Neutral Citation Number: [2010] IEHC 18

THE HIGH COURT

JUDICIAL REVIEW

2009 970 JR

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000, THE REFUGEE ACT 1996, (AS AMENDED) AND

IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

BETWEEN

A.K.

APPLICANT

AND

ELIZABETH O'BRIEN 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 Mr. Justice Herbert delivered the 4th day of February, 2010

This is an application seeking leave to apply, by way of judicial review, for an order of *certiorari* quashing the Decision of the first named respondent made on 2nd July, 2009, to affirm the recommendation of the Refugee Applications Commissioner that the applicant should not be declared a refugee. Alternatively or additionally the applicant claims various Declarations and, an Order remitting the matter to the Refugee Appeals Tribunal for a re-evaluation and reconsideration.

This application falls within the provisions of s. 5(1)(j) of the Illegal Immigrants (Trafficking) Act 2000. Subsection (2)(b) of that section provides, that leave shall not be granted unless this Court is satisfied that there are substantial grounds for contending that the decision of the Refugee Appeals Tribunal is invalid or ought to be quashed. In the Matter of the Reference of ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999, [2000] 2 I.R. 360 at 394-5, Keane C.J., for the Supreme Court, held that to be, "substantial", the grounds advanced must be "reasonable, arguable and weighty, and not trivial or tenuous". Section 11A of the Refugee Act 1996, (as inserted by s. 7(f)) of the Immigrant Act 2003), provides that where an applicant appeals against a recommendation of the Refugee Applications Commissioner made under s. 13 of the Act of 1996, it shall be for him or her to show that he or she is a refugee.

At the hearing of the Application, Ms. Cronin, B.L., representing the applicant, submitted that the decision of the respondent was invalid and ought to be set aside on three grounds:-

> A. The respondent had not fully considered and given proper weight to the medical evidence which, Counsel submitted, was significantly supportive of the applicant's claim.
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> B. The respondent had made material errors in assessing the applicant's credibility.
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> C. The respondent did not consider the country of origin information and, had failed to determine the applicant's claim in the context of the country of origin information.

As to the first ground: Counsel submitted that the respondent had failed to properly consider and, to give proper weight to a Report, furnished to the Refugee Appeals Tribunal on 27th September 2005, from Dr. Helen Greally, a Clinical Psychologist, following upon a consultation with the applicant on 31st August, 2005. The recommendation of the Refugee Applications Commissioner pursuant to the provisions of s. 13(1) of the Refugee Act 1996 (as amended), was made on the 23rd April, 2005. Counsel for the applicant further submitted that the respondent had failed to properly consider and, to give proper weight to a letter dated 14th June, 2005, from a Rape Crisis Centre.

Counsel for the applicant submitted that the respondent had wrongfully rejected this medical evidence and, had erroneously adopted a submission, made by the Presenting Officer that this medical evidence did no more than say that the applicant was traumatised and depressed and did not say how this came about. Counsel submitted that Dr. Greally's findings regarding the applicant's condition were consistent with the applicant having been raped in April, 2004 by a number of soldiers as she asserts and, that even if not conclusive in the matter were nonetheless significantly supportive of the applicant's claim.

Counsel for the applicant relied upon the following four decisions:-

> *D.V.P.S. v. Minister for Justice, Equality and Law Reform and Refugee Appeals Tribunal* (Unreported,

High Court, Edwards J., 4th July, 2007).

L.C.L. v. Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform (Unreported, High Court, Clark J., 24th January, 2009).

Mibanga v. The Secretary of State for the Home Department (Court of Appeal, Civil Division), [2005] E.W.C.A. Civ., 367.

N.M. v. Minister for Justice, Equality and Law Reform and Refugee Appeals Tribunal (Unreported, High Court, McGovern J., 7th May, 2008).

Ms. O'Sullivan, B.L., on behalf of the respondent submitted that it was manifest from express references in the decision of the respondent that she had, in fact, carefully read and considered both the letter from the Rape Crisis Centre and the report of Dr. Greally. Counsel for the respondent submitted that the basis of the applicant's claim was that she feared persecution by agents of the State of her country of nationality because of her political opinions.

