual and legal. He was represented by the Refugee Legal Service at the oral hearing which took place on 8th December, 2005. The Tribunal member informed the applicant at the commencement of the hearing that the overriding concern was to ascertain as much information concerning the flight from the country of origin and the inability to return. The applicant was also told that if his credibility fell to be determined, the Tribunal would have regard inter alia, to the provisions of s.11B of the 1996 Act. Submissions were heard from the applicant, and the presenting officer highlighted the unusual aspect of the applicant's travel arrangements to Ireland and resubmitted the s.13 Commissioner's report which outlined that he alleged that he arrived in the state through Dublin Port but was unable to explain how he entered without identity documents. He also alleged that he changed ships at sea having first boarded a vessel at Port Sudan. Having been alerted that flight, inability to return and credibility were the main issues his appeal commenced. The appellant was subsequently allowed an opportunity to furnish further country of origin information especially on the Berti tribe.

21. The decision of the Refugee Appeals Tribunal member was based on the evidence adduced at the oral hearing, the application forms and the written record of the interview of the 8th September, 2005, the further country of origin information, the s. 13 report of the Commissioner and the notice of appeal.

22. The appeal failed. The decision of the Refugee Appeals Tribunal indicates that the Tribunal member did not accept the basic credibility of the applicant. He noted that the applicant had furnished country of origin information which was fairly minimal and related to an extract from a learned tome on the tribes of Africa containing a small entry on the Berti tribe together with some information from the legal research department of the Refugee Legal Service to the effect that they were unable to locate the village of Armo on any map. The research documents furnished indicated that the Berti tribe were fairly scattered and living in villages of no more than 100 members, though the applicant alleged that his village had a population of between 1,000 and 1,300 people.

23. In reviewing the reasoned decision of the Refugee Appeals Tribunal it is clear that the finding that the applicant was not credible was supported by evidence. The Tribunal member who had the advantage of hearing and seeing the applicant, outlined several reasons for finding him not to be credible. He found it difficult to believe that a young man would have fled his village and left the country without first checking up on other members of his family and especially his young wife. He found it difficult to believe that the applicant would not have waited in another part of Sudan to check up on his family. He did not find the description of his return to his village after his alleged first capture by the Janjaweed credible. In this context he said that there was no reason to suggest that he could not have escaped persecution from the Janjaweed in Thalinja or in Port Sudan as country of origin information indicates that persecution arises in remoter parts of Darfur, particularly in western Darfur. It is clear that the applicant was not found to be a credible person in relation to his described experiences and his escape across Sudan or arrival in the state by ship without papers.

24. The applicant wishes to judicially review this decision on the discrete ground that the Tribunal member erred in law in holding that

the applicant, as a member of the Berti tribe, could have escaped persecution if he relocated to Thalinja or Port Sudan, two of the towns through which he said he travelled when leaving his village. It was argued that there was no evidence before the Tribunal that those towns were safe for a member of the Berti tribe and that the possibility of relocation in either of these towns was never put to the applicant at his appeal on oral hearing. It was asserted that the Tribunal member had therefore engaged in conjecture in arriving at this conclusion. It was an alternative argument that in any event, internal relocation could not be a legitimate alternative to refugee status as the people of Darfur are persecuted by State agents and the whole country would therefore be unsafe for them. It was urged that this finding was irrational and in breach of UNHCR guidelines on relocation and that an order quashing the appeal decision should be made. The guidelines which were opened to me, recommend an assessment of the safety of the suggested relocation site before refusing refugee status.

25. These are the arguments advanced for judicial review and the background in which the applicant seeks to extend time. The delay is a period of 24 days. The reason offered for the delay was that following the adverse decision of the Refugee Appeals Tribunal, the Refugee Legal Service was unable to provide any further assistance and notified Mr. Khaled that it was open to him to seek advices of a private practitioner. He averred that on receipt of the decision he was "*determined to challenge it in any way possible*". Because of his particular living conditions as an asylum seeker it took some time to obtain the name of a solicitor and to receive his file from the Refugee Legal Service and then to obtain an opinion from counsel and that this delay caused him to be out of time.

