

**THE HIGH COURT
JUDICIAL REVIEW**

2007 1177 JR

BETWEEN

I. A. Y.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL,

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

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT OF MS. JUSTICE CLARK, delivered on the 18th day of March, 2009.

1. The applicant is seeking leave to apply for judicial review of the decision of the Refugee Appeals Tribunal (RAT) dated the 29th August, 2007, to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner (ORAC) that he should not be granted a declaration of refugee status. Mr. Mark de Blacam S.C. and Ms. Maureen Cronin B.L. appeared for the applicant and Ms. Siobhan Stack B.L. appeared for the respondents. The hearing took place at the Kings Inns, Court No. 1, on the 24th February, 2009.

Factual Background

2. The applicant's claim is that he is of the Bergud tribe and a national of Sudan. He was born in 1982 and lived all his life in the city of Nyala in South Darfur state, in western Sudan. After four years of education he started helping his mother on their farm. He says he left Sudan as a result of the following events: in July, 2006, he made a journey in a truck from Nyala to Al Fashir to deliver farm produce. He was returning on the road on the 28th July, 2006, when he found that two villages had been bombed by the Sudanese army and Janjaweed militia and the fleeing inhabitants were on the road seeking refuge in a camp. He undertook to escort roughly sixty villagers to Tawila IDP (internally displaced persons) camp. En route, Janjaweed militia stopped his lorry, searched it, forced the villagers to get out, took his documentation (driving licence, naturalisation certificate and ID), beat him rendering him unconscious and took him to a Janjaweed camp where he was kept tied up and again beaten, interrogated and tortured. The Janjaweed accused him of helping people to escape to IDP camps, of stealing army uniforms and giving them to the opposition and of joining the opposition.

3. After ten days the Janjaweed camp moved and he was taken to a new location where he was kept under guard and had to wash uniforms. Ten days later he managed to escape when the camp was attacked. He ran to a village where he was given food and clothes and was then guided to his uncle's house in Goz village. His uncle told him it was not safe to remain in Sudan as the Janjaweed had his documentation. The uncle then paid 4.6 million Sudanese pounds to an agent who, on the 20th August, 2006, took the applicant by car to Libya. The journey took four days. The applicant hid at a farm in Libya for ten days and on the 3rd September, 2006, was taken to a ship. He changed to another ship at sea and then hid in a truck. After arriving at an unidentified port in Ireland on the 20th September, 2006, the truck in which the applicant was hiding moved but after a while it stopped and dropped the applicant off. He met a black man who spoke Arabic and who brought him to the ORAC offices.

Procedural Background

4. The applicant applied for asylum the day after his arrival in the State, claiming to fear persecution on the ground of his race. In his questionnaire he said he was afraid of being tortured and killed by the security forces or Janjaweed militia. He submitted no identity documents and at his s. 11 interview explained his ID was taken by the Janjaweed and army when he was caught. He was questioned on the facts asserted in his questionnaire and when asked to estimate the length and distance between Nyala and Al Fashir, he said his car was not new and the roads were not good so sometimes he left at 9pm and arrived at 7am the next morning but it depended on the car and the speed and most of the drivers stop at Kafod en route to take a rest, to fix a puncture or to get food. He was asked various questions about where on the route he was at the time of the attack on the 28th July, 2006 and gave unclear answers. When asked how far it was from the point he picked up the villagers to the IDP camp he said he did not know and could not be certain as the streets were not good and anything might happen; he did not know the distance in kilometres and had not done the journey to Tawila before.

