Neutral Citation Number: [2008] IEHC 424

THE HIGH COURT
JUDICIAL REVIEW

2007 338 JR

BETWEEN

G. Y.

APPLICANT

AND
THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

AND
THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

Judgment of Mr. Justice John Edwards delivered on 18th day of December, 2008.

1. The applicant is a Cameroonian national. He claims to have fled from the Cameroon on 22nd April, 2006 and to have travelled to Ireland via Zurich. He arrived at Dublin Airport on 23rd April, 2006 and applied for asylum. He sought refugee status on the grounds of an alleged fear, that if he were to return to the Cameroon, he would be persecuted (i) on account of political opinions incorrectly imputed to him, and (ii) on account an incorrect perception that he is a member of a particular social group, namely, that he is a homosexual. He had difficulties with Immigration Officers on his arrival at Dublin Airport as a result of the fact that he was travelling on a false passport. He was arrested and charged with being in possession of a false passport, with using a false passport, and with assaulting a Garda. He was subsequently convicted by the District Court and sentenced to six months imprisonment. As a result of this he was incarcerated in Mountjoy until 28th September, 2006 when he was released. He completed an ASY 1 Form on 24th May, 2006 while he was in prison. He was interviewed on 11th July, 2006 (while in prison) and again on 3rd October, 2006 (following his release). In due course his application was considered in the normal way by the Refugee Applications Commissioner. By a letter of 24th November, 2006 he was informed that the office of the Refugee Applications Commissioner was recommending that he not be declared a refugee.

2. He appealed against that recommendation to the Refugee Appeals Tribunal. By its decision of 1st March, 2007, the Refugee Appeals Tribunal affirmed the recommendation of the Refugee Applications Commissioner. The applicant claims *inter alia* an order of *certiorari* quashing the said decision of the Refugee Appeals Tribunal and an order of *mandamus* remitting the appeal of the applicant for a hearing *de novo* before a separate member of the Refugee Appeals Tribunal. There are also claims for declarations and injunctions and various ancillary reliefs.

3. The applicant seeks those reliefs on a number of grounds. These are set out in detail at paras. E(1) to E(18) inclusive of his draft Statement of Grounds. I will briefly summarize them. The applicant alleges that the tribunal erred in law in failing to assess properly the substantial elements of the evidence of the applicant. It is further alleged that the tribunal's finding that police protection would be available to the applicant was irrational and unreasonable in the light of the evidence before it. It is further suggested that the tribunal erred in law in making adverse credibility findings without regard to the evidence before it. Further, it is suggested that the tribunal misconstrued the evidence of the applicant relating to a medical certificate submitted by him. It is suggested that there was a failure to properly assess the applicant's evidence in the light of the country of origin information and that the tribunal made selective use of the country of origin information that it did rely upon. The applicant says that the tribunal took into account matters which were irrelevant and failed to take into account matters that were relevant. The applicant suggests that this court should submit the tribunal's decision to anxious scrutiny rather than applying the lower standard of review provided for in *O'Keeffe v. An Bord Pleanála*.

Background Facts

4. The applicant states that he was born in Cameroon on 12th November, 1973. He is a catholic and is of Bimileke ethnicity. He speaks Dafang, Bangou and French, and since coming to Ireland he now speaks some English. He worked in Cameroon as a mechanic. In early December, 2005 he was invited to repair the car of Government Minister. He did this and was paid for it. Five days later the applicant was contacted again by the same Government Minister and he was asked on this occasion to check out a car belonging to the Minister's friend. He agreed to do so. When he arrived to work on this car, the Minister was there along with two other Ministers. He was introduced to the two other Ministers. He was asked what political party he supported and he told them that he supported the SDP (Social Democratic Party). It was suggested to him that he should change parties and that if he did so he would receive regular work. He checked out the car as requested and one of the Ministers paid him for the work. Before he went home, it was arranged that he would return on a subsequent occasion to do further mechanical work. On the appointed day he went to the home of the Minister who had originally contacted him. Once again all three Government Ministers were present. There was also a woman there whom they introduced to him. He was served with a beer and he was told by the Ministers "Gilbert, this woman is our woman". In the course of a conversation with the applicant, the woman suggested to the applicant that she would like for him to spend the night with them. However applicant declined to do so. After the applicant had finished his beer, he told the Minister that he had to leave. He was allowed to do so, but once again an arrangement was made for him to return and work on a car.

