Neutral Citation: [2013] IEHC 468

THE HIGH COURT

JUDICIAL REVIEW

[NO. 2009/308 JR]

BETWEEN

R.R. [NO.2]

APPLICANT

-AND-

BERNARD MCCABE ACTING AS THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

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

1. This was a 'telescoped' hearing of an application for leave to seek judicial review by a Ukrainian national who seeks, *inter alia*, certiorari of a decision of the Refugee Appeals Tribunal (the "Tribunal") dated 18th February 2009 confirming the recommendation of the Office of the Refugee Applications Commissioner refusing him refugee status. During the course of these proceedings an application was made to this court by the applicant seeking to amend his statement of grounds and add some ten new grounds. I gave judgment in that matter on 25th July 2013 refusing the application but allowing the applicant to re-introduce a ground which had been withdrawn in correspondence only three days before the hearing began.

Background:
2. The applicant was born in the Ukraine on 3rd March 1971, was married (now divorced) and has two children born in 1994 and 1996. His ex-wife and his two children remain in the Ukraine. The applicant arrived in the State and claimed asylum on the 7th April 2003. The applicant claims asylum on the basis of his membership of a particular social group and his political opinion. He claims that he ran his own business in the Ukraine and that in May 1997 he obtained a loan of $35,000 from moneylenders who were part of a mafia group. Some three years later and after making repayments of $50,000 the applicant was told he still owed $50,000 in interest. The applicant was beaten badly on several occasions when he informed the loan shark that he was unable to repay him. He was hospitalised from 6th to 24th November 1999. The applicant claims he sought help from the Prosecutors Office and the Deputy Head of the Department of the Interior to no avail and that he was again hospitalised from 3rd to 21st April 2000. The applicant asserts that having been released from hospital he sought the protection of the police as it became apparent that the moneylender had mafia connections. However, the applicant complains that he was detained for two days before being put into a private car and taken to the mafia boss. He alleges he was detained for ten days by the mafia boss during which time he was raped, beaten and threatened with drowning by concrete being poured around his feet. The applicant claims he was ultimately not drowned as the mafia wanted the debt to be repaid and instead decided to send him to fight in the war in Chechnya for a fee. En route to Chechnya, the applicant claims he managed to escape his captors and flee to Kiev where he lived with a former classmate. On deciding to return to his home in 2003 he noticed a suspicious car and was informed that a policeman had called asking about his whereabouts. He decided to leave his country and seek asylum. The applicant was successful in a previous application for judicial review in 2005. The decision of the Tribunal affirming the recommendation of the Office of the Refugee Applications Commissioner is based on the lack of credibility of the applicant's claims and it is that decision which is impugned in these proceedings.

3. The applicant says that the Tribunal Member erred in failing to have regard or adequate regard to medical reports and supporting documentation. The applicant also makes complaint that the Tribunal Member made adverse demeanour findings against the applicant, particularly in light of the fact that the applicant was giving his evidence in Russian through an interpreter.

4. Counsel for the applicant contends that the Tribunal erred in basing his findings on irrelevant matters and failed to examine the core claim by the applicant contrary to the dicta of Peart J. in *Sango v. Refugee Appeals Tribunal* [2005] IEHC 395. It is also alleged that the Tribunal failed to consider the country of origin information supplied by the applicant, particularly in relation to corruption, the police and the mafia in Ukraine. It is stated that the Tribunal Member failed to make findings in relation to the past persecution suffered by the applicant. As such, it is claimed he failed to take into account the threats, assaults and rape he claims to have suffered at the hands of the mafia while he was being held captive. The applicant claims that the Tribunal Member also failed to assess the human rights record of Ukraine in assessing the country of origin information and to consider what protection would be available to the applicant were he returned there. Finally, the applicant contends that the Tribunal failed to consider properly and distinguish between four previous Tribunal decisions (which related to applicants from Ukraine who had been granted refugee status) and a decision referring to the non-requirement of corroboration submitted in support of the applicant's claim. This, the applicant submits, was in contrary to the dicta of Clark J. in L.C.L v. Refugee Appeals Tribunal [2009] IEHC 26 and *E.F.I v. Refugee Appeals Tribunal* [2009] IEHC 94.