The applicant claimed that she had been raped by several members of the armed forces because they suspected her of involvement in, or of supporting a Movement seeking independence for the region of the country were she lived and, because she did not and was unable to give them information as to the whereabouts of her husband. The applicant also claimed and, this was expressly noted by the respondent, that her father and her uncle were both killed in or about 1999 because of their membership of this Independence Movement. The applicant claimed that her husband was an active member of this Independence Movement. He gave evidence, (their appeals were heard together by the respondent), that he had been an active member of this Independence Movement between 1998 and 2003. The respondent recorded in her Decision that the applicant claimed that everybody from this particular Region was considered to be a member of this Independence Movement and, that she was therefore a member.

Counsel for the respondent submitted that it was the sole remit of the respondent to consider the medical evidence and to come to a conclusion with respect to it. The respondent, Counsel submitted, had done this and, it was reasonably and rationally open to her to reach the conclusion which she did, that the medical evidence was of no significant value in establishing if, when, where or why the alleged multiple rape had occurred. Counsel for the respondent referred to the decision in *M. E. v. Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, the Attorney General and Ireland*, (Unreported, High Court, Birmingham J., 27th June 2008).

By contrast with the decision of the Adjudicator in the *Mibanga* Case (above cited), the respondent in the instant case did not address the medical evidence only after she had articulated conclusions that the central allegations made by the appellant were not credible. In the instant case, the respondent considered the medical evidence, after she had stated the Standard of Proof which she intended to apply and as an integral part of the actual process of determining the credibility or otherwise of the applicant. The respondent in the instant case did not consider Dr. Greally's Report and Rape Crisis Centre Letter only after reaching her conclusion that the applicant's account lacked credibility. In these circumstances, the *Mibanga* Case is distinguishable on its essential facts from the instant case and, does not assist the applicant.

In *L.C.L. v. Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform*, (above cited), the relevant issue was whether the member of the Refugee Appeals Tribunal had failed to give proper consideration to the contents of the S.P.I.R.A.S.I., Medical Report as part of the process of assessing the applicant's credibility. In that case the respondents contended that the "forensic timing" of the decision when read as a whole demonstrated that member of The Refugee Appeals Tribunal did in fact consider the S.P.I.R.A.S.I Report in the course of assessing the applicant's credibility. Clark J. noted that the member of the Refugee Appeals Tribunal stated in his decision that he had considered this Report but found that the evidence (*sic*) was contingent upon whether or not he believed the applicant's story as to how he came to suffer the particular injuries. In that case the S.P.I.R.A.S.I. Report noted the presence of twelve small concentric pigmentation stars in the area of the applicant's elbows which would support the application of an electronic device and, was therefore consistent with the applicant's claim to have been tortured in this fashion. Clark J. granted that applicant leave to seek judicial review *inter alia* on the basis that the member of the Refugee Appeals Tribunal had disregarded this S.P.I.R.A.S.I. Medical Report in assessing the applicant's credibility and, had failed to give adequate reasons for so doing.

In my judgment, the decision in *L.C.L. v. Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform*, is distinguishable from the instant case. It is clear, on the face of the Decision of the respondent that she carefully considered Dr. Greally's Report and the letter from the Rape Crisis Centre and, had full regard to their contents in the course of assessing the credibility of the applicant and, did not "relegate them to an afterthought". In the *L.C.L.* case also, the medical evidence did not consist only of a diagnosis of post-traumatic stress disorder but very significantly of a finding that particular physical marks on that applicant's body were consistent with the history of torture related by him. In my judgment this case is of no assistance to the applicant here.

