

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 53 J.R.]

BETWEEN

CA

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY AND BEN GARVEY SITTING AS THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 20th day of December, 2012

1. This is an application for leave to seek judicial review of a negative decision by the Refugee Appeals Tribunal. Fifteen numbered paragraphs were advanced in the intended statement of opposition at Section E entitled *'Grounds on which Relief is Sought'*. Ultimately, counsel on behalf of the applicant, Mr. Ian Whelan B.L, indicated that the grounds of challenge to the decision of the Tribunal were:

- i. the credibility findings are irrational;
- ii. no reasons or no adequate reasons are given for the credibility findings;
- iii. the Tribunal acted in breach of Regulation 5 of the European Communities (Eligibility for Protection) Regulations 2006, by failing to take into account and have regard to the matters required to be considered, and that consequently, the decision is *ultra vires*.

2. These grounds are particularised by the assertion that *"the RAT erred in placing reliance on unwarranted and unsupported conjecture and speculation in reaching conclusions and/or drawing negative inferences regarding the applicant and in assessing his claim"*.

Background

3. The applicant was born in Nigeria in 1967. He married in 2000 and is the father of four children. He claims to have been a former member of a militant group called the Niger Delta Vigilantes and also associated with MEND (Movement for the Emancipation of the Niger Delta). These organisations are said to engage in violent activities and run a campaign of attack on Shell Oil activities in Nigeria. It is said that he gave important information to Shell regarding the activities of these organisations after he left those organisations and came to work for Shell. As a result, his former colleagues kidnapped him, placed him in a hole six feet deep, from which he escaped, travelling to Zimbabwe, spending three months in South Africa, and eventually arriving in Ireland on the 26th day of May, 2008 to seek asylum.

4. As the rationality of the credibility findings, together with the complaint as to the absence or inadequacy of reasons for those findings are at the heart of this case, it is appropriate to set out those findings before identifying the standard by which the reviewing court should examine credibility findings.

5. Section 3 of the Tribunal's decision is entitled *'The Applicant's Claim'* and the second part of that section describes the exchange between the applicant and the Presenting Officer on behalf of the Refugee Appeals Tribunal relative to his evidence. It is in the following terms:

"In response to the presenting officer, the Applicant said that he left MEND in 2004 and from then until 2008, when he left Nigeria, he gave information about the organisation whilst working in RANC and Shell. He was asked if he had any contact with anybody in MEND during the four years and he replied, no. The Applicant stated that MEND had influence in the police, the government and the entire population of Nigeria. It was put to him that he is alleging he gave information about them, even though they had a huge area of influence. The Applicant replied, yes. It was put to him that if he joined MEND because he believed in their cause, it is difficult to accept that he went to work for Shell who were the target of their action. It was put to him that he joined MEND in 2003, but all the information the Commissioner could unearth states that it did not come into existence until 2006. The Applicant disputed these findings and said it was in existence a long time. During his time in MEND, he was asked if he partook in kidnapping and blowing up pipelines. The Applicant said that if they had a problem, I would help them and sometimes I would drive them to do things. He was asked if he assisted in kidnapping and he replied that I would drive them to the targeted person. The Applicant maintained that because he spoke to the tea lady in Shell, members of the MEND kidnapped and tried to kill him by placing him in a deep hole. He was referred to his Questionnaire where he stated he gave information to Shell about the secrets of MEND containing, inter alia, strengths, weaknesses, tactics, training methods, numbers and locations, also forest and swamp areas where this terror group held hostages. The Applicant stated that as a result of disclosing this information, Shell workers were rescued without paying a ransom. It was put to him that these details would not represent casual talk to the tea lady resulting in the Applicant having to flee Nigeria. The Applicant replied, 'I told the tea lady only because I didn't like what MEND were doing to Shell'. He was referred to his interview where he stated the Niger Delta Vigilantes Group is not a violent one and his role was to look out for troublemakers. It was put to him that country of origin information states that it was a violent organisation responsible for many attacks and killings. The Applicant replied, "they were not violent". He was asked why he did not claim asylum in South Africa and he replied, "I never thought of it". He said it was only Mr. Morgan that introduced him to the idea of asylum. He was asked why, if the captors wanted to kill him, they would simply leave him in a hole. The Applicant replied, they had to leave as there was

trouble elsewhere. It was put to him that MEND worked particularly in the Niger Delta and if he was experiencing problems there, he could live in another part of Nigeria, given it is a huge country with 120m. of population. The Applicant disagreed and said he was a big person and would bring his Bible and Rosary with him and he would be easily identified. "

6. The applicant put in evidence a number of photographs, letters, certificates and a plastic card. He states that the last item proves that he worked for Shell.

