Neutral Citation: [2013] IEHC 339

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 570 J.R.]

BETWEEN

M.K., D.A., A.K., G.K. (A MINOR) AND O.K. (A MINOR)

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 18th of July, 2013

1. This case concerns a clearly expressed decision by a member of the Tribunal rejecting the credibility of the parents of a family of asylum seekers. The complaint made against the decision is that it is irrational, that it is unsupported by the evidence and that inadequate reasons are stated. The applicants sought leave to seek judicial review and the case proceeded as a 'telescoped' hearing.

2. Although frequently repeated, it is useful to recall the basic rules which govern judicial review. Judicial restraint and deference to decision makers are the watchwords. Murray C.J. in *Meadows v. Minister for Justice* [2010] 2 I.R. 701, at 723 said:

> "[55] In reviewing the rationality or otherwise of the decision it remains axiomatic that it is not for the court to step into the shoes of the decision maker and decide the issue on the merits but to examine whether the decision falls foul of the principles of law according to which the decision ought to have been taken.
>
> [56] In doing so the court may examine whether the decision can be truly 'said to flow from the premises' as Henchy J., put it in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 If not it may be considered as being 'fundamentally at variance with reason and common sense'."

3. Unless the court is reviewing the decision of a technical body - which is not the case here- the *dicta* of Henchy J. in Keegan remains the guiding light. At p. 658 of the reported decision (supra) he said:

> "I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense."

Background

4. The applicants are a Georgian family of mixed Ossetian and Georgian ethnicity. Country of origin information was supplied to the decision maker which describes the general political situation in Georgia and, in particular, describes the ethnic tensions between Ossetians and Georgians and the delicate situation regarding the South Ossetia region of Georgia. The country of origin information also detailed significant problems with police misconduct and the prevalence of torture of detainees by police.

5. On the evening of 14th February 2008, the family seeking asylum was visited by the wife's cousins who had unspecified business in the locality. At 5.00am, the family woke to loud knocking at the door. It transpired that the police were outside. Gunshots were exchanged leaving the wife's cousin and a policeman dead. The wife's cousins were Ossetians. The policeman was Georgian. Ossetians blamed the applicant family for the death of the Ossetian cousin and the police blamed the family for the death of the Georgian policeman. In these circumstances, the family said they left Georgia, fleeing persecution from the police and from certain non-State actors.

The Decision of the RAT

6. The Tribunal Member assessed the husband's claim in the following terms:

"In regard to her husband's evidence in respect of the shooting, it too stretches credibility beyond what is reasonable. The story had an air of unreality to it and having heard the evidence and observed his demeanour while he gave the evidence, I reached the conclusion that the story was not plausible or credible. I reached this conclusion on the basis that the story was vague, non-specific and did not have the type of detail one would expect from a person who had been engaged in a violent altercation of this nature. Further, I reached the conclusion that the Applicant's contention that he was forced at gunpoint to leave the house with his wife's relative had an air of unreality to it. Having heard his evidence and observed his demeanour while he was giving this evidence I found it to be neither plausible nor credible and I find it undermines his credibility."

Legal Principles

7. The question for this court is whether the rejection of credibility for the reasons stated was rational. Adopting the language, set out above, of Murray C.J. and Henchy J. I ask whether the conclusion may be "said to flow from the premises". And if not, whether it may be considered as being "fundamentally at variance with reason and commonsense".

8. The key language in the decision under review is the assertion by the Tribunal Member that he reached the decision rejecting the husband's credibility "on the basis that the story was vague, non-specific and did not have the type of detail one would expect from a person who had been engaged in a violent altercation of this nature".

9. In order to review the legality of this decision in accordance with established principle, I have carefully read the account of the

husband's evidence written by the Tribunal Member and the other written versions of the husband's story. I have not been able to detect any of the vagueness or absence of detail suggested by the Tribunal Member. It is a vivid account of a dramatic night. My conclusion is that no reasonable decision maker could have concluded that the husband's account was vague, non specific or lacking in detail. The conclusion therefore does not flow from the premises and consequently I find that the conclusion is fundamentally at variance with reason and commonsense.

10. The legality of the decision also falls to be reviewed by reference to the reasons given for the decision. In *R.O. v. The Minister for Justice and Equality* [2012] IEHC 573, I reviewed a number of authorities which addressed the requirement to give reasons for conclusions and amongst the principles which emerged from that survey of case law was the idea that reasons must be intelligible in the sense that the reasons should enable the reader to understand why the applicant for protection is disbelieved on a certain point and/or generally. My view is that although the decision maker in this case gives a clear reason for rejecting credibility, it is extremely difficult to understand on what basis the first named applicant's evidence was considered vague. If, for example, the husband was unsure about how many people had been killed on the night in question or the date of the events or the time of the day when the violent episode occurred, one could readily understand why his evidence could be rejected as being vague. A review of the first named applicant's written answers in questionnaire form and the accounts of his oral evidence given by the Office of the Refugee Appeals Commissioner and by the Tribunal Member himself reveal a full account of events and I cannot detect what detail might be missing or in what respect the story is vague. Therefore, the reason given by the Tribunal Member offends the requirement that the stated reason should enable its addressee to understand the basis upon which a claim for asylum has been dismissed. The reason is also unlawful because it is based on an error of fact as it cannot be plausibly said that the husband's evidence was vague, non specific or lacking in detail.