5. A report was compiled in compliance with s. 13(l) of the Refugee Act 1996 in which a negative recommendation was made. The ORAC officer found a number of credibility issues regarding his testimony and found him "vague and evasive" in response to questions about his alleged ordeal. She noted:-

- He said he travelled from Nyala to Al Fashir two or three times monthly but could not give any indication of distances or length of time between the two;

- He could not give a precise date as to when he left Nyala but was positive he was arrested on the 28th - this suggests he knew about the attacks on the villages on the 28th, which are well documented on the internet. He was "extremely vague" when otherwise recording dates - this casts doubts as to whether he was in the area at the time;
- His account of his alleged capture was implausible as it was not credible that the Janjaweed would justify themselves to the villagers, engage in conversation with them or leave them unharmed; and
- His testimony as to his escape also cast doubts on his credibility.

6. The ORAC officer accepted that the applicant may be a member of the Bergud tribe from Nyala that most attacks are on outlying villages. She said this suggests the applicant "may have been relatively safe living in the city" and she found that his account of his alleged persecution was not credible.

The RAT Stage

7. A Form 1 Notice of Appeal was submitted on behalf of the applicant in January, 2007 to which was country of origin information (COI) was attached. Limited generic grounds of appeal were set out in the Form 1 but more detailed submissions and further COI followed in April, 2007. It was here submitted that because the applicant made the trip from Nyala to El Fasher two or three times monthly, dates would not stand out; that he had a problem with the interpreter at the s. 11 interview; and that he had said at interview that he did not know what happened to the villagers when the Janjaweed took him and did not know if they were harmed. Additional COI was again furnished in May, 2007.

8. A medical report from the applicant's current G.P. dated June, 2006 was also furnished to the Tribunal. The report records the applicant's account of events - including his claim that he was beaten with sticks and rifle butts - and states that he has recovered from his injuries and has no symptoms at present apart from the scars of his old injuries. It recorded a number of scars including a 5cm x 3cm "old scar" on his left shin which "could be from avulsion to the skin due to a blow from a rifle butt as alleged"; a Y-shaped "old scar" on his forehead which "could be a wound caused by a rifle butt"; small scars on the back of his hand "sustained when defending himself when he was assaulted with sticks"; and several smaller scars on both wrists "which he claims to have sustained when he was kept tied up". The report concluded that the applicant has old scars that are "consistent with" the injuries he claimed to have sustained but that he has no residual disability and is now in good health.

9. An oral appeal hearing took place on the 14th June, 2007 at which the applicant was legally represented. No attendance note of the hearing is before the Court and the applicant's grounding affidavit does not contain a description of what occurred at the hearing. The Court is therefore reliant on the summary contained in the RAT decision which does not purport to be fully comprehensive. According to that summary, the Presenting Officer questioned the applicant about the attack on the Janjaweed camp that allowed him to escape, the events of 28th July, 2006 when he said he was taking agricultural products from his farm to the market and how long it took to travel the road. He said that it took thirteen hours each way between Nyala and El Fashir. He described his travel arrangements to Ireland as being first in a small boat and then in a large ship for a number of days before being transferred to another ship at sea and then arriving in Ireland. He thought he spent not more than seventeen days on the ship but could not fully remember. He explained that although the pound was replaced by the dinar in 1992 people still refer to the currency as pounds. It is recorded that at the submissions stage, it was argued that the ORAC reports did not reflect the geography the applicant was familiar with and that there was no evidence to suggest that he was not from Darfur. It was submitted that the medical report furnished said his injuries were consistent with his story and that overall, his story was truthful and that he had a well founded fear of persecution.

10. In essence, the applicant's story of why he was seeking asylum was not believed and a negative decision issued from the RAT on the 29th August, 2007 and it is that decision that is the subject of challenge in these proceedings.

