THE HIGH COURT

2006 No. 1015 J.R

BETWEEN

E. L.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND REFUGEE APPLICATIONS COMMISSIONER

RESPONDENTS

Judgment delivered by Mr. Justice Bryan McMahon the 31st day of July, 2008

1. The applicant seeks leave to bring judicial review proceedings seeking various orders and declarations including an order of *certiorari* to quash the decision/recommendation of the second respondent dated 19th/20th July, 2006 that the applicant failed to establish a well founded fear of persecution as defined under s. 2 of the Refugee Act 1996 (as amended). The applicant, it is to be noted, has also appealed on a without prejudice basis the above aforementioned decision/recommendation which stands suspended pending the outcome of this application.

2. If the appeal is availed of, the applicant will have a right to a full oral hearing where all the issues can be revisited. It is also significant to note that in the present case the applicant has brought earlier judicial review proceedings to seek leave to challenge the decision of an earlier Refugee Applications Commissioner (RAC) which challenge was settled by consent between the parties on the 24th April, 2006. That settlement provides at para. 3 that:-

> "The applicant to be notified of the date and time of a further interview which will be conducted by an authorised officer other than the officer who conducted the original interview. Both of the authorised officers involved in the original investigation will be precluded from involvement in the reactivated investigation."

3. I am satisfied that in coming to this settlement it was envisaged by the parties that the interview notes of the first interview and the opinion and recommendation of the RAC on that occasion were to be available to the subsequent decision makers and that reliance could be placed on the totality of the evidence gathered in both the first interview and the second interview that followed the settlement. The decision and the recommendation of the RAC, made on the 19th/20th July, 2006, was by virtue of the settlement terms entitled to rely on the answers provided by the applicant at both interviews.

4. The applicant, a national of Libya, sought asylum in Ireland in or around the 18th July, 2005.

The Background

5. The applicant stated that he lived in Tripoli with his parents and siblings since he was born. He stated that he attended university from 1997 until 2001 graduating with a BA in Accounting and that he worked in his parents shop after he completed university.

6. According to the applicant he had been a member of the National Front for the Salvation of Libya (NFSL) since he started university and he continued his involvement after he completed his studies.

7. He stated that he was an ordinary member of this party and that he distributed leaflets against the regime.

8. The applicant claimed that he had visited Malta on a number of occasions over the years and met party officials there, including the assistant to the party leader.

9. He stated that during these meetings he was given information on how to deal with people when he was giving out anti-Government leaflets.

10. The applicant stated that in 2000 he obtained a tourist visa from the British embassy in Malta and travelled to the United Kingdom spending three months there before returning to Libya.

11. He stated that in January, 2003 his uncle and a neighbour, who were also members of the NFSL, were arrested and detained in custody by the Libyan authorities.

12. He stated that his parents were fearful that under pressure of questioning they would be forced to give names of other party members, including his own, to the authorities and it was decided that he should leave the country.

13. The applicant claimed that he discovered a year and a half ago that his uncle and the neighbour – who have subsequently been released from prison had given his name to the authorities during questioning.

14. The applicant stated that he travelled to the United Kingdom in February, 2003, having firstly obtained a student visa. He stated that the visa was originally valid for four months but it was subsequently extended in the United Kingdom for a further three months.

15. The applicant stated that he did not apply for a further extension of his visa when it expired on the 27th September, 2003 as he was thinking of leaving the United Kingdom and coming to Ireland.

16. The applicant stated that he decided to leave the United Kingdom and come to Ireland because of the improved relationship between Libya and the United Kingdom.

17. The applicant stated that he lived illegally in the United Kingdom from September, 2003 until he left and travelled to Ireland on the 20th April, 2004.

18. He stated that after his arrival in Ireland he stayed with two friends whilst studying English at home.

19. He stated that while in Ireland his family would sometimes send him money and other Libyans would also help him out.

20. He stated that he did not apply for asylum in Ireland during this time as he was advised by a friend that there were members of the Libyan Government spying on Libyans in Ireland.

21. The applicant stated that on the 1st July, 2005, he was stopped and asked for identification by a member of An Garda Síochána.

