Neutral Citation Number: [2013] IEHC 467

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 757 J.R.]

BETWEEN

I. B.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL (CONSTITUTED OF PAUL CHRISTOPHER, TRIBUNAL MEMBER), THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 24th day of October 2013

1. The applicant is an Iranian national who came to Ireland on 19th December 2009. He applied for asylum, claiming fear of persecution for reasons of political opinion. He informed the Irish authorities that he had been arrested in June 2009 at a 'Green Movement' demonstration and that he was tortured for twelve days. He claimed that he was almost arrested on a second occasion in December 2009 at another political demonstration and that he escaped. The Refugee Applications Commissioner made a number of adverse credibility findings and declined to make a positive recommendation in his favour. On 31st July 2012, the Refugee Appeals Tribunal affirmed the recommendation of the Refugee Applications Commissioner, declining a recommendation of refugee status to the applicant.

The Decision of the RAT

2. The Tribunal rejected the credibility of the applicant. The applicant contends that he is Iranian; politically involved with the Green Movement; a street protester; a victim of arrest and torture at the hands of the Iranian authorities; and the author of campaigning emails. It is not clear from the decision of the RAT whether all of the applicant's narrative or parts only of it are rejected.

3. The Tribunal Member begins his analysis of the applicant's claim as follows:

> "The Tribunal finds that the appellant's account of having been allegedly persecuted in the manner contended for was implausible and it was not generally satisfied as to the appellant's credibility in relation to the particular claim for asylum advanced by him. When one took any random element of his story and scratched beneath the surface, serious credibility gaps appeared."

4. The Tribunal Member proceeds to describe elements of the applicant's narrative which caused him to reject his credibility. He refers to the fact that two summonses were submitted by the applicant and concludes that they were not genuine. In addition, the applicant's account of how he came into possession of the summonses with the assistance of his brother gave rise to incredulity. Allegedly, his brother travelled from Iran to Dubai for the purpose of sending the summonses by private courier to Ireland. Further, copies of emails- submitted after the oral hearing, on the prompting of the Tribunal Member - did not convince the Tribunal Member that the applicant was politically involved. Surprise was expressed that these documents had never been submitted at any stage during the asylum application process and it was noted that generating fake emails was not difficult.

5. In addition to these particular credibility findings, seven other matters in a series of reasonably detailed bullet points are not1ed by the Tribunal Member as undermining the applicant's credibility. The decision then asserts:

> "... the above issues on credibility lead to the conclusion that the appellant is not credible in his evidence. They satisfy the materiality criterion required by the High Court (Kelly J.) in *S.C. v. Minister for Justice* (Unreported, High Court, Kelly J., 26th July 2000)."

Towards the end of the decision, in addressing comparator decisions of the RAT submitted in support of the applicant's claim, the Tribunal Member, in distinguishing these decisions, says:

> "The Tribunal finds that the decisions are not relevant to this particular claim. Firstly, the decisions accepted the credibility of the core claim advanced, i.e. that the appellants in those cases, or at least members of their family, had already come to the adverse attention of the regime in Iran. That is not the situation in respect of this appeal (given the credibility finding already made)."

These passages from the decision in suit record the rejection of credibility by the Tribunal member.

6. The first ground of challenge advanced by the applicant is that the Tribunal failed to inquire whether there was a risk of future persecution if the applicant were repatriated, negative credibility findings notwithstanding. In support of his claim, Counsel for the applicant refers to *M.A.M.A. v. The Refugee Appeals Tribunal, the Minister for Justice, Equality and Law Reform and the Attorney General* [2011] 2 I.R. 729. I accept that this case is authority for the proposition that there are circumstances in which an asylum decision maker is required to apply a forward looking test, in spite of negative credibility findings. In other words, even when aspects of an asylum applicant's narrative are disbelieved, a decision maker might be required to ask whether there is a risk of future persecution should the applicant return home. Cooke J. (in *M.A.M.A.* supra) said as follows:

> "[17] ...The sole fact that particular facts or events relied upon as evidence of past persecution have been disbelieved will not necessarily relieve the administrative decision-maker of the obligation to consider whether, nevertheless, there is a risk of future persecution of the type alleged in the event of repatriation. In practical terms, however, the precise

> impact of the finding of lack of credibility in that regard upon the evaluation of the risk of future persecution must necessarily depend upon the nature and extent of the findings which reject the credibility of the first stage. This is because the obligation to consider the risk of future persecution must have a basis in some elements of the applicant's story which can be accepted as possibly being true. The obligation to consider the need for 'reasonable speculation' is not an invitation or pretext for gratuitous speculation: it must have some basis in, and connection to, the apparent circumstances of the applicant."