The Impugned Decision

11. Having set out the narrative in summary the RAT decision set out various legal principles and provisions and the Tribunal Member then turned to analyse the applicant's claim. In the "analysis" section the Tribunal Member made numerous negative credibility findings, relating to the following:

- (i) At his s. 11 interview, the applicant was unable to give any indication of the distance between Nyala and Al Fashir or how long it took to get from one to the other. *"This would have been within the domain of the Applicant, as he traversed the distance many times."* Only after the s. 13 report did he say the journey took 13 hours. *"This is a huge journey, irrespective of the condition of the roads";*
- (ii) The applicant could not give a precise date as to when he left Nyala in contrast to the date of the attack on the villages near Tawila;
- (iii) It is difficult to accept he was able to fit 60 people on board his truck as he said he was taking farm produce to the market and presumably the truck was therefore full of products;
- (iv) His account of his capture is implausible as it is not credible the Janjaweed would explain their actions to the villagers or leave them unharmed;
- (v) His account of his escape was implausible;
- (vi) It is difficult to accept he gave 4.6 million Sudanese pounds to the agent because the equivalent would be over €974,000. If he gave 4.6 million Dinari, the equivalent would be €900. The logistics of transferring from one ship to another on the high seas would amount to a lot more than €900. The applicant did not provide a full and true explanation of how he travelled to and arrived in Ireland (reference to s. 11B (c)).
- (vii) Based on his evidence at the hearing he did not provide a reasonable explanation to substantiate his claim that Ireland was the first safe country in which he arrived since departing from Sudan (s. 11B (b)). Failure to seek asylum elsewhere was "not consistent with an intention to flee".

(viii) His account of changing ships on the high sea and arriving at the ORAC offices without hindrance was implausible given the security surrounding ports and airports since 9/11.

(ix) Even though he had shown some knowledge of the areas, he was unable to describe distances even though he was travelling huge distances every two weeks and "should be able to equate distances, despite his short time at school." He was not in possession of sufficient details to indicate he was from Darfur. He also had "enormous difficulties" explaining the currency even though he regularly went to the market to sell farm produce.

(x) The Tribunal Member found that the medical certificate submitted was "not in any way a diagnosis of how he came to have the scars, some of which were old" yet he claimed to have been tortured the previous year.

(xi) He concluded that having regard to "the implausibility of the information provided" and "the manner in which the evidence was delivered and his overall demeanour", the applicant was not credible and although he had some knowledge of Sudan, he did not have a well-founded fear of persecution.

The Issues in the Case

12. The applicant's primary complaints may be summarised as follows:

- (a) Flawed assessment of credibility; and
- (b) Inadequate consideration of the medical evidence.

13. Ms. Stack B.L., counsel for the respondents, submitted that the applicant has failed to produce even elementary evidence to support the grounds that he is putting forward for his challenge, particularly insofar as he has not produced an attendance note of the appeal hearing.

The Court's Assessment

14. This being an application to which section 5(2) of the Illegal Immigrants (Trafficking) Act 2000 applies, the applicants must show substantial grounds for the contention that the decision ought to be quashed. As is now well established, this means that grounds must be shown that are reasonable, arguable and weighty, as opposed to trivial or tenuous.

15. Each of the recited findings was minutely analysed and compared with what was said by the applicant in his questionnaire, at interview, before the Tribunal and in his explanatory affidavit. An examination of these documents and the decision discloses that there can be no doubt that the applicant was well informed on the details of the city of Nyala in marked contrast to his knowledge of the geography of the road to Al Fashir and Kafod or to Tawila or Goz. It was his knowledge deficiencies here which cast doubt on his claim that he was attacked and detained by the Janjaweed because he was transporting fleeing villagers to Tawila on the 28th July, 2006 in his truck. As his asserted fear of persecution if returned to Sudan emanated from that particular incident and not because he was from Nyala, the knowledge he displayed regarding the geography of Nyala was largely irrelevant whereas the important issues for focus were the events of the 27/28th July and thereafter. I find no fault with the manner of the Tribunal member's concentrating her assessment on the core issues of the application.

