Neutral Citation Number: [2007] IEHC 276

THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 1255 JR]

BETWEEN

A.W.S.

APPLICANT

AND
DES ZAIDAN ACTING AS THE REFUGEE APPEALS TRIBUNAL

RESPONDENT

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

FIRST NOTICE PARTY

AND
IRELAND AND THE ATTORNEY GENERAL

SECOND NOTICE PARTY

Judgment of Ms. Justice Dunne delivered on the 12th day of June, 2007

1. The applicant in this case seeks leave to apply for judicial review in respect of a decision of the respondent herein dated the 7th October, 2005. The basis upon which leave is sought and that the decision of the respondent was unreasonable or irrational and in this context it is alleged that the respondent failed to have regard to the overall weight of the applicant's evidence and that there was a failure on the part of the respondent to consider all of the applicant's evidence and in particular to have regard to the explanations given by the applicant in respect of certain matters which were considered by the respondent.

2. In his affidavit sworn herein on 14th November, 2005 the applicant sets out details as to his background. He is a native of Togo, who arrived in the State on the 9th June, 2003. On his arrival he claimed asylum in the State and he completed the usual questionnaire and subsequently he attended at interview at the Office of Refugee Applications Commissioner (ORAC). His claim for refugee status was grounded on a fear of persecution by reason of his political opinions. In the questionnaire and interview at ORAC he described of his fear of persecution by Government Authorities in Togo by reason of his political opinions and political activity in organising opposition to the Government. In the course of his application he submitted certain documents to ORAC namely identity documents and newspaper articles which he had written.

3. At the hearing before the respondent further documents were submitted including an article published by the applicant on the internet and a copy of an article which appeared in the Clare Champion newspaper together with a photograph including the applicant in which the applicant and others were seen demonstrating about the abuse of human rights in Togo.

4. Following the hearing before the respondent, the recommendation of ORAC was affirmed and the applicant's appeal was dismissed. The applicant complains that the identity documents and the newspaper articles published by the applicant in Togo together with material written by the applicant, which was published on the internet and the article in the Clare Champion newspaper were not considered or properly considered by the respondent in the course of deciding his appeal. It is contended that the respondent did not consider or evaluate the cumulative weight significance and relevance of this evidence together with the other evidence of the applicant's political opinions, activities and experience which he gave during the oral appeal on the 16th May, 2005. He also complained that the respondent failed to consider country of origin information submitted to the respondent by the applicant.

5. Finally the applicant takes issue with the manner in which the respondent dealt with certain evidence in respect of a number of specific issues which arose during the course of the oral appeal namely:

> 1. The absence of any mention of a "Red List" in country of origin material and the explanation of the applicant to the effect that this term was an expression used locally in Togo. It is contended that although the respondent referred to this explanation in the decision he failed to consider the explanation in his decision and recommendation.
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> 2. The applicant also complains of the manner in which evidence he had given of an assault because of his political opinions was dealt with. He explained why he did not mention that assault in his questionnaire or at interview before ORAC by explaining (a) that it was "more information that I had not taken into consideration before the hearing" and that it was not the reason why he left the country. The reason he left was because he was on the Red List. It is contended that the respondent failed to consider and evaluate this part of his explanation.
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> 3. In relation to the assault referred to above he gave evidence that the perpetrators of that assault were motivated by his real or imputed political opinion and his explanation in regard to that was on the basis of what was actually said by the attackers during the assault and again it is contended that the respondent failed to take this into consideration and omitted it from his consideration.
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> 4. He stated that he gave extensive evidence during the course of his oral hearing which indicated his political credentials, interests, knowledge and opinions which he contended was of such weight, preponderance and significance that it should not have been undermined by any difficulty in accepting his explanations for giving evidence at the oral appeal of a fact which he had not mentioned at a previous stage of the process.

6. It should be noted that in relation to the newspaper articles written by the applicant they were written by the applicant since he came to Ireland.

7. In essence the applicant challenges the adverse credibility findings of the respondent on the basis that the respondent failed to consider and evaluate the entirety of the applicant's evidence and its constituent parts and its cumulative effect and impact.