5. On the appointed day he was collected by the Minister's driver and he was brought to the Minister's residence. When he got there he found the woman on her own and she served him with a beer. While they were talking she informed him that she would like to have sex with him. Suddenly she went into a room and stripped off. She then pulled him into the room. While in the room, the applicant took off his clothes with the intention of having sex with the woman. The woman then said that she would go and get a condom and to the applicant's great surprise the three Ministers all came into the room. The applicant was then raped by all three men. When the rape was over the woman came to see the applicant and told him that he was never to speak of it, that he was to keep it a secret and that if the applicant spoke of it, it would cost him his life. He was given a sum of 5,000 CFA francs and driven home. When the applicant got home, he told his wife that he was very ill in the stomach and that she should call a taxi to take him to hospital. While in hospital, the applicant told a doctor what had happened to him. On the following day, certain journalists arrived to his hospital room seeking to film him and to question him. The applicant did not allow himself to be filmed, but he did speak to them. After some days the applicant left hospital.

6. Country of origin information discloses that in or around this time an article was published in a particular organ of the Cameroonian press purporting to identify certain public figures as homosexuals. In particular, one of the Ministers that allegedly raped the applicant was named as a homosexual. This was significant because Cameroon is an extremely conservative society, where homosexuality is very much taboo. In this context it is also noted that some months later the publisher in question was prosecuted for criminal libel and

received a four month prison sentence.

7. Be that as it may, on the day after the applicant left hospital the police arrived at his home to arrest him. They smashed the door and the window and damaged property in his house. The applicant claims that he was tortured and flogged and was bleeding all over. He was then handcuffed and taken to a police station where he was stripped and placed in a cell. A little later the Superintendent came to see him and asked him what had happened. The applicant states that he explained everything to the Superintendent and that the Superintendent then said that he (the Superintendent) had received a call from Yaounde instructing him to hold the applicant for three days, that certain people were coming to get him. According to the applicant's affidavit this officer was an old class mate and he was also a good friend of the applicant's older brother. The applicant gave him his older brother's telephone number. On the following day the Superintendent came back to see the applicant and told him that at 8 p.m. he should go out to empty the slops, that he should then climb over a barrier and that his brother would be waiting there for him in a white Toyota. This is in fact what happened. They drove all night until they reached the village of Bangou. While the applicant was in Bangou, he learned that his problem was being discussed on the radio and in the press. In the meantime the police came to his home and harassed his wife in an attempt to get her to tell them where he was. The applicant's wife did not know where he was. On 20th April, 2006 the police came to their house. However, the applicant was not there as he was working on a plantation nearby. Two days later the applicant's brother brought him to Yaounde from where he got a flight out of the country.

The Decision of the Refugee Appeals Tribunal
8. The first thing that should be said is that the applicant's claim was rejected by the Refugee Appeals Tribunal solely on credibility grounds. In that regard it is appropriate to recite at this stage the relevant portion of the tribunal's decision. The Tribunal Member stated:-

> "There are a number of significant aspects of this applicant's claim that I do not credible, and they are as follows:
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> (1) Homosexuality in Cameroon is illegal and contrary to s. 347 of the Cameroonian Appeal Court. It appears as if the police view that particular section in the penal code to enforce the law (sic). I note from a letter sent by Human Rights Watch to the Minister of Justice in Cameroon, dated 30th November, 2005, that on 21st May, 2005 the police arrested 11 men from the Nlonga Brigade in Yaounde on suspicion of violating s. 347 of the Cameroonian Penal Code.
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> (2) It appears as if the police act on foot of complaints received concerning people engaged in homosexual acts. For that reason, I find it difficult to believe that the police would assault somebody like this applicant, who was involved in providing them or anybody else with information that a certain person was engaged in homosexual activities. I make this comment even in the context of such a person being a Government Minister. This basic fact in itself must question this applicant's credibility to a certain degree.
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> (3) However, even if I accept that this particular applicant would be targeted by the police, then I think that such an eventuality could hardly come to pass into the future when, in fact, the editor of the newspaper who published the Minister's name has been jailed for making a false report, and, as such, the Minister is exonerated. Therefore, it would appear unlikely that the Minister or anybody else in authority would now have any reason to target this particular applicant on that account. This factor in itself must also go to the overall credibility of the applicant.
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> (4) This applicant claims to have spent five days in hospital arising from his treatment at the hands of the police. He has produced the medical cert, which, basically, contradicts that. The medical cert states that he spent ten days in hospital. This cert is also dated the 6th December, 2006. This man said that he had this particular cert when he was incarcerated in Mountjoy Jail between April and October, 2006. That period of time pre-dates the actual date that is on the medical cert. Whilst this might seem a trivial contradiction, I think that I am entitled to take it into account in the overall context of other inconsistencies and issues of credibility in so far this applicant's claim is concerned.
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> (5) This man said that he escaped from prison with the assistance of a Superintendent. It should be borne in mind that this applicant claims that he was in prison at the behest of the Minister that he was labelling as a homosexual. The manner of his alleged escape and the fact that this applicant claims that he was assisted by a Superintendent, is not, to my mind, credible. It is unlikely that a Superintendent would risk his career or may be more to help somebody who was, allegedly, involved in naming a Government Minister as a homosexual. After his escape, this man spent four months in his local village. He was not detained during that period and did not come to any harm. If the police wanted to target this applicant, then I feel that they would have been able to locate him over such a period of time. This aspect of the applicant's claim is not credible and also goes to the wellfoundness of the claim in question.