Findings:
5. The Tribunal Member rejected the claims of the applicant principally on the basis of a lack of credibility. In particular, the Tribunal Member found that the applicant's evidence in relation to the borrowing of money and his alleged abduction and assault to "have an air of unreality to it". The Tribunal Member also utilises the phrase "having heard the evidence and observed the demeanour of the Applicant" on a number of occasions in reaching his adverse credibility findings. Complaint is made by the applicant in this regard and the dicta of Cooke J. in *H.R. v. Refugee Appeals Tribunal* [2011] IEHC 151 on 'demeanour' findings must be recalled:

> "There is not doubt, of course, but that the Tribunal member is perfectly entitled to base a finding as to lack of credibility and plausibility upon the manner in which an asylum seeker gives evidence and on his or her demeanour when answering questions in relation to the details of facts and events which form the basis of the claim. Indeed, in many cases where such facts and events are incapable of any independent corroboration, the personal credibility of a claimant may be crucial. At the same time, however, the decision-maker must be careful not to misplace reliance upon demeanour and risk

> construing as a deliberate lack of candour a demeanour which may be the result of nervousness, of the stress of the occasion and even of the embarrassment of being an asylum seeker. An apparent hesitation and uncertainty may well be attributable to difficulties of language and comprehension. In the judgment of the Court, before a decision maker in the asylum process bases a rejection of a claim upon lack of credibility based mainly on the personal appearance and demeanour of the claimant, the decision-maker ought to be fully confident that the basis of the claim and all relevant facts and circumstances recounted have been fully and correctly understood and that there is no possibility that the decision-maker and claimant have been at cross purposes on any material point."

In the case of an applicant who is giving evidence via the services of an interpreter it would appear that a Tribunal Member must take extra care not to misplace reliance on demeanour in reaching his conclusions. In this regard, I also refer to a decision of Hogan J. in *F.O.O. v. Refugee Appeals Tribunal* [2012] IEHC 46 who stated:

> "It seems to me that the applicant can establish substantial grounds for contending that the Tribunal member violated these principles [(4), (5) & (9) of *I.R.*], not least in the absence of any reasoned dialogue to explain his conclusions. Why, for example, was the applicant's demeanour lacking in credibility? Did he hesitate to answer difficult questions? Did his answers given the impression that he had been coached or that his answers had been pre-prepared according to a set script? Did he unnecessarily avoid eye contact? Absent an explanation - which would not have to be discursive or lengthy - this Court might be coerced to conclude that the Tribunal member elected to disbelieve his evidence for purely subjective reasons, contrary to the fourth principle articulated by Cooke J. in *I.R.*"

6. The applicant described an incident during his abduction which involved pouring concrete over his feet. The applicant's written account of this incident in his questionnaire is as follows: "I was tied to a chair and my feet were placed into a basin filled with cement. When the cement hardened I was told that I was to go "swimming" in the river next morning. I sat in that position the whole night awaiting my death...In the morning I was pardoned and they told me that this was my last warning..."

7. The applicant's oral testimony about the incident is set out by the Tribunal Member as follows: "The Applicant said on the last day they poured concrete on his feet and said they were going swimming now. He said he was sitting in the chair with concrete on his feet. The Applicant said the city is on a deep river and he said that the river is about one kilometre in width. The Applicant said they could easily fulfil the promise and they could drown him because that amount of money was not significant to them."

8. In the analytical part of the decision the Tribunal Member describes the applicant's version of the concrete incident as follows: "To set out the Applicant's contentions fully it appears that he sat in a chair, concrete is poured on his feet, they wait for it to set and then the lot is carried to a river and is thrown in. Having heard this evidence and observed the demeanour of the Applicant while his evidence was being given it stretched credibility beyond endurance..."