8. In the course of this hearing I had the benefit of helpful written submissions from the applicant and the respondent. In the course of oral submissions, counsel on behalf of the applicant dealt at length with the decision of the respondent. At p. 2 of the decision, the respondent noted in reference to the Red List as follows:

> "According to the applicant he stopped canvassing because Habib's brother who is a soldier in the Presidential Guard
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> 'told us that our names were on the Red List or red notepad. I have known about the Red List for years. Many

people on it have been killed.'

The applicant told the tribunal that when Habib's brother told him this, his immediate reaction was to flee. He spoke to his cousin who promised to help him."

9. Subsequently it was noted by the respondent at p. 5 of his decision as follows:-

"When asked by the presenting officer why he had not mentioned the assault in his questionnaire or in the interview notes he commented:

'It is extra information. One more information I had not taken into consideration before the hearing.'

When asked by the presenting officer why not as this was the only time he claimed to have been assaulted, he replied:

'This is not the reason why I left the country. They are looking for me because I am on the Red List.'

The applicant was then asked how did he find out that he was on the Red List and he replied:

'Habib's brother was working with the Presidential Guard in Togo. He told Habib and Habib told me. …'

The applicant was then asked by the presenting officer how did Habib's brother come to see this Red List, he replied:

'He is a Presidential Guard.'

The applicant was then asked by the presenting officer could he think of any reason why Habib's brother would have access to this list and he replied:

'I don't know. What I know is that Habib's brother also knows people of higher ranks who may have had access to this information. He himself may not have seen it but others may have told him.'"

10. Complaint is made on behalf of the applicant that the applicant's explanation for the existence of a Red List was referred to in that part of the decision of the respondent which set out his conclusions. I think one can only say that this aspect of the matter was dealt with at length by the respondent at p. 8 of his decision. The respondent had noted that in the s. 13 Report it had been commented as follows:-

"Through extensive research I was unable to locate any reports relating to the existence of a 'red paper' in Togo. The country reports on Togo over the past five years make no reference to such a list. Human Rights organisations would consider the existence of such a list extremely serious, therefore I feel that it would documented."

11. The respondent went on:

"This is a quotation from the author of the s. 13 Report. The applicant was invited to comment on this and he gave his reasons as already outlined in the background to the claim."

12. The respondent then went on to deal with the submissions in regard to the so called Red List. The essence of the complaint made in this regard is that in the decisive part of the decision at p. 8, the respondent did not refer to the explanation given by the applicant as to the Red List, namely the fact that the term "Red List" was a local term and that as such, that could explain why there was no country of origin information to support the concept of the Red List. At para. 14 of his affidavit grounding this application the applicant stated that in the course of the hearing before the respondent, he was questioned as to the absence of any mention of Red List in country of origin material and that he gave an explanation that the use of that term was an expression used locally in Togo and that that was the reason for the lack of any reference to it in external country of origin material. Complaint is made that although reference is made to the explanation the respondent failed to indicate the content of the explanation and thus has failed to consider that explanation.

13. The next issue which gave rise to concern on the part of the applicant relates to an alleged assault. In the part of the decision headed "Background to claim" the respondent set out in detail the evidence given by the applicant in relation to the assault. That assault was alleged to have occurred on a Thursday in April or May 2003, but the exact date of the alleged assault was unclear. The applicant and his friend Habib were attacked by a number of people. He was asked how he knew that his assailants were soldiers or members of the government militia and he responded that the district in which he had been assaulted was a district that supported the government and also from what was said during the course of the assault. No specific reference was made to this in the account of the assault. In dealing with this aspect of the applicant's evidence the respondent noted as follows:

"The applicant claimed to have been assaulted once in his lifetime in Togo and that was in May 2003. He told the tribunal that he was not sure of the identity of these people who assaulted him but was of the opinion that they may have been soldiers or government militia. He claimed that this incident took place in May 2003, but again was not sure of the exact date. I have considerable hesitation in believing his evidence on this alleged assault. The applicant omitted to mention this assault in his questionnaire and interview bearing in mind it was the only time he was assaulted in Togo. I also find his evidence vague in this regard. When asked to comment on this at the hearing, he replied:

'It is extra information. One more information I had not taken into consideration before the hearing.'

