Neutral Citation: [2015] IEHC 788

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 13 J.R]

BETWEEN

K.F.D. (TOGO)

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL

MINISTER FOR JUSTICE AND EQUALITY

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 11th day of December, 2015

1. This is telescoped hearing for judicial review seeking *certiorari* to quash a decision of the Refugee Appeals Tribunal dated 18th December, 2012, and notified to the applicant not earlier than 28th December, 2012, and remitting the appeal of the applicant for de novo consideration by a different tribunal member.

BACKGROUND

2. The applicant is a Togolese national from Lome, born on 2nd July, 1971. He is of the Ewe ethnic group and speaks Ewe, French and some basic English. The applicant's claim is based upon his alleged political opinion and membership of a particular social group. The following is the applicant's account of the alleged persecution.

3. The appellant had been a sympathiser of the opposition party in Togo, *Union des Forces du Changement* (UPC), for many years and joined the party in September, 2003, whilst the then President of Togo, Eyadéma Gnassingbé, founder of the *Rassemblement du Peuple Togolais* (RPT) party, was still in power. The applicant stated that, following a street demonstration on 3rd June, 2003, violence erupted in his area of Lome and his father fled to Benin. As a result, the appellant stated that he joined the UPC; his motives were grounded in his desire to contribute to a change in politics and to resist the Gnassingbé dictatorship.

4. The applicant travelled to France on a fraudulent passport on 28th June, 2004 for medical treatment for his knees and waist. The French authorities informed the RAC that the applicant made an asylum application in France but he did not pursue his claim and that the applicant went into hiding in France. The applicant maintained that he never intended to make an asylum application in France and that he went to register with the authorities for the sole purpose of obtaining medical treatment. The applicant stated that he returned to Togo in early 2005.

5. The applicant stated that whilst he was taking part in an anti-government demonstration on 12th February, 2005, which celebrated the death of Eyadéma Gnassingbé, he was stabbed in the right eye by an army soldier. He was arrested and detained for one week, during which he was beaten and interrogated. He received first aid there. After his release, he was forced to sign a document whereby he committed not to take part in anti-government activities. He was warned if he were to contravene this, his life would be in danger. Upon release, the appellant was admitted to hospital for a three-week period, where he underwent surgery for his eye on 21st February, 2005. However, he had suffered irreversible sight loss in the afflicted eye.

6. The applicant continued to participate in the political activities of the UPC and took on the role of regional coordinator for the organisation, organising events, and producing and disseminating literature. After UPC-organised demonstrations on 4th August, 2007, state authorises destroyed the applicant's shop. On 14th April, 2010, while attending another demonstration, the applicant was badly beaten and detained by state authorities. While in detention the applicant stated that he was regularly beaten and one morning he experienced pains and noticed blood in his trousers. He believes that he was raped. The applicant then heard that one General Atipou was in the area and he requested to see him. The general was a family friend and agreed to facilitate his escape. In late December, 2011, the general took the applicant to Ghana. From there the general entrusted the applicant to a pastor, Charles. Charles organised travel arrangements with another pastor, David. David and the applicant left Ghana on 25th January, 2012.

7. The applicant travelled by aeroplane, transited through Ankara, and arrived in Ireland on 26th January, 2012. The applicant completed an ASY1 form on 27th January, 2012, a s.8 questionnaire on 6th February, 2012, and attended at the offices of the RAC for a s.11 interview on 12th April, 2012. A negative recommendation issued from the RAC by way of a s.13 report dated 31st May, 2012. The report included a s.13(6)(d) finding, namely:

> "the applicant had lodged a prior application for asylum in another state party to the Geneva Convention (whether or not that application had been determined, granted or rejected)"

Preceding the above finding, at p.70 of the booklet, the authorised officer stated:

> "The applicant's fear is based on a stated fear of persecution in Togo. It is not considered credible that he would face persecution on these grounds."

