Neutral Citation Number: [2010] IEHC 514

THE HIGH COURT

JUDICIAL REVIEW

2008 1123 JR

BETWEEN

A. S. R.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Ryan delivered the 22nd October 2010

1. This is an application for leave to bring judicial review proceedings in respect of a decision of the Refugee Appeals Tribunal dated the 1st September, 2008, whereby it affirmed the recommendation of the Refugee Applications Commissioner that the applicant should not be declared a refugee. Mr. Anthony Hanrahan B.L. appeared for the applicant and Ms. Sinead McGrath B.L. for the respondents.

Background.
2. The applicant, a national of Afghanistan, was born in 1989 in Kabul. He arrived in the Ireland on the 5th December, 2005, aged sixteen. His claim for asylum is premised on his contention that he fears persecution at the hands of the Afghan government on account of his family's connections with the Hizb-i-Islami political organisation, which is opposed to the government. He claims that his father and brother were killed by the government authorities and his mother and sister have had to move to Pakistan.

3. According to the applicant's version of events, his father was a commander in Hizb-i-Islami from 1985 onwards. The applicant himself was at no time a member of Hizb-i-Islami but, in 2005, he distributed anti-government political leaflets on the instructions of his father. On foot of this, the applicant was arrested by the Afghan secret police. He was beaten and mistreated while in custody. Under interrogation he revealed to the police that his father had given him the leaflets. After five days of detention the applicant's mother secured his release by bribing a guard. The guard brought the applicant out of the police station in the early morning under the pretence of going to pray at the mosque. He gave the applicant something to cover his face. From the mosque, the guard brought him by public bus and taxi to the applicant's aunt's house. The applicant then learned that his father and older brother had been arrested two days previously in connection with their activism in Hizb-i-Islami. They were later killed in prison and their bodies released to the applicant's mother. The applicant's family were aware that the police were looking for him and his uncle therefore organised his departure from Afghanistan. He left Afghanistan on the 3rd November, 2005 and travelled to Ireland via Pakistan.

4. The Refugee Applications Commissioner made a negative recommendation in respect of the applicant. The Commissioner found the applicant's account to be lacking in credibility in a number of respects. Moreover, the Commissioner stated that "if the applicant's claim to be a member of a Hizb-i-Islami family were deemed credible, it is considered, taking country of origin information into account... that the applicant as a non-member of Hizb-i-Islami himself, is in his own words, a low level worker who distributed some leaflets on the orders of his father, would not be targeted by the authorities."

5. The Refugee Appeals Tribunal rejected the applicant's appeal. The Tribunal Member made negative credibility findings against the applicant in relation to the following matters:

- his limited knowledge of Hizb-i-Islami and their activities;
- his account of escaping from police custody;
- his claim to have distributed subversive anti-government leaflets in public places during daylight hours;
- the fact that no independent corroboration, such as international media reports, could be found to support the applicant's claim that his father and brother had been killed in prison.

Without prejudice to these findings, the Tribunal Member also drew the conclusion that in any event the applicant was unlikely to be of any interest to the authorities if returned to Afghanistan on account of the time that has elapsed since the applicant's alleged arrest, the fact that he was never a member of Hizb-i-Islami and the fact that he would not support violence.

The Application for Judicial Review.
6. The grounds upon which the applicant seeks leave to judicially review the Tribunal's decision are essentially two-fold. First, the applicant submits that the delay between the date of hearing and the Tribunal's decision was inordinate. Secondly, it is asserted that the Tribunal. Member erred in her assessment of credibility by relying on conjecture, focusing on peripheral issues, failing to take into account the applicant's young age and by acting irrationally in a number of respects. The issues of delay and credibility are inextricably linked in the present case according to the applicant. Credibility was a central feature of the Tribunal's decision and it would seem that an assessment of the applicant's oral testimony was one of the primary means by which credibility was gauged. At the RAT hearing, the applicant gave evidence orally and answered questions put to him. He gave details of his alleged past persecution, putting emphasis on certain matters, and clarifying issues which were raised. As in every oral hearing, this involved the Tribunal Member observing the demeanour and body language of the applicant as he gave his evidence.

7. The applicant's oral hearing before the Tribunal took place on the 3rd December, 2007 and the decision is dated the 1st September, 2008. The applicant argues that the passing of almost nine months renders the decision unsafe and in breach of fair procedures and natural and constitutional justice. Mr. Hanrahan, Counsel for the applicant, spoke of the importance afforded to viva

voce evidence in our legal tradition and opened a number of cases which espoused the primacy of oral evidence. He made the case that after almost nine months the Tribunal Member could not possibly have recollected the applicant's testimony and demeanour with any accuracy and she can only have based her decision on her notes of the hearing and the documentation submitted to her. In the result, the applicant was essentially deprived of the benefit of giving oral evidence and his entitlement to an oral hearing under s. 16(10) of the Refugee Act 1996 was effectively worthless.