I am satisfied that the applicant has not offered the tribunal a reasonable explanation for this omission. Equally, I am mindful of the fact that the applicant claimed that on the occasion he was assaulted in May 2003, he was not out canvassing. …"

14. Complaint is made in respect of two aspects of the respondent's decision in this regard. The first complaint is that the explanation given by the applicant for not mentioning the assault in the course of the questionnaire or before ORAC was that he had simply not taken it into consideration before the hearing and that it was not the reason why he left Togo. It was submitted that in this regard

there was a failure by the respondent to consider and evaluate that explanation. Additionally complaint was made that the applicant knew that the perpetrators of the assault were government militia or soldiers, was in part because of what was said during the course of the attack. Complaint was made of the fact that no reference is made to that part of the explanation in the course of the decision.

15. Complaint is also made that the respondent failed to have regard to the extensive evidence given by the applicant as to his political credentials, interests, knowledge and political opinions. It was submitted that his credibility should not have been undermined by any difficulty in accepting his explanations for giving evidence at the oral appeal of a fact which had not been mentioned at a previous stage of the asylum process.

16. Complaint was also made that at the conclusion of the hearing of his oral appeal submissions were made on his behalf by counsel and complaint is made that the respondent failed to consider those submissions. In addition complaint is made that it is not apparent from the decision that all of the documents submitted on behalf of the applicant were considered. Indeed, it was expressly submitted that there was nothing in the decision to show that the document so submitted had been read. Complaint is made that those documents should have been expressly considered by the respondent and their weight should have been assessed.

17. In the course of submissions, counsel on behalf of the applicant referred to a number of decisions in relation to the assessment of credibility, including the decision in *Bujari v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Finlay Geoghegan J., 7th May, 2003). In the course of her judgment at p. 5 it was noted:

> "The assessment of the credibility of the applicant is a matter for the examiner at first instance or on appeal by the member of the Tribunal. It is not a matter for this court on judicial review. However, the process by which such credibility is assessed does appear to be a matter which is within the remit of this court upon a judicial review."

18. She went on:-

> "I am satisfied, on a careful consideration of the decision of the member of the tribunal herein, that no reference is made at all by him to any explanation given to him at the oral hearing by the applicant for the material difference in the facts as stated in the initial interview and at the oral hearing. Further I am satisfied that on a fair reading of that decision the change in the facts was a material factor in the tribunal member's assessment of the credibility of the applicant and his ultimate assessment that the applicant's story (presumably the story given at the appeal) was not credible."

19 Counsel pointed out that only part of the explanation for the failure to refer to the assault was mentioned in the course of the decision. Counsel then referred to the decision in the case of *Kramarenko v. Refugee Appeals Tribunal,* (Unreported, High Court, Finlay Geoghegan J., 2nd April, 2004) in which it was noted in dealing with the question of credibility as follows:

> "Accordingly, the assessment of the applicant's credibility in this application was relevant to both the subjective and objective elements of her claim to be a refugee. I am satisfied that there are substantial grounds for contending that the Tribunal or an adjudicator at first instance is obliged, where an issue is raised as to the credibility of the applicant, to assess the applicant's credibility either in general or in relation to a particular factual issues and make a clear finding on that issue."

20. Reliance was also placed on the judgment in the case of *Memishi v. The Refugee Appeals Tribunal,* (Unreported, High Court, Peart J., 25th June, 2003). In that case at p. 12:

> "In relation to credibility, Mr. Christle referred to the Diaz decision and that in Cordon-Garcia, to which I have referred and quoted relevant passages. The principles which emerge from these decisions are that a Tribunal is not entitled to make adverse credibility findings against an applicant without cogent reasons bearing a nexus to the decision, that the reasons for any such adverse finding on credibility must be substantial and not relating only to minor matters, that the fact that some important detail is not included in the application form completed by the applicant when he/she first arrives is not of itself sufficient to form the basis of an adverse credibility finding, and finally that the fact that the authority finds the applicant's story inherently implausible or unbelievable is not sufficient. Mere conjecture on the part of the authority is insufficient, and that corroboration is not essential to establish an applicant's credibility."