7. The *dicta* of Cooke J. in *MAMA* is very helpful. Applying the approach advised in that case to the present facts, I must first examine the nature and extent of the findings which reject credibility. The task of the court would be simple if each part of the applicant's claim had been separately considered with an indication by the decision maker as to which parts of it were believed and which parts of it were disbelieved. I do not say this by way of criticism of the Tribunal Member. Credibility findings do not follow a mechanical or mathematical process. I cannot say whether the Tribunal Member rejected each element of the applicant's claim. But by reference to the language used by the decision maker, I am certain that he rejects the claim that the applicant was arrested, imprisoned and tortured because of his involvement with the Green Movement in Iran. That is not to say that the Tribunal Member does not believe that the applicant is Iranian nor does he necessarily disbelieve that the applicant is somehow associated with Green politics in Iran. In my view, the rejection of the applicant's claim that he was arrested and tortured because of his politics, absolves the decision maker of the need to consider the question of the risk of future persecution of the applicant in Iran. Where the decision maker has come to the firm view that no past persecution happened because of political opinion and activities, there is no need to examine whether there is a risk of future persecution because of political opinions and activities. No believable part of the applicant's claim required the decision maker to consider the risk of future persecution.

8. I therefore reject the submission that this decision is unlawful because of the absence ofa consideration of the risk of future persecution.

9. As indicated earlier, the Tribunal Member dismissed the probative value of the copy emails submitted by the applicant to demonstrate that he campaigned by email in support of the Green Movement in Iran. The following text appears in the decision immediately after the dismissal of the email evidence:

> "They [the copy emails] do not bolster his claim in any material sense. The Tribunal is fortified in this view by viewing the short video clips (recorded on a phone) of his purported attendance at various demonstrations in Iran provided by the appellant in support of his claim. Again, it is difficult to ascertain by viewing them whether the appellant was even present or whether they were obtained elsewhere (to note in this regard is that the appellant stated that they were stored on a removable flash memory card rather than on the RAM of the phone itself). However, even if one were to accept that he was, the clips, far from showing the appellant being manhandled or even identified by agents of the regime (as he had earlier contended), show the demonstration being a fairly quiet, peaceful affair untainted by the visible presence of police or army officers. Indeed, the participants themselves appeared fairly relaxed and unconcerned about the presence of even undercover agents, which seems incongruous with the earlier contention made by the appellant that he and other participants had been acutely aware of the dangers of undercover agents and the resultant necessity to conduct all their activities furtively."

10. There is no doubt but that the content of these video clips was a significant factor leading to the rejection of the appellant's credibility. According to the Tribunal Member, what the video clips depicted was the opposite of what the applicant had claimed. In other words, the applicant's video evidence contradicted his written and oral evidence.

11. In an amended statement grounding application for judicial review, the applicant pleads that:

> "The First Named Respondent made findings based on a purported video clip when no such video clip was provided at all. In the premises, the First Named Respondent failed to consider, properly or all, relevant material and took into account irrelevant and unknown material."

This plea is supported, as required by the Rules of Court, by an averment by the applicant that:

> "The First Named Respondent asserts that I provided video clips of protests on my phone when this was not done at any stage."

12. The pleading and averment about the video clip are not met by the respondent with evidence to the contrary. The statement of opposition is in the barest of terms, simply denying that the applicant is entitled to any reliefs. No replying affidavit has been sworn by the respondents. Thus, the uncontradicted evidence is that the applicant did not tender a video clip in evidence to the Refugee Appeals Tribunal. No explanation has been offered by Counsel for the Tribunal why the decision maker said that a video clip had been submitted by the applicant. I do not need to speculate on how this happened. The respondents' silence speaks for itself. I have no doubt but that the complaint made in respect of this matter by the applicant must be upheld.

13 Counsel for the Tribunal urges me to allow the decision to stand by excising the passage quoted above dealing with the video clip. This is an invitation I refuse. Numerous decisions of the High Court warn against deconstructing credibility findings in decisions of the RAT. As Cooke J. notes in *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 353 "When subjected to judicial review, a decision on credibility must be read as a whole and the Court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in disregard of the cumulative impression made upon the decision-maker. ....." That cuts both ways and applies to respondents too.

14. In this case, I cannot overlook the stark fact that the Tribunal Member considered evidence which he mistakenly believed the applicant had submitted. Neither can I disregard the fact that the Tribunal Member analysed the content of that material and concluded that it contradicted claims made by the applicant. Though it is not possible to say to what extent this contributed to the rejection of credibility, its negative effect cannot have been small. However one might categorise or describe what happened, my view is that the episode infuses the decision with illegality and it must therefore be set aside.

