Neutral Citation: [2015] IEHC 400

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 499 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED) IN THE MATTER OF THE IMMIGRATION ACT 1999 (AS AMENDED) IN THE MATTER OF THE ILLEGAL (TRAFFICKING) ACT 2000 (AS AMENDED) AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003, SECTION 3(1)

BETWEEN

G.G.N.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 26th day of June, 2015

1. This is a telescoped application for judicial review seeking an order of *certiorari* to quash the decision of the Refugee Appeals Tribunal (RAT) dated 10th May, 2011, and remitting the appeal of the applicant for de novo consideration by a separate tribunal member.

EXTENSION OF TIME

2. The within proceedings were brought outside the statutorily permitted time by a period of four days. No objection was raised by the respondents in relation to the necessary extension and given the amount of time that has elapsed since the commencement of these proceedings and the explanation offered, I am satisfied that it is appropriate to grant an extension of time in respect of these proceedings.

BACKGROUND

3. The applicant was born in Niger on 19th October, 1987, and moved to Nigeria when he was four years old with his mother. As the applicant did not provide documentation to confirm his nationality, his claim of persecution was examined in regards to two countries: Nigeria and Niger.

4. The applicant claimed that he had been a member of the Niger Delta Youth Movement (NDYM) since 2001, and was a full time coordinator for the party. He says he was involved in a number of protests for the party from 2002 to 2005 and that he was arrested and tortured in 2007. He claimed that while he was attending a protest at an international oil company in 2008, a substance was thrown into his house while his mother was there and she later died from an illness, which the applicant attributed to the substance. He stated that he was arrested by government soldiers in 2010 and brought to a shrine and forced to drink a potion, which was supposed to kill him. However, he claimed that he managed to escape to a house, where a man gave him some herbs that cured him. He then went to Lagos and reported everything to the police.

5. He stated that he met a named British national at protests in Lagos. This man arranged his travel from Lagos to Dublin, *via* London and the applicant then used this man's passport until he was arrested by the Gardaí in Ireland. The applicant arrived in Ireland in October, 2010 and was arrested by Gardaí in December, 2010 due to his possession of false documentation.

6. The applicant applied for asylum on 14th December, 2010. The applicant's s.11 interview was held on 23rd March, 2011. The authorised officer of the Refugee Applications Commissioner (RAC) determined that the applicant was unable to explain adequately why he didn't apply for asylum until arrested by Gardaí or why he was living in Ireland illegally. As a result, s.13(6)(c) of the Refugee Act 1996 (as amended) was applied, which provides:

> "That the applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State"

On that basis, the appeal to the Refugee Appeals Tribunal was determined without an oral hearing. The decision of the commissioner dated 7th April, 2011, was appealed to the Refugee Appeals Tribunal by form two notice of appeal submitted on behalf of the applicant on 19th April, 2011. The Refugee Appeals Tribunal affirmed the decision of the Refugee Applications Commissioner by decision dated 10th May, 2011.

IMPUGNED DECISION

7. Section 6 of the tribunal's decision under the heading 'analysis of the applicant's claim', at paras. 2 to 5 states the following:

> "There are a number of problematic inconsistencies in the applicants (sic) evidence which undermine his credibility and thus question the legitimacy of his claim for international protection. In assessing credibility the Tribunal has approached the issue as laid out by Cook J. (sic) in the case of Radzuik – v – MJELR 24th July 2009.
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> During his interview he was asked basic questions concerning the party to which he allegedly belonged. He was unable to correctly name the president and gave no coherent reason for his lack of knowledge considering his long association with the NDYM. Country of origin information does not support his assertion of the number of oil companies operating in Bayelsa State. His inability to list the companies operating there is not indicative of someone allegedly involved with NDYM since 2001. His lack of basic knowledge allied to the omission of any proof of membership of NDYM seriously undermines the

applicant. His evidence of arrest and forced consumption of poison by the soldiers coupled with his miraculous meeting with a man who gave the applicant herbs to counteract the poison is not credible especially when viewed in the light of the applicant's assertion the soldiers didn't shoot him because the bullets would not penetrate his body.