The Wife's Claim

11. The second named applicant wife also claimed asylum and explained her participation in the events of the evening in question. Her claim was dismissed as follows:

> "In respect of the evidence of D.A. I found her story in respect of the shooting to stretch credibility beyond what is reasonable. She appears to contend that a double shooting took place at her home in the early hours of the morning and by 9 o'clock the following morning the police had left taking with them two bodies, one of a policeman and the other of her cousin. I found her story to be neither plausible nor credible that she would not have been taken away for questioning that they would not have sealed off the house that forensic experts would not have attended at the house and that the police service would simply have walked away from the house a short number of hours later. She makes no reference to a search being conducted. I found this evidence to be neither plausible nor credible and I find it undermines her credibility."

12. This decision is also alleged to be irrational. The evidence in the case was that the wife was questioned twice at her home in the hours immediately after the double killing. Her evidence to the Tribunal was that when she had answered the police questions, they left and then she left the family home and went to her uncle's house which was nearby. Her house was burnt down later that day.

13. The wife's credibility is rejected by reference to the perceived behaviour of the police. However, the comments about the behaviour the police are based on conjecture and speculation. Neither the Tribunal Member nor the wife could have any knowledge as to whether or not there was a forensic examination of the house in the hours between the departure from the house by the wife and her children and the burning of the house later that day. This issue was never put to the second named applicant and she never had an opportunity to deal with this concern. But even if the matter had been put to her how could she know whether there had been a forensic inspection after she left and before the house was burnt down? The fact that she was not taken away for questioning- though she was questioned twice at the house- may have a perfectly plausible explanation. Maybe that's the way things are done in Georgia.

14. In *I.R. v. The Minister for Justice, Equality and Law Reform* [2009] IEHC 353, Cooke J. indicated that "a finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation and the reasons from such facts must be cogent and bear a legitimate connection to the adverse finding". In order for the rejection of the wife's credibility to be sustained, the Tribunal Member would need to establish as a matter of fact that no forensic examination of the house took place. In addition, the Tribunal Member would be required to establish that the police in this district of Georgia would routinely carry out such an examination. It would also need to be established that it would be normal Georgian practice to take a person in the position of the wife away or into custody for questioning.

15. There was no evidence before the Tribunal in relation to police procedures in Georgia and I accept the submission made by counsel on behalf of the applicants that the Tribunal Member appears to have assumed that the police in Georgia would behave like An Garda Siochana following a double murder. It should be recalled that the country information revealed significant deficiencies in the the Georgian police force such that one could not assume that they would behave like police in Ireland. It seems to me that these issues were not raised in any way during the process and it is unsafe to make credibility findings based on this sort of speculation and conjecture.

16. In respect of the two credibility findings made of the husband and wife, both paragraphs in the text of the decision commence with general assertions that the story of the double killing stretches credibility beyond what is reasonable. In a decision of this court in *R. O* (supra)., I referred to credibility findings where the reason for the incredulity is patent. I said:

> "I need hardly add that the duty to give reasons on credibility findings is not automatically breached where the reason for the incredulity is patent and is therefore not expressly stated. In this case for example, the fifth reason given for disbelieving the applicant related to her claim that she walked to the next village in an hour. When it was put to her that the next village was some 70 kilometres distant, she said that she ran. That the Tribunal does make the obvious comment that no human being could run much less walk 70 kilometres in an hour and that for this reason she is disbelieved, does not offend the rules on giving reasons for credibility findings."

17. In my view, the general rejection of credibility contained in the quoted paragraphs from the decision in suit, insofar as they express patent incredulity, is also unlawful. There is nothing inherently implausible or impossible about the idea of a double murder involving Ossetians and a Georgian policeman in a part of Georgia 40km south of the troubled region of South Ossetia. Country of origin information reveals the delicate security situation in Georgia and the ethnic tensions which cause eruptions of violence from time to time. A double murder involving a policeman and a civilian would not be unimaginable or implausible in a stable European state, much less in a troubled region such as Georgia. There is nothing inherently implausible about thes events.

18. The Tribunal Member also made detailed findings on the possibility of internal relocation and/or State protection but counsel for the respondent fairly conceded that this case turns on the legality of the credibility findings. As I have decided that the credibility

findings are unlawful, the remainder of the Tribunal's decision is not required to be analysed.

19. I grant leave to seek judicial review and make final orders of *certiorari* and order that the matter be remitted to the Tribunal for reconsideration. At the election of the applicant this decision may be placed on the file to be viewed by the next decision maker.