8. In reply, the respondents submit that no actual prejudice has been caused to the applicant by the delay; in order to succeed in an application for *certiorari*, there must be some disquiet as to the Tribunal Member's decision. The respondents rely on the authority of *A.M.R. v. Minister for Justice* (Unreported, High Court, 25th April, 2008) [2008] I.E.H.C. 108 where, in the context of a fifteen week delay, McGovern J. held as follows:

> "There was no doubt that decisions of this nature should be given as soon as possible and there is an obligation on the Chairperson of the Tribunal to ensure that its business is managed efficiently and disposed of as expeditiously as may be consistent with fairness and natural justice.
>
> I do not believe that it would be desirable to set down a rigid rule which states that unless a decision is given within three months of the hearing, that it is therefore reviewable on the grounds of excessive delay. Even where credibility is in issue there may be good reasons for the delay. In addition, there may be circumstances in the particular case which would tend to suggest that the applicant has not been prejudiced by any delay on account of the nature of the evidence considered. It seems to me that each case should be considered on its own merits and be dealt with in a way which is consistent with fairness."

McGovern J. goes on to state:

> "In my view, the correct approach is to look at the decision in this case and see whether there is anything in it which would tend to suggest that the person making the decision was hampered in some way by the delay between the hearing and the making of that decision. While the applicant contends that the first named respondent did not properly assess the evidence in making adverse credibility findings and engaged in conjecture, it is clear from the decision itself that it contains a detailed account of the applicant's case and in no way supports a contention that the decision maker may have been hampered due to the length of time between the hearing and the date of the report. The notes of the hearing and all relevant material was before him and there is nothing to suggest that the Tribunal member was acting on memory. In so far as he made an assessment as to the credibility of the applicant this was on the basis of information recorded in written form."

9. McCarthy J. said in *Kramenranko v. O'Brien and Refugee Appeals Tribunal* (Unreported, High Court, 14th July, 2009). at p. 9:

> "1 am satisfied in this particular instance however, that the appropriate manner in which one approaches the question of delay is first of all whether or not what one might term prejudice has followed from the delay and not imputed prejudice, but actual prejudice. I accept also that one must be extremely jealous, as it were, in guarding the proposition that if in fact there is delay, if prejudice exists, then the decision could not stand."

10. *F.K.S. v. Refugee Appeals Tribunal* (Unreported, High Court, 30th October, 2009) [2009] I.E.H.C. 474, concerned a delay of some eight months. Dunne J. was not satisfied that leave should be granted and said that she would be slow to indicate a level of delay which was unacceptable:

> "In this case, a period of over eight months elapsed between the hearing of the appeal before the Refugee Appeals Tribunal and the delivery of the decision. The question raised is whether that delay is something that renders the decision of the Tribunal *ultra vires* the Refugee Act 1996 (as amended) or is a breach of natural and constitutional justice. I have referred previously to the authorities opened to me in this regard. I think that the first point of importance to note is that there is no suggestion whatsoever of any prejudice to the applicant as a result of the delay. This is a case which turned upon the credibility of the applicant and it is clear from the authorities that if the delay has caused any concern as to the safety of the decision by virtue of the gap between the oral hearing and the determination of the appeal, then in such circumstances it may be open to either party to have the decision quashed as being invalid. Finlay Geoghegan J. in the case of *Messuoudi* referred to above made that clear. This is not such a case. It is clear from the facts of this case that no point whatsoever is taken by the applicant as to the credibility findings in this case.
>
> I am not of the view that delay *per se* should, as a general proposition, give rise to the quashing of a decision of the Tribunal. There may be cases of such egregious delay that it would be untenable to permit the decision to stand but they must be far and few between. This is not such a case. There may be cases in which a change of circumstances occurs in the course of the period when a decision is awaited which would make the decision unsafe. It may be that in cases where credibility is in issue that the delay has led to a fear as to the accurate recollection of the evidence by a Tribunal member. To that extent, one would have to have regard to the facts and circumstances of any particular case. I am conscious of the fact that the hearings before the Tribunal have at their heart an individual's human rights and consequently it is important that decisions should be given within a reasonable period of time. However, I would be slow to indicate the level of delay which is unacceptable. In the circumstances of this case the delay was less than satisfactory. However, no prejudice of any kind was suffered as a result of the delay. In those circumstances I am not satisfied that the applicant is entitled to leave on this ground."

