Neutral Citation Number: [2008] IEHC 17

THE HIGH COURT

2006 No.199 JR

BETWEEN

H.Y.

APPLICANT

AND

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

RESPONDENT

Judgment of Mr. Hedigan delivered on the 16th day of January, 2008

1. The applicant seeks an order of *certiorari* quashing the decision of the Refugee Appeals Tribunal (RAT) of the 26th June 2006 upholding the decision of the Refugee Appeals Commission (RAC) for asylum in Ireland.

2. The applicant is a Palestinian national from the Gaza Strip. He arrived in Ireland on the 25th May 2004 and applied for asylum. The Refugee Appeals Commission rejected his application on the 30th March 2005. The appeal was refused on the 26th January 2006. The grounds of the application are error on the part of the RAT in assessing credibility, breach of fair procedures in failing to have regard to the submissions made on behalf of the applicant and that the decision was unreasonable.

The background:

3. The applicant is a Palestinian from the Gaza Strip. Since 1993 he has been an active member of Fatah. His father and brother were also members of Fatah. His father was killed in 1997 by the Israeli Defence Forces and his brother is in prison. In 1998 he was himself imprisoned by the Israeli Defence Forces on the basis of his being a suspected suicide bomber. He alleges he was badly mistreated and subject to torture. He was released with the help of the Red Crescent in 2000. Thereafter he says he returned to Gaza where according to his own evidence for the 4 years until 2004 he had no problems. He was involved during this time only in peaceful protests which included throwing stones at the Israeli Defence Forces during occasional confrontations. He stated that he was not captured by the Israeli Defence Forces because he took precautions. At the beginning of 2004 the applicant alleges that a list was produced which contained his name. This list he says was produced by the Israeli authorities and was a list of persons that the Israelis wanted the Palestinian Authority to detain. He alleges this occurred because the Palestinian Authority were trying to demonstrate cooperation with the Israelis. The Palestinian Authority's response he says was to warn him to leave Gaza. He alleges he escaped disguised as a member of the Red Crescent in an ambulance. Although there were many roadblocks he says he escaped into Jordan where he remained for two and a half months. Because he would be returned either to the Palestinian Authority or the Israeli Authorities he left and travelling on a Spanish passport arrived in Ireland via Holland. He did this with the help of a trafficker to whom he paid $5,000. He claims he is regarded as a terrorist by the Israelis and bases his claim for asylum on a well founded fear of persecution.

4. The decision of the RAT was delivered on the 26th January 2006. The decision taken was that pursuant to Article 41 of the UNHCR Handbook because the facts were not clear an assessment of credibility was indispensable. The RAT in this regard concluded, firstly that it was implausible that having remained trouble free in Gaza for four years his name should suddenly become the focus of Israeli attention when he himself testifies that he had been involved in nothing more than peaceful protest and had had a trouble free existence in that period. Secondly, the RAT thought it improbable the Palestinian Authority would expel one of their own citizens at a time when they had poor relations with the Israelis at their behest. Thirdly, the RAT thought not credible the applicant's account of his escape from Gaza via Nablus, this being one of the most closely guarded borders in the world and a heavily militarized zone and this, on his account, at a time when he had just appeared on the list of persons they wanted handed over. Lastly, his account of his journey from Gaza to Jordan through Holland to Ireland on false documentation in the heightened security situation that prevails in Europe and the Middle East was thought to be implausible.

5. For these reasons the RAT affirmed the recommendation of the RAC.

6. In his submissions, the applicant firstly challenges these findings on the basis that during the four years of 2000 to 2004 the applicant was not trouble free and in fact was still involved politically albeit peaceably. The RAT's decision in this regard was conjecture and failed to take into account that he took precautions to avoid capture by the Israeli Defence Forces (IDF). It was therefore quite plausible that he would end up on the list after four years. Secondly, the applicant's solicitor Ian Robertson made submissions that in his experience of dealing with the Palestinian problem, it was not implausible that the Palestinian Authority who had a very difficult balancing act between placating the IDF whilst not betraying their own people would warn people the IDF demanded be detained to leave Gaza. This also is condemned as conjecture by the applicant. Thirdly, as to the escape by ambulance, the fact is he did get out. The escape was likely without the knowledge of the officials of the Red Crescent. He again alleges this part of the decision is based on conjecture. Fourthly, the applicant was very frank about his journey to Ireland, he admits he paid $5,000 to a trafficker, this, it is alleged, is also a conclusion based on conjecture and in any event is peripheral.