7. In passing, I note that although there are no express credibility findings or decisions as to credibility in the passage just quoted, it is clear that the evidence of the applicant is tested by the questions and matters that are put to the applicant by the Presenting Officer. When a matter is put to a witness - however informal the setting or forum- the questioner is suggesting that the witness's version of events is untrue or inaccurate by reference to the matter that is being put to him or her. I agree with the submission of the Minister's counsel that the credibility findings in this case are to be read in conjunction with the passage quoted.

The Credibility Findings

8. Six credibility findings are said to have been made by the Tribunal.

(i) **Participation in Criminal Activities.** The Tribunal noted as follows:

"He said he belonged to an organisation which is notorious for kidnapping and blowing up pipelines and in general causing mayhem. He was asked if he partook in their criminal activities and he replied that if they had problems he would help them by driving them to where they were going. This answer was quite vague, he was asked if he assisted in kidnappings and replied 'I'd drive them to a targeted person'. This would indicate the Applicant was involved in criminality rather than monitoring events in the Niger Delta region."

It is difficult to identify the quoted passage as a clear finding of lack of credibility. The language deployed by the decision maker conveys doubt and unease rather than outright disbelief. On balance, I have decided that this is not a credibility finding which I need to examine by reference to its alleged irrationality or the alleged absence of reasons attached thereto.

(ii) **Giving Information to the Tea Lady.** The Tribunal said as follows:

"He claims that because he gave information to a tea lady concerning NDV and where they kept their hostages, the Applicant was visited by members of this organisation who, in turn, brought him to a forest and put him into a hole where he remained for two days. It beggars belief why the group would abduct him rather than killing him once they confronted him with his alleged treachery. When this was put to him, he stated 'they were concentrating on attacking the ship in the sea and they didn't have time'. [sic]"

The Tribunal makes a clear credibility finding here. No irrationality attaches to the incredulity and the reason for this finding is clearly stated.

(iii) **Leaving the Applicant Unguarded.** The Tribunal said as follows:

"It is not credible that an armed militia, MEND, who allegedly considered the Applicant responsible for the deaths of a number of their members when hostages were released and the consequent loss of revenue from the ransoms, would go to the trouble of abducting and travelling with the Applicant into a forest only to leave him unharmed and unguarded."

I have no difficulty discerning the rationality of this finding and the reason given .

(iv) **The Message on a Rope.** The Tribunal found:

"His claim that his friend threw him down a rope with a message on it is not believable."

The applicant had explained that the friend who lowered the rope with a message on it was a friend from the time when the applicant was involved with the terrorist group and also a childhood friend. He names his friend. The applicant further recounted in his Questionnaire that in his hurry to escape he did not bring the rope along with him and owing to the fact that his friend was seen buying the rope used in the rescue, the friend was subsequently beheaded for his actions.

I doubt the rationality of the finding by the Tribunal that it is not believable that his friend would come to his assistance. In addition, I note that no reason is given by the Tribunal for this finding. It seems to me that this is a particularly weak credibility finding.

(v) **Leaving Nigeria and coming to Ireland.** The Tribunal found as follows:

"The Applicant travelled to Zimbabwe and spent a month there before going on to South Africa. He spent three months in the latter country without seeking international protection and claims that he was supported by members of the Nigerian community. He also states that a friend of his in Nigeria sent him the money to pay an agent so that both of them could travel here via Dubai. The Tribunal does not find this credible."

When the Tribunal says *"the Tribunal does not find this credible"*, it is not entirely clear what it is they are not finding to be credible as there is nothing peculiar or unusual being asserted by the applicant and nothing in the papers that I have read would indicate that the Tribunal had any reason for disbelieving the applicant that he actually went to Zimbabwe and spent three months in South Africa before paying an agent to bring him to Ireland via Dubai. I cannot discern a rational basis for disbelieving the applicant's account and one is not assisted in the endeavour by the total absence of reasons for this finding.