16. When asked about his journey to the market, where he was when he met the refugees and when he was halted by the Janjaweed, where the camps were located, how he escaped and how he found his way to his uncle's house, his answers were distinguished by vagueness and thinness of detail. The answers were conflicting in relation to the stage of the journey when he met the fleeing villagers ranging from "going to Al Fashir, in Kafod" and "going to Al Fashir, in Al Fashir and going to Kafod," he "had slept in Kafod and was beyond Al Fashir", "after Al Fashir I went to Kafod." The affidavit was sworn following two negative findings of vagueness as to where he was when he met the refugees. He was aware that a credibility finding was made regarding whether his truck was empty of produce when he collected the villagers yet his affidavit merely states that he had picked up the refugees when "I had been travelling to the market to sell the farm produce". In the premises therefore it was to be expected that lack of credibility findings would be associated with this type of evidence.

17. The applicant's answers relating to the distance between Nyala and Al Fashir were inconsistent and variable: for example, the thirteen hour period mentioned at the appeal hearing for the trip from Nyala to Al Fashir does not accord with his statement at interview that if he left at 9pm and stopped en route at Kafod, he would arrive at 7am, i.e. a journey time of less than ten hours. It was not clear from his answers whether Kafod was on the way to Al Fashir or beyond the town. There is a clarifying note on the record of his ORAC interview that Kafod was beyond Al Fashir. There can therefore be no doubt that the applicant was well informed on the details of the city of Nyala in marked contrast to his knowledge of the geography of the road to Al Fashir and Kafod or to Tawila or Goz.

18. The impugned decision must be viewed on the basis that the applicant is a person from Nyala who claims to have travelled the road between the two principal towns in the area on a regular basis for commercial purposes. He had produce to deliver from his farm in Nyala to the market at Al Fashir. Common sense dictates that produce must be delivered in a fresh condition and some degree of forward planning is needed in relation to travel time and distance especially as all COI indicates that these two towns and indeed Kafod are situated in a very dangerous part of North Darfur. A person who makes a journey regularly in association with his living can be assumed to have a good idea of the distance and then prepare for the variables. The distance remains constant while the variables such as weather, traffic, the condition of the road or movement of military personnel are infinite variables. A failure to answer basic questions on distance on a route regularly travelled must logically give rise to suspicions.

19. It seems clear from the s. 11 interview notes that the applicant was not knowledgeable when asked about the distances between the various villages on his journey and that he was reluctant to enter into specifics even when pressed. In the circumstances, it does not seem irrational or unreasonable to expect him to know the distance between the two places, whether in terms of miles, kilometres, hours or days. In that context, I am satisfied that the Tribunal Member made no error of fact by saying that the applicant could not give any indication of the distance between Nyala and Al Fashir or how long it took to get from one to the other. A map of the area shows that the distance between the towns is just under 200 km and Kafod, the town at which he said he stopped to rest before he reached Al Fashir, is approximately 40 km further up the road and well beyond Al Fashir. The Tribunal Member cannot be faulted for being

sceptical about his vagueness relating to the geography of the area. 20. I am also satisfied that it was open to the Tribunal Member to draw an adverse finding on the basis that the applicant was unable to provide the date when he left Nyala. It was noted in the ORAC recommendation that the applicant was surprisingly clear that the date when he met the fleeing villagers was the 28th. In contrast, the rest of his answers were remarkable for their lack of precision or clarity. If as he said he left Nyala on the eve of his arrival in Al Fashir, the date of his departure was easy to provide and had already been suggested at the ORAC interview process and in the s. 13 report. The Tribunal Member cannot be criticised for being unimpressed with this vagueness when assessing credibility.

21. With respect to the finding that it difficult to accept the applicant could fit 60 people on board his truck if it was full of agricultural produce, it is evident that the answers from the records of his interviews and his oral appeal hearing were confused and sometimes contradictory and inconsistent. The applicant has provided no convincing argument to overturn this finding.