7. As to the scope of judicial review, I would like to refer at the outset to the decision that I gave in this court on the 19th July 2007 in the case of *Harriet Omofezi and the Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform*; and I cite from that:

> "The nature of judicial review in these cases and the test to be applied may well be open to debate. Whether in cases involving human or constitutional rights, the court should go further than the standard in normal judicial review as is set out in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, or whether there is some more detailed scrutiny required as appears to be suggested by Fennelly J and McGuinness J in the case of *L. and O. v. The Minister for Justice, Equality and Law Reform*, [2003] 1 I.R. 1. Whilst I would sympathise with this stricter approach by the courts in cases involving potentially serious violations of human or constitutional rights, in the context of this case I am of the view that it is sufficient to note that, as in leave applications, there must be weighty and substantial reasons why the court should intervene. The High Court must not act as a Court of Appeal interposing its judgment of the facts in place of the established Tribunal save where there are weighty and substantial reasons to do so."

8. I was referred to the judgment of Mr Justice Edwards in *Simo v. The Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal*, a judgment of the 4th July 2007. In this judgment credibility was also a major issue. I refer to page 22 of the judgment:

> "In the instant case the second named respondent has determined that the applicant is not credible. It is well established that the court must not fall into the trap of substituting its own view on credibility for that of the Tribunal Member."

9. He cites Peart J in *Imafu*, and I will come to that with a further citation from it in a moment. He then further referred to the judgment of Clarke J. *in I(M) v. Minister for Justice Equality and Law Reform and Ors*. delivered on the 27th May 2005 in which he helpfully sets out a number of propositions distilled from the growing jurisprudence in this area on foot of which the High Court has been disposed to grant leave to various applicants to apply for judicial review on the basis that they are at least arguable to a sufficient extent to justify a finding of substantial grounds.

10. The propositions identified by Clarke J are as follows:

> "(i) The assessment by the RAT of the credibility of an appellant and his/her story forms part of the decision-making power conferred by the Refugee Act 1996 and therefore in accordance with the principle set out in *East Donegal Cooperative Limited v. The Attorney General* [1970] I.R. 317, such assessment must also be carried out in accordance with the principles of constitutional justice: *Traore v. the Refugee Appeals Tribunal and Anor.*,(Unreported, High Court, Finlay Geoghegan J, 14th May, 2004).
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> (ii) Where the assessment of the credibility of an appellant places reliance upon a significant error of fact in a manner adverse to the applicant such error renders the decision invalid: *Traore*.
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> (iii) While the assessment of credibility is a difficult and unenviable task, it is not permissible to place reliance 'on what one firmly believes is a correct instinct or gut feeling that the truth is not being told'. Such a process is an insufficient tool for use by an administrative body such as the Refugee Appeals Tribunal. Conclusions must be based on correct findings of fact. *Da Silveria v. the Refugee Appeals Tribunal andOthers,* (Unreported, High Court, Peart J., 9th July, 2004).
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> (iv) A specific adverse finding as to the appellant's credibility must be based upon reasons which bear a legitimate nexus to the adverse finding. *Kramarenko v. the Refugee Appeals Tribunal and Anor.*, (Unreported, High Court, Finlay Geoghegan J., 2nd April, 2004). Placing reliance on the decision of the United States Court of Appeals for the Ninth Circuit in *Aguilera-Cota v. INS 940 F, 2nd, 1375*, (9th Cir., 1990).
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> (v) A finding of lack of credibility must be based on a rational analysis which explains why, in the view of the deciding officer, the truth has not been told. *Zhuchkova v. Minister for Justice, Equality and Law Reform*, (Unreported, High Court, Clarke J., 26th November 2004)."

11. As I said, I would also like to refer to the fuller citation of *Imafu* that was referred to by Mr Justice Edwards in his judgment cited above and in that regard I refer to the judgment I gave in the case of *Mubi v. the Refugee Appeals Applications Commissioner and the Refugee Appeals Tribunal, the Minister for Justice, Equality and Law Reform*, a judgment of the 17th May 2007. On page 4 of the judgment citing *Imafu* I set out the following:

> "This court must not fall into the trap of substituting its own view on credibility for that of the Tribunal Member. The latter, just as a trial judge, is at trial rather than the appellate court in the best position to assess credibility based on the observation and demeanour of the applicant when she gives her evidence. These are essential tools in the assessment of credibility and it is always essential to remember that what appears as the spoken word in a transcript or in a summary of evidence contained in any written decision cannot possibly convey the necessary elements for the assessment of credibility. That is why a court would be reluctant to interfere in a credibility finding by an inferior tribunal other than for the reason that the process by which the assessment of credibility has been made is legally flawed."

12. Applying these principles to this case, I would start by addressing the points set out by Clarke J and applying them here always bearing in mind they are intended to be applicable to applications for leave. Nonetheless I think they are helpful in the substantive case as here.

