Neutral Citation [2015] IEHC 682

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 476 J.R.]

BETWEEN

G.I.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY,

RONAN MAGUIRE SITTING AS THE REFUGEE APPEALS TRIBUNAL, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 6th day of November, 2015

1. From 1995 onwards the applicant was engaged in self-employment running a restaurant in Nigeria, his country of origin. He claimed that he was a member of a local youth organisation, the aim of which was to fight corruption in his community by the traditional rulers. He stated that he was the public relations officer and that his function was to represent the association in dealings with oil companies.

2. He stated that his problems arose in 1997 when a memorandum of understanding was reached between the community and an oil company in which the company agreed to provide local drainage. The contract was awarded to traditional rulers who, he states, embezzled the contract money. He stated that he was arrested and detained and subsequently released on giving an undertaking as to his future conduct.

3. He says that in January 2000, as a result of further agitation in relation to fair allocation of jobs, he was arrested and spent a number of weeks in the police station, only being released when the protest was over.

4. He says that in 2002, following a spillage resulting from illegal extraction of oil from pipelines, he was again arrested, and was tortured and beaten up. He was not charged and was only released when he agreed not to continue with the protests.

5. He also stated that his business was destroyed in 2007 when he was in detention. He claims that he joined a human rights organisation that same year called AAFRights and was a local coordinator.

6. In 2008, a "*voodoo*" was left in front of his house which he interpreted as a death threat. He subsequently moved house.

7. He says that on coming from a meeting in 2010 he was arrested by the police and held for a number of months and then transferred to a prison. In November 2010 he says he met a prison guard and asked him to contact his family and his human rights organisation, AAFRights. He stated that he was not released from prison but escaped from detention.

8. He says he left Nigeria on 14th November, 2010 with a man named James Barry. Mr Barry seems to have assisted his travel and essentially played the role of a people trafficker, and the applicant seems to know very little about him. Mr. Barry and the applicant arrived in Ireland on 15th November, 2010, having travelled *via* Paris.

9. On arrival, he and Mr. Barry got a taxi and came to the offices of the Refugee Applications Commissioner where he made an application for asylum.

10. That application was in due course rejected by the Commissioner.

11. On appeal to the Tribunal, his application was also rejected by a decision dated 19th May, 2011, and it is against that decision that the applicant brings the present application for leave to apply for judicial review.

12. The basic ground on which the Tribunal reached its decision is that it rejected the applicant's credibility at a general level.

13. The particular aspects of his account that were held to be lacking in credibility were the following:-

> (i) The applicant's direct evidence that his problems began with the memorandum of understanding between the oil company and the community in 1997 was contradicted by his s. 11 interview where he stated that the memorandum was in 2008.
>
> (ii) He stated that his restaurant was destroyed in 2007 when he was in detention but in his direct evidence had not given any evidence of being in detention in 2007. He also stated in his s. 11 interview that the restaurant was destroyed in 2008.
>
> (iii) He kept referring to "*my human rights organisation*" without actually naming the organisation.
>
> (iv) He did not know that the founder of AAFRights was dead.
>
> (v) He produced a list of members of the organisation which, in the view of the Tribunal, did not correspond with information available on the internet.

(vi) The Tribunal Member considered it incredible that a well known human rights organisation would spirit one of its employees out of the country rather than seek to highlight a breach of the applicant's human rights.

(vii) The applicant claimed to know nothing about Mr. James Barry even though this was a person with whom he had travelled from Lagos to Paris to Dublin with and who, on arrival in Dublin, put him in a taxi and directed him to the Commissioner.

(viii) The applicant had stated that he travelled on a passport which did not have his photograph on it. The Tribunal considered it incredible that it was not detected.

(ix) The Tribunal found the idea that the applicant could walk out of a high security prison to lack any sense of credibility.

14. Overall, the Tribunal found the applicant's story "*to be wholly implausible and completely lacking in credibility*" (p. 16 of the decision).

15. The applicant issued the present notice of motion on 10th June, 2011. No time point has been taken by the respondents.