22. The applicant subsequently claimed asylum in Ireland on the 18th July, 2005 having been detained in custody for a week.

23. The authorised officers based their decision on the lack of credibility of the applicant's testimony. In doing so they drew attention to the fact that much of the information provided by the applicant was inherently subjective in nature. They accepted the guidelines provided in the United Nations High Commissioner for Refugees (UNHCR) "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees" which states that in assessing an applicant's claim it is often necessary to apply the benefit of the doubt to those elements of claim which are not susceptible of proof. (See para. 203 of the UNHCR Handbook.) The authorised officers, however, drew attention to para. 204 of the same document which adds the proviso that the benefit of the doubt should only be given when available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. In this regard the applicant's statement must be coherent and plausible, and must not run counter to generally known facts. The authorised officers then went on to assess the applicant's overall credibility in light of his answers at interview and in light of the relevant country of origin information available.

24. The authorised officers relied on six independent and separate sources for its background information on the country of origin in question, Libya. Authorised officers then identified several areas where it was not satisfied with the applicant's version of events and concluded that they could not rely on his general credibility.

25. To succeed in a case for leave the applicant must show that there are substantial grounds for granting the application

26. The main grounds of dissatisfaction identified by the applicant can be summarised as follows:-

> 1. There is a lack of basis for the recommendation by the RAC.
>
> 2. The RAC applied an incorrect legal test, arguing in particular that a finding of lack of credibility did not mean that the RAC was excused from considering as a separate question whether the applicant was a refugee within the meaning of s. 2 of the 1996 Act.
>
> 3. The RAC failed to apply a forward looking test in assessing a central element of refugee status i.e. whether the applicant is likely to face persecution if he returned to his country of origin, and if so, is State protection available?
>
> 4. The want of fair procedures.
>
> 5. Insufficient or no consideration given to the applicant's explanation for failing to seek asylum in the United Kingdom when he had an opportunity to do so before coming to Ireland in April, 2004.
>
> 6. The RAC failed to have regard and take into account matters which he is statutorily obliged to take into account by virtue of s. 11B of the Refugee Act 1996 as inserted by s.7 of the Immigration Act 2003.

27. I will now examine each of these arguments in greater detail.

1. Absence of Analysis and Basis for Recommendation
28. The applicant argues that the RAC made no rational analysis and relied on a "gut feeling" in reaching the conclusion that the applicant was not credible.

29. The first reason that the RAC gave for doubting the credibility of the applicant was that the applicant showed little knowledge of the political party of which he was an active member for over six years distributing leaflets and meeting with representatives from the United States in Malta on a couple of occasions. The RAC, in these circumstances, found it surprising and non-credible that the applicant was not familiar with the names of the leaders of the party or the founders of the party. The answer which he gave to the RAC did not correspond with the information in the country of origin sources. The RAC considered the applicant's excuse in this regard i.e. that the party matters were shrouded in secrecy, but rejected this explanation. At para. 4.4.1 the RAC makes the following statement:-

> "When the applicant was asked if he could name as many members of the party leadership as he knew he was unable to name any, stating that he wouldn't know that as he didn't deal with the leadership and as these matters are conducted in public(sic) he wouldn't be aware of the names of these people."

30. The RAC's conclusion was:-

> "The applicant's lack of knowledge in this regard raises serious credibility issues."

31. It is clear that much of the relevant information was in fact in the public domain and the NFSL party had a website and a newsletter and that the names of the leaders were published. For this reason I do not accept the applicant's argument that no reasons were given for the RAC's finding. I find that there were sufficient reasons identified by the authorities that might well justify the conclusions arrived at in the circumstances.

32. Again, when asked about the penalties that he might expect if it was discovered that he was a member of the political party in question, the RAC was not impressed with the answer furnished by the applicant who referred only to imprisonment as a possible penalty and did not specifically refer to the fact that he might be liable for the death penalty. This matter was clearly flagged by the RAC in its interview. At the interview in this connection it is true to say that the applicant did make reference to the fact that he might be killed and there was also some country of origin information which although acknowledging that the death penalty was available clearly further acknowledged that it had fallen into disuse in recent times. Nevertheless, looking at the answers of the applicant in relation to the questions raised in this regard, one could appreciate the general conclusion reached by the RAC in this matter.