Conclusion
9. The tribunal has considered all relevant documentation in connection with this appeal including the notice of appeal, country of origin information, the applicant's asylum questionnaire and the replies given in response to questions by or on behalf of the commissioner of the report made pursuant to s. 13 of the Act. Accordingly, pursuant to s. 16(2) of the Act, I affirm the recommendation of the Refugee Applications Commissioner made in accordance with s. 13 of the Act.

The applicant's submission
10. The applicant makes a number of complaints in the course of his submissions about the manner in which his credibility was assessed by the Tribunal. With respect to para. (1) the applicant contends that the Tribunal erred in equating consensual homosexual activity with male rape. The applicant does not claim to have been a willing participant in the assault upon him and in the circumstances, it is difficult to understand the relevance of s. 347 of the Cameroonian Penal Code which apparently criminalises consensual homosexual activity. Moreover the applicant did not complain to the police that the Minister in question was engaged in homosexual activity. In fact, he complained to nobody, although he did give a history of male rape to his doctor and he also may have made unguarded statements to members of the press who visited him in the hospital. The applicant's case, however, is that far from him complaining to officialdom about the Minister, it was the other way around. He contends that the Minster ostensibly made a complaint to the police about him to the effect that he had been promulgating falsehoods about the Minister. Moreover the applicant contends that the police acted unquestioningly on the Minister's complaint and that this was unsurprising having regard to the unequal power relationship between the parties. Accordingly, the Tribunal Member seems to have misunderstood his case.

11. The applicant also complains that the Tribunal made an adverse credibility finding relating to the authenticity of the medical report produced by him and in relation to the time that it was procured without taking into account the explanations put forward by the

applicant. Further, the applicant complains that the Tribunal Member makes no mention of and, inexplicably attaches no weight to, the substantive contents of the medical report which he says supports his claim of being forcibly sodomised.

12. The applicant also contends that the Tribunal Member erred in foreclosing on speculation regarding the possibility of the applicant being exposed to future persecutory risk, even if he had doubts with respect to aspects of the applicant's story.

13. Finally, the applicant urges the court that the Tribunal Member's decision should be subjected to the higher standard of "anxious scrutiny" rather than review according to the standards set out in *O'Keeffe v. An Bord Pleanála*, [1993] 1 I.R. 39.

The Respondent's submissions

14. The respondent submits that there is no basis for a review of the Tribunal Member's decision. The respondent contends that it is not appropriate for the High Court to substitute its view of the facts for that of the Tribunal Member. It is only if the challenge to the Tribunal Member's decision goes to jurisdiction (i.e. if it is illegal or contrary to legislation) or if there has been a failure to apply fair procedures that judicial review might be available. The respondent contends that the applicant has not demonstrated substantial grounds as required by s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000. Further, the respondent contends that the court should have regard to the principle of curial deference and should be slow to interfere with the decision of the Tribunal in the circumstances of this case. The respondent contends that the Refugee Appeals Tribunal is an expert administrative Tribunal whose decision should not be interfered with unless it has been demonstrated that the decision is based upon a clearly identifiable error of law or in unsustainable finding of fact. The court is reminded that the applicant bears the burden of proving that he personally has a well founded fear of persecution.

Decision

15. This court is very conscious that it is not it's function to act as a court of appeal in respect of findings of fact or of law by the Refugee Appeals Tribunal with which the applicant happens to be dissatisfied. In the case of *Imafu v. The Minister for Justice, Equality and Law Reform and Others* (Unreported, High Court, Peart J. 9th December, 2005), the learned judge stated, at p. 11:-

> "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, is in the best position to assess credibility based on the observation of the 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 why 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."

16. Accordingly, this court would not be prepared to interfere with the decision of the Refugee Appeals Tribunal in this matter unless it was satisfied that the process by means of which the applicant's credibility was assessed was legally flawed. Regrettably, the court is of the view that there are substantial grounds on foot of which it may be argued that that process was indeed legally flawed. First, in *Zhuchkova v. The Refugee Appeals Tribunal* (Unreported, High Court, Clarke J. 26th November, 2004) Clarke J. cites with approval the following statement of Peart J. in the case of *Da Silveira v. The Refugee Appeals Tribunal* (Unreported, High Court, 9th July, 2004):

> "Conclusions must be based on correct findings of fact. A factual error of sufficient importance will often have capacity to at least cast some doubt upon the integrity of the decision-making process, and in those circumstances this court's function is to intervene and, if necessary, on a substantive hearing to provide redress."