The member of the Refugee Appeals Tribunal in *D.V.T.S. v. Minister for Justice, Equality and Law Reform and Refugee Appeals Tribunal* (Unreported, High Court, Edwards J., 4th July, 2007), held that the S.P.I.R.A.S.I. Report in that case went no further than finding that the injuries noted were consistent with the applicant's allegation of torture, but were non-specific and there were many other possible causes for these injuries. The applicant in that case contended that the member of the Refugee Appeals Tribunal had failed to appreciate that the authors of the S.P.I.R.A.S.I. Report considered that the injuries to the applicant's back and to the soles of his feet were not merely consistent with torture but were "highly consistent" with the form of torture which the applicant claimed had been inflicted on him, and so removed the level of proof from the realm of the merely possible to probable. Edwards J. considered that on the face of the Decision the Member of the Refugee Appeals Tribunal did not appear to have appreciated or take proper account of this aspect of the evidence. The learned Judge found that supplementary country of origin information submitted by the applicant confirmed that torture and ill-treatment of political opponents of the government of that particular country had been widespread in the country in the recent past.

Edwards J. found that the member of the Refugee Appeals Tribunal placed reliance upon a significant error of fact in assessing the credibility of the applicant, in failing to take account of the S.P.I.R.A.S.I. Report that the marks on the applicant's back and the soles of his feet were highly consistent with the physical abuse and/or torture which he alleged had been inflicted on him. The learned Judge further found that the member of the Refugee Appeals Tribunal had made no meaningful attempt to assess the applicant's claim of having been tortured in the context of the background information

of the country of origin. He found that several sources confirmed the prevalence in that country at that time of the specific type of ill-treatment and torture to which the applicant claimed he had been subjected.

The facts in the instant case are altogether different. There is no S.P.I.R.A.S.I. Medical Report in this application, nor is there any evidence of physical injuries. It was a matter for the respondent to assess the medical evidence, which the court is satisfied she correctly did, in the course of determining whether the applicant's account was credible. I find that it was rationally and reasonably open to the respondent to conclude, as she did, that the medical evidence established no more than that the applicant was found by Dr. Greally to be seriously traumatised and depressed when seen by her on 31st August, 2005 but, unlike the medical evidence in the *D.V.T.S.* Case, could not say that her condition on the occasion was probably caused by the alleged trauma described by her and, that there were a few other possible causes. I am satisfied that the finding of the respondent in the instant case was not made on a significant error of fact as found by Edwards J., in the *D.V.T.S.* Case and, was entirely *intra vires*. I am satisfied that this decision is of no assistance to the applicant in the instant case.

Similarly, in *N.M. v. Minister for Justice, Equality and Law Reform and Refugee Appeals Tribunal* (Unreported, High Court, McGovern J., 7th May, 2008), a case also relied upon the applicant in the instant case, the learned Judge found that none of the medical reports suggested that the applicant's symptoms of anxiety or post-traumatic distress disorder were either consistent with or not consistent with the account of torture which he gave. Significantly however, the learned Judge found that a Medical Report from Dr. F. O'Brien of the Centre for the Care of Survivors of Torture (S.P.I.R.A.S.I.), considered that the scars on the applicant's legs tended to support the applicant's account of this ill-treatment in his country of origin.

Counsel for the applicant in the instant case placed particular emphasis on the conclusion of McGovern J. that:-

> "Where the medical reports appear to support the applicant's claim, I think that it is incumbent on the Tribunal member to specifically deal with the medical reports and state why he does not accept them".

In the instant case the respondent dealt specifically with both Dr. Greally's report and with the Rape Crisis Letter and stated her reasons for concluding that they did not support the applicant's claim. The facts in the *N.M.* Case are clearly distinguishable from the facts in the instant case. While the medical report in the instant case could scarcely have attracted the application of the rule stated by McGovern J., the respondent nonetheless appears to have applied it in reaching her conclusions. I quite satisfied that this case also is of no assistance to the applicant in the instant case.