The SPIRASI Report

15. The applicant claims that he was tortured in custody and a medical opinion compiled by the SPIRASI Centre for the Care of Survivors of Torture was submitted. Dr. Ciaran Leonard, the examining physician, concluded that the injuries apparent on the applicant supported his account and he said "I would classify the overall findings as 'highly consistent' in keeping with the guidelines of the Istanbul Protocol".

The Tribunal Member assessed the medical opinion in the following terms:

> "The Tribunal has no difficulty accepting that the lesions (or "scars" as termed by the examining physician) could have been caused by the trauma, *i.e*. whipping, described and there are few other possible causes. What neither the Tribunal nor the examining physician can comment intelligibly upon is who exactly inflicted the trauma (*i.e*. "whippings") concerned. All we can go on in this respect are the appellant's own contentions and statements, which, as outlined, are not to be trusted".

16. The Tribunal Member quibbles that the examining physician did not say what the injuries were consistent with. For an examining physician compiling a report for the SPIRASI Centre for the Care of the Survivors of Torture, the phrase "highly consistent" has a technical meaning. I accept that the physician intended it to mean that the injuries were highly consistent with the applicant's own account of how they were inflicted. I am surprised that the Tribunal Member appears to be unfamiliar with the meaning of the phrase "highly consistent" in the context of the Istanbul Protocol (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). Paragraph 187 of the Istanbul Protocol says. "....For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution given by the patient. The following terms are generally used:...(c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes".

17. Complaint is made in these proceedings about the manner in which the Tribunal Member addressed the medical opinion of Dr. Leonard which found that the applicant's injuries were "highly consistent in keeping with the guidelines of the Istanbul Protocol". Useful guidance has recently been given by Clark J. in a decision entitled *R.M.K [DRC] v. The Refugee Appeals Tribunal* [2010] IEHC 367 (Unreported, High Court, 28th September 2010) as to the correct approach to be taken in the assessment by an asylum decision maker of a medical opinion as to alleged effects of torture. In that case, it was said that the Tribunal Member failed to consider properly the Spirasi medical reports submitted by the applicant. The learned judge noted as follows:

> "Medical evidence is not determinative of a fear of persecution for a Convention reason and must be viewed in the round with those preliminary circumstances but does not by itself neutralise negative credibility findings. To take an extreme example, an applicant may present with scars and old injuries which suggest that the bearer suffered greatly in the past but his narrative of being from a particular conflict zone where resort to torture is well known might be found to be simply not credible. This may be, for example, because he displays no knowledge of specific geographical features of the area, is unaware of well known local customs or historical events, or is unable to speak the local language. If the primary finding if that he is not from that area, then the probative effect of injuries consistent with torture for the purpose of assessing whether he has a well founded fear of persecution for the reasons alleged is regretfully nil."

18. I agree with that statement. Where an asylum decision maker has rejected the credibility of an applicant's narrative of political involvement and consequential torture, the fact that physical injuries and scars are, in the opinion of a physician, highly consistent with the applicant's attribution, does not require a decision maker to adjust credibility findings, provided they are rigorous and go to the heart of a claim.

19. Later in the *R.M.K* judgment, Clark J. says:

> "There can be little doubt that the impugned decision outlines the Tribunal Member's reasons for attaching low weight to the medical reports. He found the applicant personally not credible and the physician's findings of injuries *'highly consistent or typical of'* torture did not alter his view on the lack of credibility of the applicant's evidence. The assessment of that credibility issue must therefore be addressed. While there were certainly credibility matters relating to the applicant's travel arrangements and his arrival in Ireland, the court considers that the key issue in determining the weight to be attached to the unusually equivocal SPIRASI medical report supported by two earlier reports is the rationality of the Tribunal Member's assessment of the primary fact of whether the applicant could in fact have been a prisoner in the GLM for 63 days, or indeed at all in 2003."

In the event, Clark J. assessed whether the underlying credibility findings in that case were sufficient to support a rejection of the applicant's claim, notwithstanding the strength of the SPIRASI Report. She found that the underlying credibility findings were not of such rigour and therefore the lack of weight given to the SPIRASI Report was unfair.

20. As is apparent from the earlier part of this judgment, a significant credibility finding in this case is unsafe. It is not possible for me to determine the extent to which that particular finding brought about the overall rejection of the applicant's credibility. I am therefore not in a position to find that the credibility findings are of such rigour that the SPIRASI Report could be dismissed or given little weight. For the sake of completeness, I find that had video clip evidence been kosher, the approach of the Tribunal Member to the SPIRASI report would have been correct. I therefore reject the complaint made by the applicant about the approach of the Tribunal to the medical opinion.

21. This being a telescoped hearing, an order is made granting leave to seek judicial review in respect of the relevant part of the grounds in paragraph (e)(2) of the Amended Grounding Statement and an order quashing the decision will issue. The matter is remitted to the Tribunal to be heard by a different person.