9. There is significant ambiguity in the text quoted at paragraph 6 above. In my view the applicant did not say that the cement fully set. The applicant's statement may mean that a threat that was made to drown him "When the cement hardened". It is not clear that that the applicant said that cement was poured over his feet and was allowed to set, as characterised by the Tribunal Member. The applicant's statement is capable of meaning that cement was poured on his feet and left there for some time but was removed before it set. The applicant did not say he was put into the river. The credibility finding associated with the concrete incident is based on ambiguous testimony which has been mischaracterised. The resulting rejection of credibility is irrational.

10. The duty to give reasons m administrative decision-making does not necessarily require an express reason to be stated for each finding made, as long as the reason for a finding is patent on the face of the decision, in line with the dicta of Murray C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3. In this instance, the finding of the Tribunal Member is patent as he simply finds the evidence of the applicant to be "neither plausible nor credible". However, it would appear that he has mischaracterised the evidence given by the applicant in reaching this conclusion. I find the conclusion of the Tribunal Member irrational in this instance.

11. Prior to reaching the above conclusion the Tribunal Member states: "With regard to the medical reports while injuries may have been sustained by the Applicant, the circumstances in which these injuries were sustained is by no means clear and if one were to take into account the incredible proposition of sitting in a chair and having concrete poured on his feet then I don't believe that any weight could be given to the Applicant's contentions." The applicant claims that the Tribunal Member has erred in this regard by failing to take any or any adequate account of the medical reports submitted. In my view, the Tribunal Member was obliged to consider the medical reports in their own right and without reference to the alleged incident in which concrete was poured over his feet. It does not follow that the medical reports submitted by the applicant can simply be dismissed on the basis that the Tribunal Member finds one strand of the applicant's story to be an "incredible proposition". I find that the Tribunal Member erred in failing to adequately weigh the evidence contained in the medical reports in the balance.

12. The next finding made by the Tribunal Member refers to the evidence of the applicant that the mafia boss had arranged to send him to Chechnya to fight in the conflict for U.S. $2,000 per month and that the applicant managed to escape from his captors during a lunch break while they were en route to the war zone. The Tribunal Member states that "Having heard the evidence and observed the demeanour of the Applicant while he gave [evidence] I reached the conclusion that it was neither plausible nor credible and I found that it stretched credibility beyond what is reasonable." I find this conclusion to lack any adequate reasons on the part of the Tribunal Member and to be illegal as a result. The reasons for this finding are not patent and the Tribunal Member seems to have have based his decision solely on the demeanour of the applicant. The aspects of the demeanour which troubled the Tribunal Member are not identified. (See the cases referred to at paragraph 5 as to the requirment for specificity in demeanour findings if used to found lack of credibility.)

13. The Tribunal Member also makes a finding in relation to the applicant's contention that the mafia boss was looking for him 3,000 kilometres away from his home in Siberia where he had relatives. The Tribunal Member states that he found this stretched credibility and stated: "I reached this conclusion on the basis that even if he were indebted to local criminals this is not plausible nor credible that they would continue with their search in Siberia." I find that while no illegality attaches to this particular finding per se, it would appear to be peripheral in nature. The Tribunal then goes on to assess the applicant's account of his travel to the State on a forged passport via Paris. The Tribunal Member had regard to s. 11B (b) of the Refugee Act 1996 in making his assessment that: "In the current security climate I do not find this evidence to be plausible or credible. Documents are rigorously checked and vetted on a number of occasions through all international airports and as a consequence I do not find that the Applicant provided a plausible or reasonable explanation as to how he travelled to and arrived in this jurisdiction." In this regard it would appear that the Tribunal Member may have erred in citing the wrong sub-section of s. 11B where s. 11B (c) would perhaps appear more appropriate in the context. This particular finding is also peripheral to the applicant's core claim. There was no evidence as to the quality of the fake passport. Nor was there any evidence as to the rigour with which passports are checked. Thus the implausibility assumes a low grade

fake passport and a careful document check at the Irish border. This credibility finding is overly reliant on speculation.

14. It is also alleged that the applicant failed to correct a perceived inconsistency in his evidence as regards his reason for coming to Ireland. The Tribunal Member points to the fact that during the course of the hearing the applicant had said that the person who arranged his forged documentation advised him to come to Ireland but that in his interview he had previously stated that: "I wanted to go to Ireland it was my personal wish I thought it was a good country because it was not very hot and it is very green". It appears to me that this inconsistency, if it is so, is relatively minor in nature and is another peripheral finding made by the Tribunal Member.