33. The applicant's counsel also argues that the RAC should have indicated more clearly to the applicant that he had some reservations and doubts about the answers he was being given. In my view the RAC does not always have to specifically warn the applicant in explicit terms that he or she is in doubt in relation to the answers if the RAC, by repeating the questions, clearly signifies that he is entertaining doubt as to the veracity of the answers. This will be sufficient. In this connection, the RAC posed four questions relating to the death penalty to the applicant and in the second interview alone put seven questions in relation to the

leadership of the party to the applicant. There was a further six questions at the second interview relating to the party activities and in relation to his failure to seek asylum in the United Kingdom. A total of fourteen questions were put to the applicant in relation to the account the applicant gave of meeting another party member from the United States of America in Malta. This extensive questioning in my view is sufficient to signal to the applicant that the RAC is entertaining some doubts as to the version of events being offered by the applicant. There is no need to spell it out further. The RAC's doubts were further reinforced by the applicant's account of a meeting or meetings held with higher ranking members of the party from the United States in Malta on a couple of occasions. The applicant stated that he met these visitors with another member of the party on these occasions. The RAC was again sceptical that high ranking members of the party from the United States would travel to meet low level members in Malta for such meetings. They also entertained doubts as to how the applicant, although a member of the party from 1997 until 2003 when he went to the United Kingdom, and who was travelling in and out of Libya on a more or less regular basis, did not come to the attention of the authorities in all that time especially given the vigilance of the authorities in Libya at that time for political dissidents. There is no doubt that the RAC in their report clearly adverted to the applicant's answers and gave reasons for discounting his explanations, before expressing their conclusion.

34. Finally, the RAC thought it was strange, to say the least, that the applicant had not sought asylum in the United Kingdom when he arrived there in 2003 if the situation was as bad as the country of origin information suggested. It was explained to the court that the applicant's fear of persecution only became real in early 2005 when he learned that his uncle and neighbour might have been tortured into giving his name to the authorities. If this is true it might be a reason for failing to apply before that date while he resided in the United Kingdom, but it does not explain why he didn't seek asylum earlier in Ireland. It will be recalled that he came to Ireland in April, 2004 and had not applied for asylum when he was detained in July, 2005 and eventually did so only on the 18th July, 2005, as it was made a condition for his release. If the RAC erred in this finding it was not a serious error in the circumstances and is one that can be easily addressed in appeal. The substance of the finding, however, still stands: he did not apply for asylum in this country for six months after he knew that his uncle and neighbour had been arrested and he did so only when he was obliged to do so to secure his release from detention in this country. In any event there is evidence from the country of origin sources that being a member of the political party itself must have represented a serious risk for the applicant, sufficient to justify an application for asylum, if he really feared for his safety. There are grounds for reaching the conclusion they did on these matters.

2. Application of the Incorrect Legal Test

35. Counsel for the applicant also argues that just because the RAC found that the applicant was not credible should not be the end of the enquiry. Even in such a case the RAC was still obliged to address the question as to whether the applicant was a refugee. A lack of credibility finding does not automatically determine the latter question. In theory this may be so, but as a practical matter in many cases such a finding on credibility will determine the refugee question also. In the present case the RAC did not believe the applicant's story for several reasons. Some of the RAC's doubts related to the applicant's alleged fear of persecution if he returned home. In rejecting the applicant's version of events on this issue on credibility grounds, it follows that an essential element of refugee status is absent, and that the applicant cannot in this case be a refugee for that reason.

36. The applicant's argument might have more appeal if the lack of credibility finding did not relate to an essential element in the definition of what is a refugee (see *Da Silveira v. Refugee Appeals Tribunal & Ors*, (Unreported, High Court, Peart J., 9th July, 2004)). If, for example, the RAC did not believe the applicant's account of where he lived in this country since his arrival, the Commissioner would still have to separately address the question as to whether he might still be a refugee. This, however, is not the case here.