(vi) **Reasons for Seeking Asylum.** The Tribunal says:

"Further, Professor Hathaway has stated that if one is truly fleeing persecution and delays in seeking international protection, such conduct can go to credibility. The applicant was in a number of countries before arriving here and his reasons for failing to seek asylum in any of them is not credible. S. 11B of the Refugee Act 1996, as amended, applies. The Tribunal is satisfied that the applicant lacks credibility. "

It seems to me that the applicant gave an explanation for why he did not seek asylum in South Africa. The first form completed by the applicant in pursuit of refugee status (the ASY1 form) records that:

"Applicant stated he never applied for asylum in Ireland or any other country. Applicant stated he spent one month in Zimbabwe in hiding, and went to South Africa looking for work with D.P.R. but they are killing foreigners there so he decided to leave. Applicant stated he met Mr. Morgan in South Africa and he arranged his travel and accompanied him to Ireland, and collected passport South African from Applicant at Dublin Airport." [sic]

9. Ground 5 of the notice of appeal to the Tribunal is exhibited and it takes issue with the decision of ORAC who concluded that the applicant had not given a valid reason as to why he did not attempt to claim asylum in South Africa. It is pointed out at p. 19 of the s. 11 interview (between ORAC and the applicant) where it says:

"... I went to South Africa to see if I can build my life again when the problems began in South Africa, that's when I decided to leave. "

The notice of appeal identifies media reports (annexed to the notice) which describe outbreaks of violence directed at foreigners, claiming lives and causing injury. In this regard, the Tribunal stated that "The Applicant was in a number of countries before arriving here and his reasons for failing to seek asylum in any of them is not credible." On balance, it seems that the Tribunal did not fairly assess the reasons given by the applicant for not seeking asylum in South Africa. The Tribunal does not seem to provide a specific, intelligible cogent reason for its finding. Although the applicant did say that the reason he did not seek asylum was because *"he never thought of it"*, that is capable of being understood by reference to the fear of violence in South Africa directed at foreigners such as himself. It seems to me that the finding of lack of credibility based upon the reason given by the applicant for not seeking asylum in South Africa might be irrational. I can detect neither a rational basis nor a reason for this credibility finding.

Adequacy of Reasons for Credibility Findings

10. In my recent judgment of *Omidiran (An Infant) v. Minister for Justice and Equality* (20th December 2012) I examine the relevant case law with regard to the assessment of the adequacy of reasons for credibility findings and say that the following questions may be asked to discern if adequate reasons were given for credibility findings:

- (i) Were reasons given or discernible for the credibility findings?
- (ii) If so, were the reasons intelligible in the sense that the reader/addressee could understand why the finding was made?
- (iii) Were the reasons specific, cogent and substantial?
- (iv) Were they based on correct facts?
- (v) Were they rational?

11. In asking these questions of the credibility findings identified at paragraph 8 (iv) (v) and (vi) I find that the Tribunal may have fallen into error.

12. It bears repeating that this is not an appeal from the decision of the inferior Tribunal and I am not entitled to replace the Tribunal's findings on credibility, even if I would have come to different conclusions. I must review the rationality of the credibility findings by reference to the standard set out in *State (Keegan) v. The Stardust Victims Compensation Tribunal* [1986] I.R. 642 by Henchy J. In other words, illegality based on irrationality would only attach to the credibility findings if I decided that a substantial argument (as this is the leave stage) had been advanced that decisions as to credibility were at variance with reason and/or in the teeth of common sense.

13. I have found it difficult to discern the rationality of the three contentious credibility findings in this case. Sometimes reasons for findings are patent but such is not the case here and where there is an absence of reasons in such circumstances, defending rationality can be difficult.

14. There is an obligation on the protection decision makers to state reasons when rejecting credibility, unless the reason is patent. As can be seen from the account of the credibility findings given above, this did not happen in each of the credibility findings. Recalling the guidance given by Cooke J. in *I.R. v The Minister for Justice, Equality and Law Reform* [2009] IEHC 353 that the High Court should be wary of deconstructing credibility findings, and bearing in mind the realistic approach of not condemning the whole of a decision for the want of a statement of reasons with respect of one of a multiplicity of credibility findings, I have decided that the applicant has established substantial grounds for contending that three of the credibility findings may be unlawful. As these credibility findings related to central parts of the applicant's tale of persecution and escape, I am persuaded that errors may have tainted the entirety of the decision. Irrational and unreasoned credibility findings as to trivial matters maybe without harmful effect. Such frailty might lead to a finding by the High Court that the decision is lawful notwithstanding the error, or a finding that an unlawful decision, in the exercise of discretion, will not be disturbed.

I grant leave to the applicant to seek judicial review of the decision in suit on two grounds: 1) the credibility findings identified at paragraph 8(iv), (v) and (vi) of this decision are irrational; 2) no reasons or no adequate reasons are given for the credibility findings identified at paragraph 8(iv), (v) and (vi) of this decision.