22. It was asserted by counsel for the applicant that the Tribunal Member engaged in impermissible speculation and conjecture by stating that it was implausible that when taking the applicant from his truck, the Janjaweed would have explained to the villagers that the applicant was one of the people behind the resistance or have left them unharmed. This finding was contained in a composite paragraph containing a number of other findings relating to his capture and escape which were found implausible. This was stated in the context of COI documents which were before the Tribunal Member on the subject of the Janjaweed militia where the general tenor of that information was that the Janjaweed were, as the Tribunal Member described, "known for their viciousness". The COI described them as a loose collection of fighters who, with the support of the Sudanese government, has adopted a scorched earth strategy, targeting IDP camps, razing villages, terrorising and indiscriminately killing civilians, stealing livestock and firing on, executing and burning escaping refugees to death in escape vehicles. Instances of such execution and burning of fleeing refugees were well documented in the COI which states that the Janjaweed are generally armed with AK-47s or G-3 rifles, all provided by the government, and that they ride camels and horses. None of the information contained in those reports would convey the impression that the Janjaweed would be disposed to engaging in conversation with a group of displaced villagers who they discovered in a truck. In the circumstances, and in the context of the wide dispersal of such information about the Janjaweed, I am satisfied that it was neither unreasonable nor irrational for the Tribunal Member to have regard to the vicious nature of the militia and to draw the inferences that he did in that respect.

23. The finding that the applicant's description of his escape from the second Janjaweed camp where he was under guard was implausible was also challenged. Again, an analysis of the different versions of the evidence was conducted. At his s. 11 ORAC interview, the applicant first said the camp at which he was held was "*bombed during the night*" but when asked about this a little further into the interview he said "*There was a fight and I don't know where it came from.*" He continued "*When the fight happened I found an opportunity to escape. I was kneeling* (this may possibly be a translation for crawling) *for a while and then I started running the whole day*". When asked if he saw any of the three guards who had been in charge of him when he escaped he said "*when the fight erupted everyone tried to protect himself and it was dark and I was kneeling until I reached safety.*" His description of running for a whole day without being apprehended, finding a village from which he was guided to his uncle or cousin's house was found not plausible and again this finding was criticised.

24. It is my view that when this finding is viewed against the decision as a whole and in the context of attacks on and from the Janjaweed in the area, the idea that an injured prisoner or indeed any person could run all day without being apprehended is implausible and the Tribunal Member cannot be faulted for the particular finding. The applicant's general ignorance of where the camps were, what the name of the village to which he ran was and how he came to find his uncle's village of Goz were all factors which were available for consideration in the assessment that the story of the applicant's escape and deliverance. The applicant was on notice from the ORAC recommendation that his account of his escape had been found implausible but he did not seek to clarify or expand upon his account in his appeal submissions nor did he submit any objective evidence of any attack on a Janjaweed camp in mid-August, 2006. He said nothing to clarify or elucidate the details of his escape. The Tribunal decision records that when asked how the camp was attacked, "*he said he didn't know, but he just escaped and ran away during the night.*" In the circumstances, I cannot criticise the Tribunal Member for finding the account of his escape to be implausible.

25. It is difficult to understand why the applicant asserts unfairness or error in the findings relating to the applicant's travel to the State. The applicant had no proof of identity, of how he arrived here, when he arrived or with whom he travelled. The Tribunal Member is obliged under statute to take these matters into account when considering credibility. An explanation that his ID documents were taken by the Janjaweed does not explain how he was able to travel across Sudan and into Libya without any identification documents. It does not explain the lack of detail on where he boarded the ship in Libya, where and how he changed ship at sea and where his ship berthed in Ireland. I am satisfied that it was perfectly open to the Tribunal Member to make the finding that he did, having regard to s. 11B (c) of the Refugee Act 1996, as amended.