The applicant was in this country for two months and only claimed protection when apprehended whilst using false identity. If he was fleeing persecution he failed in his obligation to seek international protection as soon as practicable. Professor Hathaway has stated that such conduct goes to the credibility of an applicant. The applicant's account of transiting 3 international airports without handling his own passport is not credible. The Tribunal is satisfied that s. 11B of the Refugee Act 1996 (as amended) applies.

Cumulatively the foregoing fundamentally undermined the credibility of the applicant to such an extent that the Tribunal is unable to afford him the benefit of the doubt."

8. The decision concluded by affirming the negative recommendation of the Refugee Applications Commissioner.

APPLICANT'S SUBMISSIONS

9. Counsel for the applicant, Mr Michael Conlon S.C., submitted that since the applicant's appeal was conducted as a papers-only appeal, extreme care needs to be taken. Counsel relied upon the case of *V.M (Kenya) v. Refugee Appeals Tribunal & anor.* [2013] IEHC 24, where at para. 22 Clarke J stated:

> "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."

10. The applicant also relied upon a decision of this court in *B.Y. (Nigeria) v. Refugee Appeals Tribunal & anor.* [2015] IEHC 60 where the above statement was endorsed. The applicant contended that extreme care was not taken in this case. The reason for a lack of oral hearing in this case was due to the s.13(6) finding as per the RAC report. At p. 69 of the booklet of pleadings it states:

> "The applicant failed to apply for asylum until he was arrested two months after his arrival in the State. As a result, Section 13(6)(c) of the Refugee Act 1996 (as amended) applies to this application that:
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> > 'The applicant without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State.'"

11. The applicant noted that the s.13(6) finding is not mandatory. It is at the discretion of the RAC authorised officer to apply the section. The applicant maintained that sufficient reasons were provided by the applicant for his delay in seeking asylum.

12. The applicant further submitted that the questions put to him at his s.11 interview were not precise enough and that the findings made against the applicant as a result were based on mistake. The tribunal decision was based on the s.13 report of RAC, which the applicant claimed was an erroneous report. Statute requires that the Refugee Appeals Tribunal have regard to the s.13 report as per s.16(16)(b) of the Refugee Act 1996 (as amended). Therefore, the applicant argued, the impugned decision has been infected by these errors.

13. The applicant contended that the interpretation by the tribunal member of Professor Hathaway in the impugned decision as quoted above is incorrect. The applicant referred the Court to p.52 -54 of Hathaway's 'The Law of Refugee Status' (1st ed.) which states:

> "The basic principle that illegal entrants are eligible to have their claims to Convention refugee status determined in accordance with law is nonetheless clear from the important dictum of Mr. Justice MacGuigan of the Federal Court of Appeal in the case of *Surujpal v. Minister of Employment and Immigration* [(1985) 60 NR 73 (FCA)]:
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> > 'It does not stand to the applicants' credit that, after entering Canada as visitors, they illegally obtained Canadian social insurance cards, worked illegally for approximately a year before they were found out and arrested, and then claimed refugee status. Nevertheless, since the law allows them to apply as refugees even in such circumstances, we must conclude that it does not intend that their refugee claim should be determined on the basis of these extraneous considerations…'
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> This position respects the fundamentally protective purpose of refugee law, and reinforces the primacy in the determination process of the risks faced by the refugee claimant.
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> The decision in *Khemrag Surujpal [ibid*], however, impliedly approves of a more limited role for evidence of illegal entry or presence in the assessment of the claimant's credibility. While it is clearly inappropriate to disallow a refugee claim on the ground of illicit arrival or stay, the Convention establishes an obligation on refugees to "present themselves without delay to the authorities and show good cause for their illegal entry of presence" [Convention article Art. 31 (1)]. It seems right, therefore, to inquire into the circumstances of any protracted postponement of a refugee claim as a means of evaluating the sincerity of the claimant's need for protection. As observed in *Jeno Pillmayer* [Immigration Appeal Board Decision V84/6254 C.L.I.C, Notes 100.17 November 20 1986]:
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> > 'The board cannot assume that the niceties of Canadian immigration law were known by the applicant. However, it is reasonable to expect that given his stated intention to make a refugee claim, the applicant would have shown some due diligence in pursing his claim after his arrival in Canada or at least provide the board with an explanation for the delay.'
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> Where there is no reasonable excuse for the delay, an inference of evasion going to credibility is often warranted. Acceptable explanations would include, for example, lack of familiarity with or trust with the claims procedure or reliance on events which occurred only since arrival in Canada.
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> The case of *Malik Abdul Majad* [Immigration Appeal Board decision T76/9507, December 17 1976] offers a good example of the circumstances in which a negative assessment of credibility may reasonably be derived from the circumstances of