Generic nature of the grounds of challenge
16. Ms. Silva Martinez, B.L., for the respondents complained by way of initial objection that the grounds on which relief is sought as set out in the statement of grounds are unduly generic, and lack the appropriate specificity required by the rules.

17. It is worth noting that of the grounds initially pleaded, grounds (c), (f), (g) and (h) were abandoned as was the last sentence of ground (a).

18. I note that the Rules of the Superior Courts (Judicial Review) 2011 did not commence until 1st January, 2012, at which point a more exacting requirement for pleading in judicial review matters came into being. As these pleadings predate the 2011 rules, I would not be prepared to hold that they are unduly generic. However, a more exacting standard must be required of pleadings in judicial review matters instituted after 1st January, 2012.

Did the Tribunal fail to "take into account" country of origin information?
19. The main point made on behalf of the applicant by Mr. Paul O'Shea, B.L. is that by rejecting the applicant's credibility in an overall manner, the Tribunal failed to "*take into account*" all country of origin information in accordance with Regulation 5 of the European Communities (Eligibility for Protection) Regulations 2006.

20. This complaint cannot be understood without endeavouring to define what "*taking into account*" means as a matter of law. Mr. O'Shea submitted that the obligation to take material into account means that it "*must be commented upon*" - otherwise the applicant and the court do not know why the application is rejected.

21. For reasons which I have explained in greater length in my decision in *R.A. v Refugee Appeals Tribunal* (Unreported, 4th November, 2015), I would reject this submission. There is a clear distinction between taking something into account on the one hand and commenting on it in a narrative fashion on the other hand.

22. At p. 9 of his decision, the Tribunal Member recites the terms of regulation 5 of the 2006 Regulations, and at p. 16 he recites that he has perused the documents submitted. As the decision on its face purports to have taken the documents into account, the onus is on the applicant to show that this is not the case, an onus which has not been discharged. The right to a narrative discussion of the evidence submitted could only arise if documentary evidence was being positively rejected, as opposed to a situation where it was insufficient to take the applicant over the line.

Whether there is an obligation to "assess" country of origin information irrespective of a credibility finding
23. Mr. O'Shea submits that by virtue of regulation 5 of the 2006 Regulations and Article 4(3)(b) of the Qualification Directive 2004/83/EC, there is an obligation to positively assess country of origin information in all cases irrespective of whether a Tribunal Member finds the applicant to be credible.

24. He submits that the correct approach is that set out by Kelly J. in *Camara v. the Minister for Justice, Equality and Law Reform* (Unreported, High Court, 26th July, 2000), namely that the decision maker should first consider whether the incident could have happened, having regard to country of origin information, and only then assess whether it did, in fact, happen.

25. He submits that to allow the Tribunal not to engage with the country of origin information where it considers the applicant to be credible is to create an "*exception*" to the relevant European Directives.

26. For reasons I have set out in greater detail in my judgment in *R.A.*, this analysis is misconceived. There is no duty to assess country of origin information where the applicant's credibility is being rejected generally. Mr. O'Shea relies on the authority of the *M.M.S.* decision which I held in *R.A.* not to represent a correct statement of the law. Therefore I reject his submission under this heading also.

Whether the Tribunal findings would have been affected by further consideration of the country of origin material
27. A corollary of the foregoing approach is that a decision maker is not required to analyse a particular issue if it could not make a difference to the ultimate finding. This principle was applied by Mac Eochaidh J. in *G.A.A. v. Refugee Appeals Tribunal* [2015] IEHC 519.

28. Given the reasons for the rejection of the applicant's credibility, such as his lack of knowledge in relation to whether the leader of his organisation was alive or dead, the fact that he did not mention the name of his organisation in his repeated references in evidence, and the fact that there was an eleven year discrepancy in his alternative versions of timescales as to when the problems he experienced arose, it seems to me that no examination of the country of origin information could have rescued the applicant from the conclusion that his story lacked credibility.

29. By virtue of regulation 5(1)(b) of the 2006 Regulations, only "*relevant*" country of origin information needs to be taken into account. Such information is not "*relevant*" if it would not affect the ultimate decision.

30. Mr. O'Shea submits that it is not for the court to put itself into the shoes of the decision maker and to decide whether he or she would or would not have been swayed by particular information. I think that this is to describe the problem the wrong way around.