26. While the Tribunal Member seems to have drawn on his own experience of other cases as a member of the Refugee Appeals Tribunal to find that the €900 alleged to have been paid by the applicant to the agent for his journey was an unusually low sum, it is not a finding which could be impugned for that reason alone as some degree of deference must be accorded to the Tribunal Member on these matters. I am guided by the decision of Peart J. in *Okeke v. The Minister for Justice, Equality and Law Reform* [2006] I.E.H.C. 46. The RAT is an expert body charged by the legislature to hear appeals in this particular area and it has acquired a great deal of experience and knowledge built up over the years relating to travel arrangements made by applicants from various countries. A measure of appreciation must be afforded to the Tribunal Member's knowledge on the subject of travel, particularly as the account given by the applicant of his travel to and arrival in the State bears a strong resemblance to other accounts which have come before this Court. For these reasons, as Peart J. found in *Okeke*, I am satisfied that it cannot be substantially argued that this was a conclusion which could not be properly arrived at by the Tribunal Member.

27. It was open to the Tribunal Member to refer to s. 11B (b) of the Refugee Act 1996, as amended, in this case where the applicant's only answer when asked at his s. 11 interview why he didn't decide to stay in Libya was that he was frightened and his uncle told him to follow the Libyan agent.

28. I finally turn to the question of whether the Tribunal Member gave inadequate consideration to the medical evidence furnished by the applicant. The author of the medical report has written many other reports presented in asylum claims. It was not compiled by SPIRASI, who are familiar with the Istanbul Protocol for assessing injuries which are claimed to have

been received by torture. The injuries found are not described in the generally accepted hierarchy laid out in the Istanbul Protocol when describing injuries as being "not consistent", "consistent with", "highly consistent", "typical of", and "diagnostic of" torture. The report prepared by Dr. Fernandez does not contain any reference to the Istanbul Protocol. Even if it is assumed that the G.P. was familiar with the Istanbul Protocol and used the word "consistent" in that context, his diagnosis indicates only that the applicant's scars "could have been caused by the trauma described". This is a non-specific finding and where there could be many other possible causes. The injuries found in the report seem somewhat at variance with the maltreatment and torture described by the applicant when he was beaten until he passed out. While one should be very slow not to accept the contents of a medical report, the contents of this one must be seen in the context of his history to the doctor of "assault and detention for twenty days by the Janjaweed militia in Darfur". The applicant also described "being tied to a tree for ten days and being beaten with rifle butts and sticks" and that his wounds were treated at his uncle's farm. There is no mention of being rendered unconscious by blows at the truck.

29. In this context, I am guided in particular by the decision of Birmingham J. in *M.E. v. The Refugee Appeals Tribunal* [2008] I.E.H.C. 192, where the medical report indicated that the applicant's injuries were "consistent with" the injuries he claimed to have sustained. In a finding comparable to that made in this case, the Tribunal Member in *M.E.* found a medical report to be of no probative value in the sense that it did not assist as to how the injuries detailed were received. Birmingham J. noted that if the approach of the Istanbul Protocol was followed, the report would mean that while the injuries were consistent with a beating, there were also many other possible causes, and he went on to find as follows:

"Even if one accepted that the injuries were caused by the method described (i.e. a beating with a light rod or stick), the report offers no assistance as to where, when and in what circumstances the injury was caused. The report is indicating that it was possible that the injuries were caused as described but does not elevate that to a probability."

30. Birmingham J. contrasted the quality and quantity of the "non-specific" medical report in *M.E.* to the reports that were at issue in *Khazadi v. The Minister for Justice, Equality and Law Reform* (Ex temp., High Court, Gilligan J., 19th April, 2007) and *Simo v. The Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 305 and concluded that the complaints that the Tribunal Member failed to give adequate consideration to the medical report in *M.E.* was not made out. I consider that this analysis applies equally in the present case. The Tribunal Member considered the report. He did not reject the injuries detailed. He found that the medical report was not diagnostic of how the applicant came to have the scars he displayed. I cannot see how it could be argued that it was not open to the Tribunal Member make such a finding. I therefore find that the applicant fails on this ground.

Conclusion

The applicant has not established any substantial grounds for reviewing this decision and leave is therefore refused.