37. That the RAC did not lose sight of this is clear from para. 2 of their report where they set out the "legal basis for assessment" quoting the definition of a refugee as given in s. 2 of the Refugee Act 1996. Paragraph 4 of the report is headed "well founded fear" and it is clear also from this that the detailed examination carried out under this heading, while focusing on credibility was doing so in the context of the applicant's claim that he had a well founded fear of persecution. Paragraph 4.5 concludes on this issue that the applicant "has not demonstrated that he has a well founded forward looking fear of persecution in Libya".

38. For this reason there is no application of an incorrect legal test in my view.

3. Failure to Apply a Forward Looking Test

39. Paragraph 4.4 of the RAC's report, as quoted above, clearly states that the RAC was concerned with a "forward looking fear of persecution".

40. It must also be acknowledged that when there has been a negative finding on credibility, such as we have in this case, the application of a forward looking test has little or no reality in most cases. In *Botan v. Refugee Appeals Tribunal & The Minister for Justice, Equality and Law Reform* (Unreported, High Court, 30th June, 2006) in a similar case to that before this court, Feeney J., having considered this kind of issue, stated:-

> "This is a case where the lack of credibility fundamentally infects the subjective element of an alleged well founded fear of persecution. It is against that background that the court rejects the grounds raised concerning a lack of consideration of country of origin information and the alleged failure to apply a forward looking test in determining whether the Applicant had a well founded fear of persecution in Iraq."

41. In taking this position Feeney J., also relied on *Imafu v. The Minister for Justice, Equality and Law Reform & Ors* (Unreported, High Court, 9th December, 2005) where Peart J. stated at p. 10 of his judgment:-

> "In my view, while accepting as a general proposition that the Horvath principle is a good one and in many if not most cases might be appropriate, it does not mean that there cannot be an exceptional type of case where the Tribunal Member can quite adequately and completely assess and reach a conclusion on the personal credibility of the applicant, such that there would be no possible benefit to be derived from seeing whether the applicant's story fits into a factual context in her country of origin."

42. I reject the applicant's argument under this heading for these reasons.

4. Want of Fair Procedures

43. Counsel for the applicant argues that the RAC, in the interviews it had with the applicant, did not adequately draw the applicant's attention to material being relied on and that the RAC did not sufficiently indicate to the applicant that it had doubts about some of his responses to enable the applicant to dispel these doubts.

44. Once more I refer to the extensive questioning over two interviews which the RAC engaged in on the issues which concerned the RAC on credibility. I have already referred to the number of questions put on the various matters where adverse findings were

ultimately made and I have drawn attention to how penetrating the probing was on these issues. When such an extensive questioning method is pursued, when many supplementary questions are posed after the initial answers, it must be clear to the person being questioned that the RAC is entertaining doubts about the answers being furnished. In such cases there is little need for the RAC to explicitly state "I am very doubtful about the answers being furnished to me". The context and the repetitive questioning will clearly indicate disquiet.

45. Similarly it will not be necessary for the RAC to put every piece of country of origin information to the applicant at such interviews in all cases.

46. There will, of course be cases where specific country of origin information may be very relevant to the particular matter at issue, and where an obligation will arise to draw the applicant's attention to it so that he is given an opportunity to respond to statements contained therein. This is not such a case, however, in my opinion. Counsel for the applicant here does not specifically identify any country of origin information that was utilised to the prejudice of the applicant. There is a general allegation in that regard and no more. I repeat that the applicant was on notice by the extensive questioning, in two separate interviews, of what the RAC's concerns were and had every opportunity to respond. In my view there was no breach of fair procedures.

47. Mr. Justice Birmingham in *Chukwuemeka v. Minister for Justice, Equality and Law Reform & Anor* (High Court, extempore judgment, 7th October, 2007) commenting on the interviewer in that case stated that:-

> "[He] conducted a detailed interview and, while not spelling out every area where there were concerns in every detail, he probed the number of issues in the manner designed to communicate that he had concerns in relation to credibility."

48. He added that the:-

> "Recommendations/decision goes well beyond [a] statement of lack of credibility, but instead sets out in some detail the areas which give rise to concern and ultimately form the building blocks that led to the conclusion that the applicant was not credible. Each of these buildings blocks on which the conclusions were reached is criticised by the applicant, but at their heart the criticism amounts to a complaint that the applicant does not like and disagrees with the conclusions of the ORAC."