The onus is on the applicant to disturb an ostensibly lawful decision of the Tribunal. In order to do so, the applicant must show that information had been disregarded which, had it been accepted, would have made a material difference to the outcome. This, the applicant has failed to do. For example, Mr. O'Shea pointed to a BBC country profile of Nigeria dated 30th November, 2010, which referred in very generic terms to corruption and violence arising from oil exploitation and which is dated some thirteen years after the applicant stated that his problems began. I am, therefore, afraid that I cannot accept Mr. O'Shea's characterisation of this material as "*specific targeted country of origin information*".

31. Ultimately, the difficulty for the applicant is that the route reached by the Tribunal in rejecting the application did not involve any rejection of country of origin information as such. Even accepting all of the information presented, the applicant was found not to be credible. This decision is not invalid simply because the Tribunal did not find it necessary to refer in narrative form to any particular country of origin information.

Whether the credibility findings were unreasonable
32. An issue was briefly canvassed in oral argument as to whether the credibility findings by the Tribunal Member were unlawful in the sense of being unreasonable, or in the sense that the Tribunal Member did some research on the internet after the hearing and did not specifically put the results of it to the parties. I have no hesitation in saying that the complaint about internet research is completely without substance. The Tribunal Member specifically sought and obtained permission from the applicant to do further research on the internet and the applicant cannot be heard now to complain in this regard. As far as any complaint of irrationality regarding the credibility findings is concerned, no such complaint is pleaded, but even if it had been pleaded, I see nothing in those findings that is in any way irrational having regard to the test as set out in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, which I find to be the governing authority in this regard.

Alleged breach of Procedures Directive
33. Mr. O'Shea also alleges that Article 8(2)(a) of the Procedures Directive 2005/85/EC has been violated because he says the applicant's claim was not assessed "*objectively*". He contends that an application is not assessed objectively if the assessment does not take into account country of origin information.

34. This interpretation of Article 8(2)(a) is not one that I can accept. The requirement on the Tribunal or any asylum decision maker to act "*objectively*" is a general requirement not to engage in subjective decision making. It does not import a requirement to have regard to particular items of potential evidence, still less to discuss those items in a narrative form.

Suggested reference to the Court of Justice
35. Mr. O'Shea has suggested that, because of a divergence of approach between different High Court judges as to how the Qualification Directive (and the implementing 2006 regulations) should be applied, there is a doubt as to the meaning of the Directive which can only be resolved by a reference to the Court of Justice of the European Union under Article 267 on the Treaty on the functioning of the European Union. Of course, he also accepts that the obligation to refer (in a case where there is no right of appeal) does not apply to an "*acte clair*" (see *CILFIT v. Ministry of Health* [1982] ECR 3415).

36. The *acte clair* doctrine does not require absolute certainty (unattainable in any event). A reference is not necessary, even from a court from which no appeal lies, if the question is irrelevant to the decision, has already been answered by the Court of Justice, or is free from "reasonable" doubt, and the assessment of whether to refer must have regard to the specific characteristics of EU law including the risk of divergence of approach across the European Union; see *X and van Dijk* (C-72/14 and C-197/14) Court of Justice of the European Union, 7th September 2015 para. 55, *CILFIT* para. 21). The Court has also stressed that it is solely for the national court to determine whether a reference is necessary to enable it to give judgment (*X and van Dijk* para. 57). Assessing the matter as it appears to me at this point in time, and having regard to the reasons more particularly spelled out in my decision in R.A., it appears to me that the European law issue is irrelevant in the present case given the wealth of adverse credibility findings which would hold water even if the Directive had the meaning contended for by the applicant, and in any event the meaning of the Directive is sufficiently clear as to render a reference to the Court of Justice inappropriate and unnecessary at this point, especially in the absence of any material on which I could conclude that there is a risk of a divergent approach across the European Union.

Order
37. For the foregoing reasons, I will order:

(i) that the application for leave be dismissed;

(ii) that the matter be adjourned for a short period to enable the parties to consider any consequential applications; and

(iii) that any party intending to make such an application give the other party advance written notice of particulars of the proposed application.