Finally, in relation to this medical evidence, it was submitted on behalf of the applicants that the respondent, by failing to apply the provisions of paras. 206-212 inclusive of the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status deprived the applicant of her right to fair procedures. In my judgment it is not stated nor is there anything in Dr. Greally's Report of 27th September, 2005 to suggest, as was submitted on behalf of the applicant by Counsel at the oral hearing before the respondent, that the applicant was a mentally disturbed person upon the 27th April, 2009 or was suffering from such a degree of mental disturbance as to require a special examination of her case, in accordance with these paragraphs. In my judgment as no medical evidence of mental disturbance was led by the applicant it was properly open to the respondent to conclude, having had the additional advantage of seeing and hearing the applicant, that there was no reason to apply different examination techniques or a lighter than normal burden of proof in her case.

For these reasons, this court is satisfied that this first submitted ground for seeking leave to apply for judicial review is not a substantial ground.

The second submitted ground, – that the respondent relied upon significant errors of fact adverse to the applicant in assessing the credibility of the applicant, – referred to the following conclusions reached by the respondent and set out in her Decision (together with her finding in relation to medical evidence), and stated to be the reasons why she found the applicant's account to lack credibility:-

> "I find that her evidence in relation to her membership or non-membership of (the Independence Movement) to be contradictory and I do not accept her explanation as to why she twice stated at hearing in answer to the questions from her own legal representative, that she was not a member, yet when it was put to her that she had previously stated she was, (again on two occasions), she claimed she was".
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> "I find it impossible to believe that a mother of a child under two years of age, or indeed any child would flee from her home with one of her children, leaving the other at the mercy of the soldiers or indeed whatever fate might befall such a young and vulnerable infant. It is simply beyond the bounds of credibility, regardless of the applicant's evidence of what had happened to her prior, that she would choose to leave the house without at least attempting to locate her infant and without any concern for his safety. This is not explained by the applicant's alleged recent traumatic experience."
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> "The applicant's evidence was rather vague, she seemed to know very little about when her husband was in the army, when he left, when joined (the Independence Movement) and so on. She was not even sure herself of when she began to live with him, noting that she claimed it was some time after her father died in 1999, yet her husband claimed it was some time in 1998".
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> "I need not again point out here the discrepancy in the applicant's evidence in relation to the time it took to travel to her aunt's house, there is a significant difference between three to four hours and thirty minutes. I do not accept the applicant's attempt at explanation (that she doesn't count time) for why she could not clarify this."

Each of these reasons is based upon a finding of fact from the evidence heard by the respondent and, on a rational analysis of those facts. The conclusion on the part of the respondent that the applicant's account is lacking in credibility is based on the cumulative effect of all facts and not on any form of intuitive thinking on her part. In my judgment it was open to the respondent, rationally and reasonably to reach the conclusion which he did, having regard to the cumulative effect of all these matters.

It has repeatedly been held in judicial review applications and, by Peart J. in relation to asylum cases in *Imafu v. Minister for Justice, Equality and Law Reform*, [2005] I.E.H.C. 416, that the Court must not fall into the trap of substituting its own view on credibility for that of the tribunal.

Counsel for the applicant submitted that the conclusion of the respondent that it was beyond the bounds of credibility,

and, she found it impossible to believe that the applicant, despite her claim that she had been subjected to multiple rape by the soldiers, would flee the house, leaving her one year old son to the mercy of those soldiers or to general circumstances, was a wholly subjective judgment and, therefore was not a reasonable or rational basis upon which to find the applicant lacking in credibility. In addition, Counsel for the applicant submitted that fair procedures required that this conclusion of the respondent should have been canvassed with the applicant who should have been afforded an opportunity of responding to it.

In my judgment no such obligation arose. The applicant had clearly explained why had she had escaped with one of her sons and why she did not take her youngest son with her and how she later discovered what had become of this child. Nothing called, as a matter of reason and justice for further clarification or explanation, there was no ambiguity or discrepancy in her account and no important issue left unaddressed. In her Decision the respondent records that the applicant was expressly asked about this matter at her First Interview, in particular, how she could leave a one year old child behind, and the respondent in her Decision refers to the answers given by the applicant on that occasion. As was held by this Court in *Kikunbi v. Refugee Appeals Tribunal*, (Unreported, High Court, 7th July, 2007), there is no yardstick by which the respondent could decide whether she considered this account credible or not other than by the application of commonsense and life experience. This does not invalidate her decision on the suggested ground that it was based solely or even largely on, or was influenced exclusively by the personal feelings and opinions of the respondent.