49. In my opinion these words are apposite to our case and I have no hesitation in adopting them as applicable here.

5. That the applicant had not sought asylum while he resided in England

50. I have already adverted to this matter when dealing with the credibility issue. The applicant alleges that his real fear only arose when he learned that his uncle and his neighbour were arrested in January, 2005 and that there was no reason to apply for asylum in England before that date. The fact remains however that membership of the political party was a very dangerous activity which attracted a penalty of imprisonment and sometimes death. The authorities in Libya were vigilant at that time and the applicant must have feared that his travelling in and out of the country could well have attracted the attention of the authorities. Moreover, he was several months in Ireland after he learned of his uncle's and his neighbour's arrests and made no effort to apply for asylum in this country during that period. As has been seen he eventually applied for asylum in Ireland only after he had been arrested and released on condition that he make such an application. Again, the RAC had reason to believe that the applicant was not to be believed in these circumstances.

6. Section 11B of the Refugee Act 1996

51. The applicant argues that when considering the matter of credibility, the RAC should have regard to the thirteen specific factors listed in s. 11B of the Refugee Act 1996 (as inserted by s.7 of the Immigration Act 2003).

52. There is no doubt that the statute identifies these matters as being relevant factors when the credibility assessment is being made. But this does not mean that the RAC must address specifically each and every one of these factors as if he or she were ticking boxes in a checklist. Not all of these matters will be relevant to the determination to be made in every case. Clearly the decision maker is not obliged to say in such cases "I have considered section 11B(a) and do not consider it relevant in the present case", repeating the same word formula every time a matter is not relevant. One is entitled to assume that the decision maker knows the extent of his statutory obligation and abides by it. Many of the thirteen matters, in any event, will not apply to the facts of the case before the court and for this reason alone will not require to be specifically identified or addressed. For example, s. 11B(h) and (i) state that the decision maker should have regard to "(h) whether the applicant, without reasonable cause, has made an application following the notification of a proposal under section 3(3)(a) if the Immigration Act 1999 [to deport]"; and "(j) whether the applicant has, with reasonable cause, failed to comply with the requirements of section 9(4) (a) [left or attempted to leave the State without the consent of the Minister]." There was no question of either of these applying in the present case and in my view it will be wholly unnecessary for the decision maker to advert to them by saying "in assessing credibility I have considered section 11B(h) and (j)". They simply do not arise in the case. The same applies to many other matters listed in the subsection. For example, once more at s. 11B(m) reference is made to evidence produced at the appeal stage in the process, something which has not occurred here as yet and accordingly can have no application in this case and requires no reference at this juncture. In short there is no obligation on the Commissioner to go through the list commenting after each factor that it is not applicable in this case.

53. The true effect of s. 11B is that it places a duty on the Commissioner or the Tribunal (on appeal) to have regard to the thirteen matters listed especially for reaching a conclusion on credibility, especially a conclusion adverse to the applicant, where such matters in the list apply to the facts of the case. Clearly the list is not exhaustive; no references are made to the demeanour of the applicant or the manner in which he responds to questions at the interview something of course which the decision maker is entitled to also take into account.

54. Furthermore, there is no obligation under the Act for the Commissioner to identify, by reference to the subsection, issues which he does have regard to provided it is clear that he has done so in his decision. Section 11B(f) for example requires the Commissioner to have regard to whether the applicant "has otherwise made false representations either orally or in writing". It is true that the RACs did not specifically refer to this in their findings but from the interviews and from the report it is abundantly clear that he did have regard to this in his deliberations and in his conclusion.

55. Reading the subsection in its entirety and taking note of each of the thirteen factors listed therein I conclude that most of the factors have no application whatsoever to the case under consideration and of the few that do for example, (c), (d), (f), (i), only (f) is critical (that is credibility issue) and this has been extensively and obviously dealt with by the RAC. I do not accept the applicant's argument under this heading.

56. For the above reasons, and bearing in mind that the applicant has a right to a full oral hearing on appeal where any deficiencies in his previous presentations can be addressed, I refuse leave in this case.