illegal entry or stay. The claimant entered Canada as a visitor and did not report to immigration authorities upon the expiration of his visa. He was arrested more than a year after his status in Canada had come to an end, and claimed refugee status at his special inquiry. There was evidence that Mr. Majad was well-acquainted with formal refugee determination procedures even before his arrival in Canada, and that he had attempted to bribe officials to grant him legal status. No explanation for delay in presenting his case was offered. In view of all of the evidence, the Immigration Appeal Board correctly concluded that the claimant had not "complied with the spirit of the Convention as set out in Article 31", as a result of which the credibility of his claim to protection was weakened.

On the other hand as Christopher Wydrznnsi has noted [see Wydrzynski, "Refugee and Immigration Act" (1979), 25 McGill L.J. 154 at p.177], the Immigration Appeal Board has frequently 'seemed to prefer form to substance in attempting to rank the honesty and openness of the applicant… [Where] the applicant had lied on arrival and only formulated his intent to apply for refugee status when deportation became inevitable, this was fatal to his claim. This type of absolutism is unwarranted if there is a reasonable explanation for delay."

14. The applicant submitted that the reasons provided by him for not having claimed refugee status at the earliest possible opportunity were valid. The applicant further submitted that the mode of travel to the country is usually a peripheral matter and should not serve to discount the entirely of the applicant's credibility.

15. The applicant contended that the tribunal member, notwithstanding the negative credibility findings made, failed to state whether or not he accepted the core of his claim, namely that he engaged in political activism, as per *E.P.A. v. Refugee Appeals Tribunal* [2013] IEHC 85 and *T.U. (Nigeria) v. Refugee Appeals Tribunal & anor.* [2015] IEHC 61.

16. The applicant averred that he was not told which subsection of s.11B applies to his case. The tribunal member stated at p.14 of the decision:

"The Tribunal is satisfied that s. 11B of the Refugee Act 1996 (as amended) applies."

17. The applicant submitted that if it is s.11B (b), no such claim regarding Ireland being the first safe country was made by the applicant in this case, relying on the decision of MacEochaidh in *F.T. v. Refugee Appeals Tribunal* [2013] IEHC 167, at para.10.

RESPONDENTS' SUBMISSIONS

18. Counsel for the respondents, Ms. Catherine Duggan B.L., submitted that this Court had been asked to revisit the entire decision of the tribunal. No additional evidence was offered at either the s.11 interview or in the notice of appeal issued by the applicant. The respondents argued that the applicant did not have even a basic knowledge of the political group which he claimed to have been a member. The respondents claimed that the applicant's counsel was now offering additional evidence and explanations for his lack of knowledge. No explanations were offered for the RAC findings that the applicant was not a member of the NDYM.

19. The respondents argued that there is no obligation on the tribunal member to record every item of evidence. The tribunal member merely summarised the evidence given by the applicant at the s.11 interview. Further, the respondents submitted, the tribunal member is obliged to consider the documentation before it but there is no obligation to recite all of the evidence proffered in the decision.

20. Counsel accepted the heightened duty in papers-only appeals before the Refugee Appeals Tribunal but submitted that this was complied with in this case; however, the respondents submitted, the evidence that was not set out by the tribunal member was not material to the claim.

21. The respondents submitted that the applicant did not offer coherent reasons for travelling on false documents nor did he provide sufficient reasons for holding such documents. Counsel for the applicant, at hearing, stated the applicant was in fear of the authorities but this was never given in evidence by the applicant; the respondents contended, on the other hand, the applicant stated that he was safe when he was in Ireland. The tribunal member found that the failure of the applicant to claim asylum as soon as is reasonably practicable "goes to the credibility of the applicant". The respondents argued that it is not definitive of a lack of credibility but rather it is a factor that might be taken into account by a deciding officer.