21. In the submissions on behalf of the respondent, counsel on behalf of the respondent pointed out that, referred to the various issues that have been highlighted herein, namely, the reference to the Red List and the issue of the assault. So far as the issue of the Red List was concerned it was pointed out that country of origin information sometimes does refer to colloquial expressions. It was submitted that the explanation given by the applicant for no reference to a Red List being found in country of origin information was simply that that explanation was not convincing. It was pointed that it was for the Tribunal to consider the weight of the evidence in this regard and the explanation given by the applicant. Reliance was placed on the decision in *Baby O v. Minister for Justice* [2002] 2 I.R. 169 in which it was stated by Keane C.J. at p. 180:

> "In this case, it was entirely a matter for Mr. Leahy to assess the weight that should be given to the various matters to which I have referred and it could not be said that there were no grounds on which he could not have reasonably arrived at the decision that her application for refugee status was manifestly unfounded."

22. Counsel also referred to the decision in the case of *Banzuzi v. Refugee Appeals Tribunal* (Unreported, High Court, 18th January, 2007), in which it was stated by Feeney J. as follows:

> "It is contended for on behalf of the respondents that there is no obligation on a decision maker to refer to every aspect of evidence or to identify all documents within its written decision. That is a correct statement of the law."

23. In dealing with the issue of the assault, it was submitted that although the tribunal member in the course of his decision did not refer to what was allegedly said at the time of the assault that this was not relevant, in that clearly the explanation for not mentioning the assault previously had been rejected by the Tribunal member. It was emphasised that it was clear from the decision that the Tribunal member did not believe that there was an assault at all and this was clearly so in the light of the vague evidence given by the applicant as to the assault. In those circumstances it was submitted that the issue as to a motive for the assault was not relevant if the Tribunal did not believe there was an assault in the first place. Counsel relied in this instance on the decision in *Banzuzi* referred to above also.

24. Counsel then referred to the UNHCR Handbook, para. 204 of which states:

> "The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible and must not run counter to generally known facts."

25. Counsel then referred to the decision in the case of *Imafu v. Minister for Justice, Equality and Law Reform and Others* (Unreported, High Court, 9th December, 2005), in which Peart J. at p. 11 of his judgment noted:

> "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 what (sic) a court will 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."

26. Accordingly it was submitted on behalf of the respondent that the Tribunal who had the benefit of assessing the demeanour of the applicant did not find the applicant to be credible. It was further submitted that it is well settled that the assessment of credibility is a matter for the decision-maker and that the court will only intervene in rare circumstances where there is a breach of fair procedures or a lack of jurisdiction.

27. I accept that the principle stated by Peart J. in his judgment in *Imafu* correctly sets out the basis upon which this court can interfere with a finding on credibility by an inferior Tribunal. Unless the process by which the assessment of credibility has been made is legally flawed or there is a lack of jurisdiction the court will be very slow to interfere. In this case the basis upon which it is stated that the decision of the Tribunal is legally flawed is that there has been a failure to consider all of the evidence and to weigh the evidence appropriately and to have regard to all relevant material submitted to the Tribunal. As I have set out at length above, reference has been made to specific items which have not been referred to in the course of the decision by the respondent and further reference has been made to some parts of the evidence of the applicant which were outlined in the summary of evidence by the respondent but not referred to in the decisive part of the decision. It must be noted that in the course of the decision at p. 7 the respondent noted as follows:

> "I have carefully considered all the papers submitted to me for the purposes of this appeal and all the matters required to be considered under s. 16(16) of the 1996 Act.

28. At p. 9 of the decision, he went on to say:

> "I have had regard to all of the relevant facts outlined and considered in detail all of the applicant's answers in his questionnaire and all his replies at interview and taken into consideration all the submissions made on his behalf and perused through all the documents submitted to include country reports submitted on the 25th May, 2005 post hearing."