26. In response Ms. McGrath for the respondents argued that the time for bringing judicial review expired on or about 13th February, 2006. She said that the basic delay was because the applicant engaged in opinion shopping after the Refugee Legal Service had indicated that they were unable to assist further. On the substantive argument she argued that the applicant has seized on a minor aspect of the Refugee Appeals Tribunal decision on relocation and has tried to build a case of unfairness from this part of the decision.

27. Both parties agreed that C.S. was the standard case on extension of time. I was also referred to the decision of the Supreme Court in *Re. Article 26 and the Illegal (Trafficking) Bill* [2000] 2 I.R. 360 and the arguments accepted by the Court relating to the special difficulties which non-nationals may be presented with in accessing the courts and which would be recognised and remedied by the residual discretion of the court to extend the time to apply for leave where the applicant shows 'good and sufficient reason'.

28. The question of extension of time was again considered by the Supreme Court in *S. v. Minister for Justice Equality and Law Reform* [2002] 2 I.R. 163. In that case the Court held, in allowing the appeal and extending time, that the stringent time limit in s.5 of the 2000 Act was balanced by the court's discretion to extend time where there was good and sufficient reason, such good and sufficient reason to include the merits of the case.

29. As the applicant did provide special reasons for the delay in accessing a solicitor, these reasons could perhaps warrant exercising discretion in favour of an extension of time but only if the applicant had demonstrated an arguable case. He has been unable to present even prima facie arguable grounds for impugning the decision of the Refugee Appeals Tribunal as the question of lack of credibility blights all other aspects of the case.

30. There was no transcript of the appeal or even a solicitor's note of evidence furnished. It has been necessary therefore to rely on the contents of the appeal file, the appeal decision and the applicant's affidavit to determine what happened at the oral appeal. I have fully and carefully considered the process of the appeal and all the documents furnished. It could not be said that the applicant failed in his appeal because the tribunal member based his decision on the failure of the applicant to relocate within Sudan although specific information was given to the applicant and his representative at the commencement of the hearing that the main issues to be addressed were flight, inability to return and credibility. The appeal decision was based on obvious discrepancies in the applicant's description of his origins and his flight. It is difficult to ignore the finding of lack of credibility in the applicant's narrative, especially in relation to his flight from his village and the journey to Port Sudan and thereafter I cannot find any failure or defect in the process nor can I find that the process failed to operate under the rules of fairness and justice. It seems to me that the evidence, taken as a whole was reasonably capable of supporting the finding that the applicant was not credible when he asserted that he was a victim of persecution.

31. Country of origin information furnished indicates that the main victims of the Janjaweed and other government sponsored persecution are the larger tribes living in the Darfur region but that there have been reports of smaller tribes, including the Berti being targeted with the geographic broadening of the conflict. There was no country of origin information supporting the contention made by the applicant that as a member of the Berti tribe, he would be persecuted by Arabs anywhere in Sudan.

32. The Tribunal member's decision was not that the applicant should have availed of relocation but rather that he had not established persecution. While the expression of the Tribunal member's opinion relating to relocation could be mildly criticised as this aspect of the case was minimally canvassed at his initial interview, the expression of opinion should be seen in the context of the overall facts of this particular case where the applicant stated that he as a member of the Berti tribe and therefore a black, as opposed to an Arab Sudanese, would be persecuted no matter what part of Sudan he lived in. While it is true that there was no country of origin information to support an opinion on relocation, it is important to note that this opinion was not in any way determinative of the ultimate decision to refuse asylum status and where many reasons were outlined in the original Commissioner's decision and then on appeal by the Refugee Appeals Tribunal. I am satisfied that the core decision was a finding that the applicant was not credible in his assertion that he was a victim of persecution by the Janjaweed. In those circumstances, the opinion or comment that he could have escaped persecution by moving to Thalinja or Port Sudan was irrelevant and had no bearing on the decision. Unfortunately, the applicant was found not credible on more basic grounds and the application for an extension of time to seek leave to bring judicial review fails.