15. The Tribunal Member next addresses the issue of documentation evidencing the taking of the loan. In this regard the Tribunal makes complaint that the applicant failed to produce any documentation despite the fact that he has availed of legal advice in the Ireland since 2003 and that he failed to offer such documentation even subsequent to the hearing. In this regard, it is noted that the applicant's response when questioned as to whether he had such documentation stated: "I have them at home and I did not know that they are valuable because in my country if there is no stamp it is not a document." The Tribunal Member states that this stretched credibility beyond endurance. In my view this response must be read in light of the applicant's response to earlier questioning at his s. 11 interview whereby when asked could he supply a copy of the loan contract, he replied "No - the moneylender has the contract." Further, the applicant stated that when he took the loan he just signed a handwritten undertaking and there was no stamp on the document. In this regard, it is important for a Tribunal Member to take into account the cultural differences which may arise when assessing the evidence of an applicant. Standard business practices which occur in this country may not prevail elsewhere. The applicant has provided an explanation as to why he has not produced the relevant document evidencing the loan and in my view the Tribunal Member has erred in reaching an adverse credibility finding by failing to adequately weigh the applicant's evidence and the explanation provided.

16. The account by the applicant of visiting the Prosecutor's Office in relation to the loan is also found to be "neither plausible nor credible" as the Tribunal Member did not find it credible that the police would not ask to see the documentation. When the applicant was asked if anyone at the Prosecutor's Office asked to see the documentation he again replied: "No, because without a stamp is not a document." In my view, this evidence must also be viewed in light of the applicant's s. 11 interview where he was asked if he sought the protection of the police in order to protect himself from extortion and replied: "At the end of March 2000 I went to the Public Prosecutor's Office in Kremenchug. The Investigating Officer recorded my complaint. Two days later I received a visit from the moneylenders & was abducted by them- they took me to a cellar at an address unknown. I was held for two days & beaten up - they demanded the money I owed them plus interest." Further the applicant was asked: "What was the result of your complaint to the Public Prosecutor's Office?" and replied: "There was no result - I was afraid to return to find out the outcome because I had been abducted after my initial visit." In this regard - it would appear that the Tribunal Member has engaged in conjecture and speculation as regards what evidence or otherwise the Prosecutor's., Office would require of the applicant in order to investigate his complaint and I find his conclusion to be irrational as a result.

17. Finally, the applicant has raised criticism of the manner in which the Tribunal Member has dealt with the previous Tribunal decisions provided in support of his claim. In this regard the applicant refers the court to the decisions of Clark J. in the decisions of *E.F.I. v. Refugee Appeals Tribunal* [2009] IEHC 94 and *L.C.L. v. Refugee Appeals Tribunal* [2009] IEHC 26. In those cases Clark J. criticised the formulaic reproduction of a dismissal of previous Tribunal decisions: "The quotation highlighted by the applicant from the decision has appeared verbatim in other decisions of the RAT and is suggestive of a blanket rejection of previous RAT decisions without further consideration or evaluation. This element of the decision, together with the rejection of the contents of the medical report without reference to reasons, is suggestive of a want of fair process." It is noted by this court that an almost word-for-word reproduction of the quotation used in *L.C.L.* again appears in the decision impugned in this case. In this case the applicant has complained that the Tribunal Member has failed to distinguish between a previous Tribunal decision which refers to corroboration and four Tribunal decisions which refer to successful Ukrainian applicants. While the Tribunal is not bound to follow previous Tribunal decisions, it is clear that they must, if submitted by an applicant, be considered properly and weighed in the balance by the Tribunal Member. It does not appear that the Tribunal Member completed that task in this instance.

Conclusion:
18. In view of the forgoing, I grant leave to seek judicial review and I grant an order of certiorari quashing the decision and remitting the matter to be re heard by the Tribunal. I also direct that a copy of this judgment be placed on the applicant's file, should he so elect.