11. Mr. Hanrahan argued that *F.K.S.* may be distinguished from the present case, where he submits there is a fear as to the accurate recollection of the evidence by the Tribunal Member and that this is manifest in her credibility assessment of the applicant, which he says is flawed. He also cites the leave decision *in Biti v. Ryan a/a the Refugee Appeals Tribunal* (Unreported, High Court, 24th January, 2005) [2005] I.E.H.C. 13 where Finlay Geoghegan J. found substantial grounds for review based on delay of some fourteen months, notwithstanding the fact that the Tribunal's decision raised no issue as to the credibility of the applicant:

> "It appears to me that in line with the reasoning in the English cases which concern the assessment of creditability of an applicant there exist for the purposes of a leave application substantial grounds for asserting that where, as in this case the assessment of the applicant's claim depends upon careful scrutiny of the evidence given by the applicant in relation to past events and her description of her fear and the reasons therefore that where a decision is not given within a reasonable period of time of the oral hearing it may be unsafe as the impact of the oral testimony may have dimmed. This is particularly so as I was informed that there is no transcript taken of an oral hearing before the Tribunal member."

Mr. Hanrahan also referred to the transcript of the ex tempore leave decision of Charleton J. in *S.O.B. v. Refugee Appeals Tribunal* (Unreported, High Court, 29th January 2008) where leave was granted in respect of a delay of just under four months. Ms. McGrath, for the respondents, submits that *Biti* was decided almost six years ago and that more recent jurisprudence, including *FKS.*, is of greater relevance to the present case.

12. Turning to the issue of credibility, it is submitted on behalf of the applicant that the Tribunal's findings were flawed in a number of respects. One credibility finding made against the applicant was to the effect that he displayed only a limited knowledge of Hizb-i-Islami and their activities. The applicant asserts that in determining this matter the Tribunal Member erred, *inter alia*, by failing to have adequate regard to the applicant's young age in requiring detailed knowledge of the Hizb-i-Islami structure and the subtleties of the participation of some former members of the present Afghan government. In reply, the respondents argue that the Tribunal Member did have regard to both the applicant's age at the date of hearing and the age that he was when the alleged events took place in 2005. At pp. 8-10 of her decision, the Tribunal Member goes into some detail on the status of minors for the purpose of asylum law and the special considerations that apply. At p. 20-21 she makes the following findings:

> "While the applicant, considering his age, may not have been familiar with the details of all the factions, one would expect, considering his family's stated involvement with Hizb-i-Islami and the elections that were held in Afghanistan prior to his departure, that he would have been aware that there was some kind of split in Hizb-i-Islami."

The Tribunal Member continues:-

> "He states that he left Afghanistan on the 3rd November, 2005, less than two months after the parliamentary elections which took place on the 10 September, 2005. While the applicant was a minor at the time of the stated events in Afghanistan, he states that his family were involved with Hizb-i-Islami and he supported the organisation and therefore it is not unreasonable to expect that he would have a more detailed knowledge of Hizb-i-Islami than that which he displayed at the interview and appeal. The applicant's lack of knowledge of Hizb-i-Islami and their activities calls into question the applicant's claim that his father was a commander in this organisation and that he was an active supporter of this organisation and seriously undermines the credibility of the applicant's account."

In light of this reasoning, the respondents assert that the Tribunal Member clearly accepted that the liberal application of the benefit of the doubt applies to minors. She noted in detail his evidence in relation to Hizb-i-Islami and concluded that she could not accept his limited knowledge, notwithstanding his age at the time. It is asserted that these findings are well reasoned and within the Tribunal Member's jurisdiction.

13. The second credibility finding made against the applicant by the Tribunal concerned his account of escaping from police custody:

> "Considering that the applicant states that he is wanted by the government for his activities, his father had been a commander in Hizb-i-Islami, it is difficult to believe that the guard would have risked taking the applicant to the applicant's aunt's home in Kabul in such a public and open manner, even if he had received a bribe and it was early morning. This account of the applicant's escape is not plausible in all the circumstances."

The applicant submits that this finding is based on conjecture and speculation and that it is unreasonable in the circumstances. It is asserted that there was no evidence before the Tribunal Member from which she could draw an inference that an Afghan policeman would not accept a bribe to assist a prisoner to escape. There was also no evidence from which the Tribunal Member could draw an inference that the policeman would not have travelled on a public bus with the applicant. Moreover, the question of whether a policeman would ride on a bus is a peripheral issue upon which the Tribunal Member should not be basing her credibility findings, it is asserted.