29. In the light of that very clear statement it is very difficult to reach a conclusion that the respondent has failed to consider and evaluate all material evidence, papers, documents and submissions. The function of this court is not to engage in an exercise which involves a minute analysis of the Tribunal decision to ascertain if each and every part of evidence given has been expressly referred to and dealt with. It is not necessary for the Tribunal to refer to all of the evidence in the course of its written decision. As was stated by Feeney J. in the *Banzuzi* case referred to above at para. 2.4:

> "It is contended for on behalf of the respondents that there is no obligation on a decision maker to refer to every aspect of evidence or to identify all documents within its written decision. That is a correct statement of the law."

30. I am quite satisfied that Feeney J. in expressing that view correctly set out the appropriate principle to be applied. As he noted before making that comment:

> "It is apparent from the foregoing that in relation to the documentation which was before the Refugee Appeals Tribunal that there was a detailed chronological consideration of same and the fact that only certain documents are quoted in the decision does not and cannot lead to a determination that all the documents were not considered. The decision expressly states on p. 7 that the member of the Refugee Appeals Tribunal had considered all the evidence … This is not a case therefore in which it could be in any way suggested that the reference in the letter of the 20th June, 2005, to consideration of all the evidence and documents and the similar references contained in the decision of the 13th June, 2005, could in any way be considered a mere formula of words."

31. Reliance was also placed by the respondent on the decision in *G.K. v. Minister for Justice* [2002] 2 I.R. 418 in which Hardiman J. stated at p. 426:

> "A person claiming that a decision-making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case."

32. There may be cases in which it could be inferred from the omission of a reference to a significant fact or document in the course of a Tribunal decision that the same had not been properly considered or evaluated. However, there must be some evidence to support such a contention. In the present case, the respondent has expressly stated the various matters that he took into consideration. There is no evidence direct or otherwise to contradict the assertion of the respondent in the course of his decision. In essence, it seems to me that the crux of this case is that the applicant, not surprisingly, does not like the manner in which the Tribunal has considered and evaluated all the evidence before him. Nonetheless there is nothing before me of any kind to show that the consideration and evaluation of the evidence and submissions before the Tribunal member was in any way flawed. As has been pointed out over and over, it is not for the court to weigh and consider and evaluate the evidence before the Tribunal member but rather to consider whether the process by which the Tribunal member dealt with the application before him was flawed procedurally. I cannot see any basis on which I could reach such a conclusion.

Delay in making the decision

33. Complaint was also made on behalf of the applicant herein as to the delay between the date upon which the oral hearing before the respondent took place and the date of furnishing the decision. The oral hearing before the respondent took place on the 16th

May, 2005. The decision and recommendation of the respondent is dated the 7th October, 2005. An affidavit of Philip Sullivan, an Executive Officer in the Refugee Appeals Tribunal deposed to the fact that the decision was made by the Tribunal member and submitted for typing on the 5th August, 2005 the decision was then typed on the 10th August, 2005 and was ready for signature on the 14th August, 2005 and was in fact signed on the 7th October, 2005. Counsel on behalf of the applicant submitted that the relevant time is the date when the decision was given. Reliance was placed on the decision in the case *of Biti v. John S. Ryan acting as the Refugee Appeals Tribunal and Others,* (Unreported, High Court, Finlay Geoghegan J., 24th January, 2005). In that case, leave was granted to apply for judicial review on the basis of an alleged unreasonable and inordinate delay in making the decision subsequent to the oral hearing. Finlay Geoghegan J. on the facts of that case formed the view that such grounds constituted substantial grounds on the facts of that case having regard to her earlier judgment in which she concluded that a member of the Tribunal to whom an appeal was assigned had an obligation under the Refugee Act 1996 which includes:

> "A duty owed to the applicant to determine the appeal within a reasonable time."

34. In that case the time involved was a period of some fifteen months after the oral hearing and it was her view that such a time was longer than any reasonable time would be. In the present case the time involved is much shorter. I cannot accept that the time involved here is such as to give rise to a substantial ground on the facts of this case that the delay herein is not such as to give rise to such a ground.

35. In all the circumstances I am not satisfied that the applicant herein has established substantial grounds for challenging the decision of the respondent herein.