The Court is satisfied that the applicant has not established substantial grounds to show that the process by which the respondent assessed the credibility of the applicant was flawed.

The final ground upon which the applicant seeks leave to apply for judicial review is that the respondent did not consider the country of origin information and, failed to determine the applicant's claim and particularly her credibility in the context of that information.

In her Decision the respondent states that she had considered all relevant documents, including country of origin information. This is a statutory duty imposed upon the respondent by the provisions of s. 16(16) of the Refugee Act, 1996, (as amended). The respondent in her Decision refers to and cites the provisions of (*inter alia*), Regulation 5(1)(a) of the European Communities (Eligibility for Protection) Regulations, 2006 (S.I. No. 518 of 2006), which provides that the decision-maker must take into account:-

> "All relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection…".

In the section of her Decision dealing with her analysis of the applicant's claim, the respondent records that she had advised the legal representative of the applicant that she would be consulting "the usual country of origin information namely, Amnesty International Report, Human Rights Watch Report, U.K. Home Office Report and Operational Guidance Notes, U.S. State Department Report (relevant country) for 2009".

The respondent further sets out in her Decision a summary of this country of origin information reporting substantial improvement in the Human Rights situation in the relevant area since 2004 particularly following a Memorandum of Understanding for Peace and Reconciliation, signed in 2006 which it is was stated largely brought an end to insurgency in the region.

In *Evuarherhe v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 26th January, 2006) Clarke J. held that:-

> "Whether or not there has been a failure to properly assess credibility in the context of country of origin information is not a question of technicality. It is a question of substance which requires to be assessed in the light of the country of origin information concerned and the reasons for doubting the credibility of the applicant in the case concerned".

In *Imafu v. Minister for Justice, Equality and Law Reform* (substantive hearing), (Unreported, High Court, 9th December, 2005), Peart J. held that the extent (if any) to which it may be necessary for the Tribunal of fact to refer to country of origin information as part of a credibility assessment depends upon the facts of each individual case.

In the instant case the respondent concluded that the applicant was not believable in her account of having been raped by a number of soldiers because they suspected her of involvement in or of supporting (the Independence Movement) and because she did not and could not give them information about her husband. I am satisfied that the respondent was free to conclude as she did, that the applicant's claim of fear of persecution on account of her alleged affiliation to or connection with the named Independence Movement, which the respondent correctly identified as the core of the claim, was contradictory and she did not accept the applicant's evidence in this regard. In the light of this finding, in my judgment it was properly open to the respondent to consider that it was not relevant to set out the various references in the country of origin information furnished by the applicant, - Report of the Bishop of the Region, Nov. 3, 2003, Global Security Report and Human Rights Watch Report, - to sexual violence against females in the Region by soldiers of the National Army for a variety of alleged reasons including accusations of membership of the Independence Movement or being related to alleged members. This Court has ruled on a number of occasions, (*i.e. K.O. v. Refugee Appeals Tribunal* (Unreported, High Court, Hedigan J., 16th October, 2008)), that the fact that the decision maker quotes certain documents does not enable an inference to be drawn that other documents before the Tribunal were not considered. In *G.K. v. Minister for Justice, Equality and Law Reform, Refugee Appeals Tribunal, Ireland & the Attorney General* [2002] 1 I.R. 418 at 427, Hardiman J. for the Supreme Court held that:-

> "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."

In my judgment no such evidence was furnished by the applicant in the instant case.

The court is not satisfied that this is a substantial ground for contending that the decision of the respondent is invalid and ought to be quashed.

In light of the foregoing, the court will refuse leave to the applicant to apply for judicial review.