14. The respondents invoke the case of *M.E. v Refugee Appeals Tribunal* (Unreported, High Court, 27th June 2008) [2008] I.E.H.C. 192 where Birmingham J. dismissed an attempt to judicially review a Tribunal decision on the grounds that it was based on conjecture and speculation:

> "There is no doubt that a Tribunal Member should not base an adverse credibility finding on speculation or conjecture...
>
> On the other hand, a Tribunal Member is not expected to accept without challenge or question every account given to him or her. Rather, he or she is expected to weigh, assess, analyse and draw inferences...
>
> I am forced to conclude that in complaining that the decision was based on conjecture, what the applicant is really saying is that the Tribunal Member should not have reached the view that she did."

In the present case, the respondents assert that the Tribunal Member examined the applicant's evidence against the background of his claim. It is submitted that her finding was rational, reasonable and fully within her jurisdiction and that the applicant's complaints are trivial, tenuous and do not go to the core of the finding which is that she could not accept that the applicant was taken out of detention in such a public and open manner.

15. The third credibility finding made by the Tribunal concerned the applicant's claim to have distributed subversive anti-government leaflets in public places during the daytime. The Tribunal was of the view that considering the content of these leaflets, the fact that the applicant's father was stated to be a commander in Hizb-i-Islami, and the inherent danger of distributing such leaflets, it was not credible that the applicant would have been distributing these leaflets during daylight hours. The applicant submits that the question of the time of day when the leaflets were distributed is peripheral to the applicant's core claim and should not have been relied upon, and that her finding on this matter is irrational and based on speculation. The respondents assert that the Tribunal did no more than draw inferences and made deductions, as she is entitled to do, and that the conclusions drawn were reasonably open to her.

16. The fourth credibility finding of the Tribunal was with respect to the fact that no independent corroboration, such as international media reports, could be found to support the applicant's claim that his father and brother had been killed in prison. The Tribunal found as follows:

> "Considering the international attention that was focused on Afghanistan after the elections and stated role of the applicant's father in Hizb-i-Islami, the applicant's claim lacks credibility as no independent corroboration of the deaths of this commander or his son could be found. While the applicant has submitted a newspaper entitled 'The Daily Sahaar Peshawar' it is not possible to authenticate this document. When this matter was put to the applicant he stated that the government would not want the media to publish or talk about the incident. The applicant states that it is easy to know

what was going on inside prison and people talked (pages 24/25, interview). It is not plausible that if the applicant's father and brother were killed as stated, and their bodies released in the manner stated, that this incident would not have come to the attention of monitoring agencies or news media (pages 29/30, interview) and would only have been comprehensively reported on in 'The Daily Sahaar Peshawar'."

The applicant argues that the Tribunal Member erred in law and acted unreasonably by imposing an "absolute requirement of corroboration" and by dismissing the cogent explanation provided by the applicant, which was supported by country of origin information. In reply, the respondents point out that the Tribunal member went to considerable lengths to source information that would corroborate the applicant's claim concerning the alleged killings of his father and brother. In the circumstances, it is asserted that the Tribunal Member's finding on this issue is not unreasonable.

17. The final basis on which the applicant claims he was prejudiced was that the Tribunal Member erred in not having regard to certain more up-to-date country of origin information in reaching her decision. The respondents rebut this argument, observing that there is nothing in the applicant's pleadings or submissions to suggest that there was information in the more up-to-date country information which would fundamentally alter or weaken the Tribunal Member's decision.

The Court's Assessment.

18. In assessing a credibility finding, it is well established that the Court must not fall into the trap of substituting its own view on credibility for that of the Tribunal: *Imafu v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Peart J., 9th December, 2005) [2005] I.E.H.C. 416, *FA.A. v. Minister for Justice* (Unreported, High Court, Birmingham J., 24th June, 2008) [2008] I.E.H.C. 220. The applicant challenges the applicability of this principle in the present case, however, arguing that the reasoning behind it, as pointed out by Birmingham J. and Peart J. is that the decision-maker making the finding of fact has the advantage of a recollection of the evidence given before him or her. This does not apply, it is argued, when the decision-maker is relying on written materials rather than a recollection of oral evidence. (It is recalled that the applicant claims the delay between hearing and decision in the present case was such that the Tribunal Member could not accurately recall the applicant's oral testimony and she was essentially working off her notes and the documentation submitted to her). Attention is drawn by the applicant to the decision of the Supreme Court in *Minister for Justice v. S.M.R.* [2008] 2 I.R. 242, an extradition case where the Court found there to be no obstacle to it substituting its own findings of fact for the findings of the High Court. In the present case, counsel for the applicant is not asking the Court to go so far as to substitute its own findings for those of the Tribunal. Rather it is submitted first, that the Court has the power to quash a finding on credibility where it is unreasonable or irrational and secondly, that this power applies a *fortiori* where the credibility finding has been made based on an assessment of written notes without the benefit of a clear recollection of the applicant's evidence.