8. The effect of the s.13(6) finding is that any appeal to the RAT would be without an oral hearing: a papers-only appeal. The applicant appealed the RAC recommendation by way of form two, notice of appeal dated 6th July, 2012.

IMPUGNED DECISION
9. In the decision dated 18th December, 2012, the tribunal affirmed the negative recommendation of the RAC, that the applicant should not be declared a refugee. The tribunal member, at p.120 of the booklet, analysed the claim presented by the applicant. The tribunal member made credibility findings against the applicant, as follows:

1. It is not credible that he would have been unaware that he was claiming asylum in France;

2. His reasons for returning to Togo in 2004 lack credibility;

3. No information could be sourced online regarding General Atipou nor was any included with the notice of appeal;

4. No supporting documents were included that prove the applicant is a member of the UPC; and

5. The applicant's stated reasons for being freed from prison by the general lack credibility.

10. The tribunal member continues that the medical report, which states that the applicant's injuries are 'typical of', on the Istanbul scale, someone who had been abused, was not sufficiently compelling to negate the credibility findings made against the applicant. The tribunal member stated that, even if the applicant's claim was found to be credible, country of origin information shows that members of the UPC are now working with the government and the applicant's alleged subjective fears would not be objectively well-founded.

APPLICANT'S SUBMISSIONS
11. Counsel for the applicant, Mr. Michael Conlon, S.C. with Mr. Gary O'Halloran, B.L., submitted that the very detailed notice of appeal, and accompanying country of origin information, was effectively ignored by the tribunal member in coming to a decision to reject the applicant on credibility grounds. The applicant argued that the standard of extreme care was not adhered to in this case since it was a papers-only appeal, without an oral hearing.

12. In relation to the Spirasi report, the applicant argued that it was fundamentally unfair for the decision-maker to discount the report where it was 'typical of a person who has been severely abused', when rejecting the applicant's claim based upon credibility. The applicant maintained that the appeal was supposed to be de novo and, as such, the statement that the report is not sufficient to overturn the s.13 finding is not an adequate manner to deal with such evidence in a *de novo* appeal. The applicant recognised that the tribunal member is obliged, pursuant to s.16 of the Refugee Act 1996 (as amended), to take the s.13 report into account; however, the tribunal member is also obliged, pursuant to s.16, to take the notice of appeal into account, which the applicant contends, the tribunal member did not do. The applicant submitted that if the Spirasi report is to be discounted, then the applicant is entitled to reasons, as per, *inter alia,* the decision of Barr J. in *A.M.A.A. v. Minister for Justice, Equality and Law Reform & anor*. [2015] IEHC 505.

13. The applicant further submitted that the tribunal member failed to adequately consider the past persecution suffered by the applicant as, not only a significant indicator of the likelihood of future persecution, but also to consider whether the past persecution on its own was such that a grant of refugee status was warranted. The applicant relied on the decision of *K.B. v. Minister for Justice, Equality and Law Reform & anor.* [2013] IEHC 169. The applicant also submitted that the tribunal member failed to speculate on whether the applicant could be exposed to persecution in Togo because of his political and personal persona.

RESPONDENTS' SUBMISSIONS
14. Counsel for the respondents, Ms. Kilda Mooney, B.L., raised an objection that the applicant had failed to plead the case that was argued at hearing. The respondents argued that there was one general pleading in relation to the notice of appeal being ignored but nothing specific in relation to the tribunal member either not having regard to specific issues identified in the notice of appeal or issues regarding the country of origin information. The respondent argued that the applicant had failed to specify the issues raised in the notice of appeal which, it is alleged, should have been addressed, nor did the applicant specify the issues in the country of origin information which, it is alleged, should have been addressed. The respondents argued that, they were not on notice of these matters, and were prejudiced as a result, and that such general pleadings contravene Order 84 of the Rules of the Superior Courts.

15. The respondents submitted that this is a case that turns on credibility where the tribunal member found that the applicant's account was riddled with inconsistencies, so much so that the Spirasi report could not negate these credibility findings. The respondents pointed out that, although the applicant said that he was stabbed in the eye in 2005, the notice of appeal states that this happened in 2003. The respondents argued that the applicant's statement that he was not good with dates is not a reason that could explain away the inconsistencies in his story.