DECISION

22. The legislative framework allows for papers-only appeals in certain circumstances. This is a decision which is taken by the Refugee Applications Commissioner. This is what occurred in this case. No challenge was taken to the s.13(6) recommendation made by the Refugee Applications Commissioner so that decision stands and cannot be interfered with by this Court. The outcome of the s.13(6) recommendation was that the appeal lodged by the applicant to the Refugee Appeals Tribunal was to be a papers based appeal. The legality of this provision is not open to question; however, this Court has stated that extreme care is required from a tribunal member when dealing with a papers-only appeal. The tribunal member found that there were a number of problematic inconsistencies in the applicant's evidence which undermine his credibility and thus question the legitimacy of his claim for international protection. The tribunal member stated that he had approached the matter in question on the basis of the criteria laid out by Cooke J. in *I.R. v. Refugee Appeals Tribunal & ors.* [2009] IEHC 353. The Refugee Applications Commissioner at p.66 of the booklet, p.2 of the decision, stated:

"The applicant's claim may be considered to constitute a severe violation of basic human rights and therefore may be considered as being of a persecutory nature and as such could satisfy the persecution element of the refugee definition. This, however, is without prejudice to an examination of the well-foundedness of the fear of being persecuted in accordance with section 2 of the Refugee Act 1996 (as amended)."

The s.13 report of the Refugee Applications Commissioner then goes on to consider the question of well-founded fear at para. 3.3. The report states:

"The applicant asserts that he has been member of NDYM since 2001 and was a full time coordinator for the party. The applicant was asked a number of questions regarding the party as to who was the president of the group in 2007 and in 2010. He asserted that the president on both occasions was Timothy Agagha. It was put to him that this was not correct (section 11, q88-92). He was asked why he did not know, considering his alleged long term involvement with the group. He asserted that he "did not receive any information about this". (Section 11, q93) [...] Furthermore, the applicant was asked to name the oil companies working in Bayelsa State. While he correctly named Shell and Chevron, he also stated Slom Badja and NNPC (Section 11, q96-97). Neither of these two is listed on available COI."

The RAC deciding officer went on to state:

> "It appears inconsistent that he was involved in protests against the oil companies but cannot name more of the oil companies working in the state and correctly name two. Taking this, in conjunction with his lack of knowledge of the leaders of the group and his failure to present any documentation to confirm his membership, it is not accepted that the applicant was a member of NDYM. Therefore, it was not accepted that the applicant has a valid forward looking fear for his stated reason of political opinion."

23. The tribunal member when dealing with this aspect of the applicant's claim on foot of the appeal at p.13 of the report (p. 101 of the booklet) stated:

> "During his interview he was asked basic questions concerning the party to which he allegedly belonged. He was unable to correctly name the president and gave no coherent reason for his lack of knowledge considering his long association with NDYM. Country of origin information does not support his assertion of the number of oil companies operating in Bayelsa State. His inability to list the companies operating there is not indicative of someone allegedly involved with NDYM since 2001. His basic lack of knowledge allied to the omission of any proof of membership of NDYM seriously undermines the applicant."

24. Counsel on behalf of the applicant contended that the question which was put to the applicant was a question in relation to which oil companies were working in the area at the time and that the country of origin information referred only to international oil companies working in Nigeria at the time. However, it seems to me that it was open to the tribunal member to have doubts with regard to the applicant's credibility in this regard given his alleged long standing with the movement and his apparent inability to answer detailed questions when asked at the interview.

25. The tribunal member then goes on to deal with the applicant's evidence of his arrest and forced consumption of poison by the soldiers coupled with his "miraculous meeting" with a man who gave the applicant herbs to counteract the poison and finds that this version of events is not credible when viewed in the light of the applicant's assertion that the soldiers did not shoot him as the bullets would not penetrate the body. The applicant contended that the analysis of this part of his evidence was incomplete and contained errors and that the tribunal member failed to recall the complete answer of the applicant to the effect: "I gambled and went to the man's house and he helped me with the local herbs" (p.54). When asked if the soldiers had shot him, the applicant replied: "I don't really know. Sometimes they want to show that the movement cannot harm them and that the bullets cannot penetrate (them). There was no point wasting the bullet after them". The tribunal member is not obliged to recite each and every piece of evidence given by an applicant. I am satisfied that the tribunal member gave due consideration to the applicant's evidence.