19. The reasoning in *S.M.R* does not apply by way of analogy to the present case. In *S.M.R.* the matter on which the Supreme Court departed from the High Court's findings concerned evidence on affidavit, not oral testimony. For this reason the more relevant authority would seem to be *Hay v. O'Grady* [1992] 1 I.R. 210, where the Supreme Court held that it would not interfere with findings of fact made by a trial judge who hears oral evidence if such findings are supported by credible evidence.

20. The applicant's submissions proceed on an assumption that I think is unjustified. That is that the process of decision making and writing the decision are entirely discrete elements and not elements in a continuing process. Counsel makes the assumption that the Tribunal Member did not entertain any thought about the case between the conclusion and the hearing and shortly before the decision was compiled and that she had in the interim forgotten all the material facts and was accordingly wholly and exclusively reliant on such notes of the hearing as she possessed. There is no evidence that this was the case. It does not follow as a matter of logic. And the contents of the decision suggest otherwise.

21. It is clear from the various authorities that there is no universal cut-off point at which a period of delay will be deemed inordinate and the decision unsafe. Each case must be assessed on its own particular facts. Clearly, any unnecessary delay is undesirable, particularly in the context of asylum applications, where fundamental rights are at stake. No reason has been put forward to explain or justify the delay in the present case. It may well be that in any given case there is good reason for delay in producing a decision. Facts have to be checked, documentation has to be considered, the issues have to be weighed up and the decision has to be put down in writing. An applicant is as likely to benefit as to suffer from a period of time elapsing between hearing and decision.

22. The applicant has not adverted to any error of fact or other flaw that could be attributed to delay. However, it is argued that the he has suffered prejudice in that the nine month delay deprived the Tribunal Member of any reasonable ability to recollect the applicant's oral testimony at hearing. The applicant submits that such was the delay that the applicant's assessment of credibility - a central feature of the decision - was compromised. I do not accept this argument. The Tribunal's decision runs to 26 pages. A detailed record of the oral hearing set out at pp. 2-7 of the decision. Having set out the applicable law, the Tribunal Member goes on to provide an assessment of the applicant's case. The decision is thorough and well-reasoned in respect of each of its findings. The conclusions reached and the manner in which they are reached are entirely reasonable and rational and at no point does the Tribunal Member base her findings on conjecture, speculation or peripheral issues.

23. This is a case of delay *simpliciter* as a ground for judicial review. I am in agreement with the decisions of McGovern J. in *A.M.R.* and of Dunne J. in *FKS.*, the latter of which concerned a delay of similar length to that at issue in the present case. Such is the soundness of the Tribunal Member's decision that I can see nothing to suggest that she was in any way hampered by the delay or that any actual prejudice has been caused to the applicant as a result.

24. I am satisfied that the Tribunal Member acted correctly in assessing the applicant's credibility and in making the findings that she did.

25. The Tribunal decision rejected the appeal on an additional ground based on country of origin information. At p. 24 of the decision, the Tribunal Member stated as follows:- "Without prejudice to the aforegoing, it is unlikely that the applicant would be of interest to the authorities were he to return to Afghanistan." She went on to consider country of origin information before concluding:- "Considering the amount of time that has elapsed since the applicant's arrest for distributing pamphlets, the fact that he was not a member of Hizb-i-Islami and the fact that he would not support violence but supports negotiation, it is unlikely that the applicant would be of any interest to the government were he to return to Afghanistan." As to the applicant's submission that the Tribunal Member erred in not having regard to certain more up-to-date country of origin information in reaching her decision, there is nothing in the applicant's pleadings or submissions to say that the more up-to-date country information might have led the Tribunal Member to reach a different conclusion than she did. Thus, even if the Tribunal Member had accepted the applicant's credibility, he would have failed on this ground. There is therefore nothing to support this argument and I would dismiss it accordingly.

26. In the circumstances, I refuse the application for leave.