16. The respondents argued that the tribunal member did look at the Spirasi report and accordingly, decided upon a probative value to assign to same. However, the respondents submitted that the court should look at the Spirasi report and decide if it is of such probative value that the tribunal member acted irrationally in assigning the probative value she did to same.

17. The respondents argued that the alleged failure to consider past persecution, as well as being vaguely pleaded, is not substantiated. The respondents submitted that the entire decision and the credibility findings are grounded on a detailed consideration of the applicant's claim of past persecution. The respondents submitted that the applicant is attempting to appeal the decision and inviting the court to submit its own views for that of the tribunal member, relying, inter alia, on the decision of Clarke J. in *Imafu v. Minister for Justice, Equality and Law Reform & anor.* [2005] IEHC 416.

18. The respondents submitted that there was no failure on the part of the tribunal member to consider future persecution. Where the claim of past persecution is deemed not to be credible, the tribunal member is not obliged to conduct a hypothetical analysis of the likelihood of future persecution, as per *M.A.M.A. v. Refugee Appeals Tribunal & ors.* [2011] 2 I.R. 729. Further, the respondents argued, the tribunal member did find that the UPC members were now actively engaged in the government of Togo and therefore, not generally, systematically persecuted.

19. The respondents submitted that the fact that the applicant had previously been in France, where he had applied for asylum, and did not mention this until it was discovered by the RAC, is not a peripheral matter and goes to the core of the applicant's credibility. The applicant maintained that he went to France for medical purposes; however, the respondents contended, this goes to the heart of his claim for asylum and whether he was in fact persecuted as he claims in his country of origin.

DECISION
20. An appeal to the RAT is a de novo appeal. This is clearly set out in *M.A.R.A. (Nigeria) v. Minister for Justice and Equality* [2014]

IESC 71, where, at paras. 13-14, Charleton J. explains the nature of appeals to the tribunal:

> "The duty of the tribunal on appeal, under subsection 16A, is either to affirm the recommendation that refugee status should be refused or the tribunal may make a positive recommendation where it is "satisfied, having considered the matters referred to in subsection (16), that the applicant is a refugee". Hence, on appeal, there is a complete opportunity to present on behalf of the applicant in aid of this enquiry as to refugee status any new facts or arguments; to reargue the points appealed; to call new evidence for or against the status of the applicant; and to plead the case afresh and in full. The result of the appeal may be the affirmation of the Refugee Applications Commissioner in whole or in part or it may be that for a particular reason argued on appeal the applicant will be found to have established sufficient for a recommendation that the Minister grant him or her refugee status.
>
> It is clear from all of this that the form of appeal explicitly set out in the Act of 1996 is not merely a review as to whether any error had been previously made: rather, it is a full and thorough enquiry into the relevant documents and observations as previously furnished to the Refugee Applications Commissioner and the hearing of oral evidence and the reception of documentary evidence and submissions in respect of every point on which an appeal has been lodged. It is also apparent that the duty of the Refugee Appeals Tribunal is to make such rulings or finding of fact as are appropriate."

21. Section 16(16) of the Refugee Act 1996 (as amended) states as follows:

> "(16) Before deciding an appeal under this section, the Tribunal shall consider the following:
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> (a) the relevant notice under subsection (3),
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> (b) the report of the Commissioner under section 13,
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> (c) any observations made to the Tribunal by the Commissioner or the High Commissioner,
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> (d) the evidence adduced and any representations made at an oral hearing, if any, and
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> (e) any documents, representations in writing or other information furnished to the Commissioner pursuant to section 11."

The above listed documents are evidence that the tribunal member is obliged to take into account. It is within the tribunal member's jurisdiction to decide on the probative value to attach to each piece of evidence.