26. In relation to the tribunal member's finding that "if he was fleeing persecution he failed in his obligation to seek international protection as soon as practicable, Professor Hathaway stated that such conduct goes to the credibility of an applicant". The applicant submitted that this is an erroneous representation of the legal position as stated by Professor Hathaway and further referred the Court to the decision of Barr J. in *P.M. v. Refugee Appeals Tribunal & ors.* [2014] IEHC 497.

27. While failure to claim asylum at the first available opportunity is not in itself a bar to a grant of refugee status, it is a matter that a tribunal member is entitled to take account of when assessing credibility.

28. The tribunal member further found that the "the applicant's account of transit in three international airports without handling his own passport is not credible". The applicant contended that this is peripheral and further complained that the tribunal failed to indicate how this issue affected the credibility of the core claim of the applicant. He relied in this regard on the judgment of McDermott J. in *C.C. v. Refugee Appeals Tribunal & ors.* [2014] IEHC 491 at para.13 thereof, where he stated as follows:

> "There is extensive discussion in the decision of his mode of travel and his story about arriving in Ireland which is also said to undermine his credibility, but it is entirely unclear whether or how this issue was said to affect his credibility on his central claim that he is homosexual."

29. The criteria for assessing credibility have been set out in the clearest terms by Cooke J. in the decision of I.R. (*supra*). Paragraphs 11.1, 11.2 and 11.3 state:

> "1) The determination as to whether a claim to a well founded fear of persecution is credible falls to be made under the Refugee Act 1996 by the administrative decision-maker and not by the Court. The High Court on judicial review must not succumb to the temptation or fall into the trap of substituting its own view for that of the primary decision-makers.
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> 2) On judicial review the function and jurisdiction of the High Court is confined to ensuring that the process by which the determination is made is legally sound and is not vitiated by any material error of law, infringement of any applicable statutory provision or of any principle of natural or constitutional justice.
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> 3) There are two facets to the issue of credibility, one subjective and the other objective. An applicant must first show that he or she has a genuine fear of persecution for a Convention reason. The second element involves assessing whether that subjective fear is objectively justified or reasonable and thus well founded.
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> 4) The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed. It must not be based on a perceived, correct instinct or gut feeling as to whether the truth is or is not being told.
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> 5) A finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation and the reasons drawn from such facts must be cogent and bear a legitimate connection to the adverse finding.
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> 6) The reasons must relate to the substantive basis of the claim made and not to minor matters or to facts which are merely incidental in the account given.
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> 7) A mistake as to one or even more facts will not necessarily vitiate a conclusion as to lack of credibility provided the conclusion is tenably sustained by other correct facts. Nevertheless, an adverse finding based on a single fact will not necessarily justify a denial of credibility generally to the claim.
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> 8) When subjected to judicial review, a decision on credibility must be read as a whole and the Court should be wary of

attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in disregard of the cumulative impression made upon the decision-maker especially where the conclusion takes particular account of the demeanour and reaction of an applicant when testifying in person.

9) Where an adverse finding involves discounting or rejecting documentary evidence or information relied upon in support of a claim and which is prima facie relevant to a fact or event pertinent to a material aspect of the credibility issue, the reasons for that rejection should be stated.

10) Nevertheless, there is no general obligation in all cases to refer in a decision on credibility to every item of evidence and to every argument advanced, provided the reasons stated enable the applicant as addressee, and the Court in exercise of its judicial review function, to understand the substantive basis for the conclusion on credibility and the process of analysis or evaluation by which it has been reached."

30. In applying the foregoing guidelines to the tribunal member's decision, I am satisfied that the decision was arrived at in compliance with those guidelines. It seems to me, looking at the decision as a whole, the tribunal member, notwithstanding that this was a papers-only appeal, was entitled to arrive at the decision at which he arrived at. I am further satisfied that he exercised the level of care required in papers-only appeals and gave due consideration to all aspects of the applicant's claim. I, therefore, find no grounds to justify the granting of leave and/or the quashing of the decision of the tribunal member.

31. I therefore refuse leave.