17. The court is of the view that the Tribunal's decision was based upon a material error of fact. The Tribunal Member does not appear to have appreciated that the applicant, according to his own case, had made no approach to the police and was entirely a victim. It was the police who came looking for him at the instigation of the Minister who was one of his rapists. In these circumstances the existence of a provision such as s. 347 of the Cameroonian Penal Code would tend more to support the applicant's story than to undermine it. Secondly, the applicant is *prima facie* correct in contending that no apparent account has been taken of the explanations put forward by him concerning the date discrepancy with respect to the medical report. The applicant avers in para. 10 of his affidavit that the medical report that he produced to the Tribunal was a second report obtained by him as the first report became lost. It was the second medical certificate that was dated the 6th December, 2006. The document that he had with him in Mountjoy jail was the first medical report. It was submitted by counsel on behalf of the applicant, and not contradicted by counsel on behalf of the respondent, that this explanation was proffered by the applicant to the Tribunal. It seems to me that if the Tribunal Member was not disposed to accept the applicant's explanations it was incumbent upon him to specifically state that he was rejecting those explanations and why he was doing so. The applicant also points out that reliance was placed on the fact that the medical report stated that the applicant spent ten days in hospital whereas the applicant himself stated that he only spent five days in hospital. The court does not consider that the mere existence of this discrepancy would of itself be a justification for regarding the applicant's testimony as incredible. Medical reports are produced before the High Court every day of the week and it frequently occurs that they contain errors. Sometimes a doctor will speak of the left leg when he means the right leg. Sometimes a doctor will accidentally misreport a date or time or other detail concerning the patient or the patient's history. These things happen and so in the instant case the mere fact that the medical report states that the applicant was in hospital for ten days whereas the applicant's own testimony was that he was only in hospital for five days, would not of itself, and in the absence of something more, justify the assumption that the applicant's testimony must be wrong. Equally, the medical report could be wrong. Moreover, the Tribunal Member himself is demonstrably wrong when he states "this applicant claims to have spent five days in hospital arising from his treatment at the hands of the police". He has claimed no such thing. He claimed to have spent five days in hospital due to injuries sustained by him in the course of the rape incident. Contrary to what the Tribunal Member has stated he has never claimed to have been hospitalised as a result of the assaults allegedly perpetrated upon him by the police. Thirdly, the applicant is *prima facie* right in stating that the Tribunal Member does not seem to have attached any weight to the substantive contents of the medical report. The Tribunal Member was obliged to consider the applicant's story in its own terms in the first instance and then in the light of what is known about the country of origin. One of the central pillars of the applicant's story is that he was subjected to male rape. In support of his claim that he was raped, he has produced a medical report which *prima facie* confirms that he was hospitalised at the material time in the Cameroon with injuries to his anal region and that he gave a history of having been subjected to sodomy. In the absence of any good reason to doubt the authenticity of this medical report it could only be regarded as providing support for this pillar of the applicant's claim. Yet it is not alluded to at all by the Tribunal Member. Fourthly, the court is of the view that the Tribunal Member does appear to have foreclosed on speculation regarding the possibility of the applicant being exposed to future persecutory risk because of the doubts that he had with respect to the applicant's credibility. He should not have done so. In *Da Silveira v. Refugee Appeals Tribunal* (Unreported, High Court, Peart J. 9th July, 2004), Peart J. stated:

> "A lack of credibility on the part of the applicant in relation to some, but not all, past events, cannot foreclose or obviate

the necessity to consider whether, if returned, it is likely that the applicant would suffer Convention persecution."

18. The court agrees with the applicant that there are substantial grounds for believing that the Tribunal failed to adopt a forward looking approach as it was required to do.

19. For the reasons set out above I am disposed to grant the applicant leave to apply for judicial review on those grounds pleaded in his draft statement of grounds that are relevant to the issues that I have identified. I do not propose to grant him leave to apply for judicial review on the grounds that there was a failure to have regard to all of the country of origin information or that the Tribunal Member made selective use of country of origin information as I do not consider that substantial grounds had been advanced in support of these contentions. It will be a matter for argument at the full hearing as to whether the appropriate standard of review is that set out in *O'Keeffe v. An Bord Pleanála* or the higher standard of anxious scrutiny. However, for the purpose of this leave application I have sought to apply the higher standard of anxious scrutiny. However, my decision to do so cannot in any way bind, and has no implications for, the court that will in due course hear the substantive case.