22. Since this was a papers-only appeal, I would reiterate this court's comments, at para. 31, in *B.Y. (Nigeria) v. Refugee Appeals Tribunal & ors.* [2015] IEHC 60.

> "The question of a paper-only appeal was considered by Ms. Justice H. Clark in V.M. (Kenya) v. Refugee Appeals Tribunal & ors. [2013] IEHC 24. That case concerned a finding pursuant to s. (13)(6)(a) of the Refugee Act 1996 (as amended) and, therefore, involved a paper-only appeal to the RAT. At para. 21 of her judgment, Ms. Justice Clark states as follows:
>
> 'One further aspect of this case of serious concern to the Court is that the appeal was conducted without an oral hearing. The Court is powerless at this remove to review or amend the Commissioner's finding that s.13(6) of the Refugee Act 1996 applied on the facts relied on in the applicant's claim. The Court therefore looks with heightened vigilance at the process of the documentary appeal in circumstances where an appellant has no opportunity to appear and explain or expand on any perceived inconsistencies or deficits in his/her claim. Unlike when the appeal is conducted orally, the Tribunal had no particular advantage over the Court in the assessment of credibility of an appellant as the same papers are before the Court as were considered by the Tribunal. At its core, the appeal concerned the evaluation of the validity of the s.13 negative recommendation and the applicant's written submissions on the availability of State protection from Mungiki defectors.'

The quotation continues at para. 22:

> 'It is by now very well established that when considering a documents-only appeal, the standard required is of necessity one of extreme care as the Tribunal Member has no opportunity to form a personal impression of the applicant as at an oral hearing.'
>
> I would wholeheartedly endorse the views expressed by Ms. Justice Clark in the aforementioned decision in relation to the extreme care that is required by tribunal members when conducting paper-only appeals."

23. The notice of appeal, just like the s.13 report 'shall' be taken into account by a decision-maker. The applicant, through the notice of appeal, attempted to provide reasons for the negative credibility findings in the s.13 report. These reasons, in my view, were not engaged with by the tribunal member. The applicant provided reasons and explanations in the notice of appeal. The tribunal can decide whether these reasons are acceptable and give reasons for so rejecting, if that is her decision. However, this should be clear to an applicant upon reading the decision. Particularly in a papers-only appeal, an applicant should be aware, from reading the decision in his case, that the notice of appeal was engaged with, where the applicant did not have the opportunity to address the decision-maker in person.

24. At para. 30 of *I.R. v. Minister for Justice, Equality and Law Reform & anor.* [2009] IEHC 353, Cooke J. states as follows:

> "In the Court's judgment, the process employed by the Tribunal member in reaching the negative credibility conclusion as disclosed in the Contested Decision was, therefore, fundamentally flawed because the documentary evidence which had been expressly relied upon before the Commissioner and in the notice of appeal and which was on its face relevant to the events on which credibility depended, was ignored, not considered, and not mentioned in the Contested Decision. It is correct, as counsel for the respondents submitted and as is confirmed by the case law summarised at the beginning of this judgment, that a decision-maker is not obliged to mention every argument or deal with every piece of evidence in an appeal decision at least so long as the basis upon which the lack of credibility has been found can be ascertained from the reasons given. However, in the view of the Court, that proposition is valid only when the other arguments and additional evidence are ancillary to the matters upon which the substantive finding is based and could not by themselves have rendered the conclusion unsound or untenable if shown to be correct or proven."

I believe the above findings in I.R. are particularly apposite in this case.

25. In my view, the tribunal member fails to engage with the explanations provided in the notice of appeal. I find that the objection raised by the respondents cannot be acceded to in this case, where the decision rests on credibility findings made and the applicant's submissions regarding those credibility findings are not clearly addressed in the decision. I do not find it necessary to address the further grounds of complaint raised by the applicant, as those complaints arise from credibility findings I have decided are untenable.

26. For the reasons set out above, I grant leave and, as this hearing proceeded on a telescoped basis, I grant an order of certiorari, remitting the matter to the tribunal for re-consideration by a different tribunal member.