> (1) The assessment of credibility must be carried out in accordance with principles of constitutional justice. It seems to me that this involves giving the applicant the opportunity to make his case and to have doubts about his story made clear to him so he has the chance to address them. It seems to me that in regard to the main issues in this case, the 2000 to 2004 period, the manner of his escape and his journey to Ireland the applicant did have the opportunity to address the doubts that would have naturally arisen. I think his case in this regard was fully outlined by him to the deciding authorities.
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> (2) I do not think any significant error of fact grounding the decision is alleged. It is argued that the decisions were based on conjecture, not upon errors of fact. So I do not think anything arises under this heading.
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> (3) It seems to me that it is under this heading that the applicant essentially makes his case. Mr Power for the applicant urges strongly on the court that firstly the 1998 arrest and the subsequent 2000 release aided by the Red Crescent in 2000 which was originally doubted in the RAC recommendation is implicitly accepted in the RAT decision. Referring to the RAT decision, I am not sure that this is so. Having examined the decision closely, it seems to me that the deciding officer may well have included all that went before when he noted;
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> > "There are a number of implausibilities with this assertion."

13. However, even allowing that the arrest and release part of the applicant's account were implicitly accepted, it seems to me that the core of the decision focused on the so-called trouble-free four years from 2000 to 2004, the applicant's sudden appearance on a list, his expulsion by the Palestinian Authority and his account of his escape from Gaza. The applicant argues that these findings fall within what Clarke J meant where he referred to the impermissibility of placing reliance:

> "On what one firmly believes is a credibility instinct or gut feeling that the truth is not being told."

14. Conclusions must be based on correct findings of fact. Are the findings in relation to the core issues based on a gut feeling or perhaps one should call it unfounded conjecture or is there a factual basis.

15. I have read through the country of origin information presented in this case. This includes the BBC Internet news report of the 7th December 1997, the U.S. State Department report of 2004, the press release published the 13th January 1997, the Palestinian report published the 29th December 2004, and the Amnesty International report of the 25th May 2005. These reports recount in terrible detail the chaos into which this part of the world has fallen and its tragic consequences for the Palestinian people. It appears to me

that there exist in these reports and in details of the interview herein the factual basis required to found the conclusions of the RAT that:

> (a) It is implausible after four years of nothing more than the political and stone-throwing activities of the applicant he should appear on a list. There is, of course, a measure of inference required in this RAT conclusion, but in my view the need for such inferences are obvious because no hard facts are likely to exist. The list, if it existed, has not been produced and probably never could be, thus the RAT are forced to make an assessment as to the likelihood of the applicant's name appearing thereon in the event it did exist. This typifies what I think Clarke J was referring to when he described the unenviable task of assessing credibility. Whether this court would come to a different conclusion is not the point. The legislature has created an elaborate structure to investigate claims for refugee status. Absent weighty and substantial reasons that give rise to clear legal flaws in the manner in which it goes about this business, the court should not interfere and certainly should not try to interpose its view on the facts in place of that of the authorities designated to decide.
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> (b) As to the likelihood of the Palestinian Authority expelling one of its own citizens because his name appeared on a list, I note the submissions that were made by Mr Robertson, solicitor, for the applicant to the RAT. There is much in what he says that is very plausible. The Palestinian authority were and I am sure still are in an almost impossible situation trying to protect their people from Israeli attack on the one hand whilst not wishing to detain those regarded by their own people as freedom fighters. Telling such people to leave might well be an answer. Nonetheless it seems to me that this is classically the kind of decision that falls to be made by the designated deciding authority, that is the RAT. Applying the *Imafu* principle outlined above, in my view I cannot interfere with this. There is a sufficient factual basis in the country of origin information referred to above to come to a decision either way and for that reason the court must accept the choice made here by the RAT.
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> (c) As to the applicant's account of his escape from Gaza, it seems very clear that the country of origin information notably that of the U.S. State Department report 2004 creates a more than adequate factual basis upon which the RAT could base a finding of implausibility in relation to the applicant's story in this regard. I am aware the applicant might have his doubts as to the reliability of a U.S. report in relation to the tragic situation of the Palestinians. Nonetheless, the U.S. State Department's reports enjoy an international reputation for reliability and would have no interest in any event in producing anything other than an accurate picture of the security situation in the area in question. The RAT conclusion in this regard is also in my view not open to challenge.
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> (d) As to the rest of his journey to Ireland, I agree it is a peripheral finding. It is, however, clearly based on the applicant's own evidence and the RAT's assessment of the security situation in Europe and the Middle East. The conclusion also it seems to me is not open to challenge.

16. For all these reasons I must refuse the relief and decline to make the orders sought.