Neutral Citation: [2015] IEHC 30

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 388 J.R.]

BETWEEN

A.D. (Afghanistan)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 20th day of January, 2015

1. This is a "telescoped" hearing for judicial review seeking an order of *certiorari* quashing the decision of the first named respondent of the 5th day of April, 2011, which affirms the recommendation of the Refugee Applications Commissioner that the applicant should not be declared a refugee. Further the applicant seeks an order remitting the appeal of the applicant for full reconsideration by the first named respondent.

Background

2. The applicant claims to be an Afghan national, born on the 25th March, 1991, from Qarabagh district in Kabul province and claims to have a fear of persecution for political reasons. The applicant applied for asylum on the 27th April, 2010, and an "ASY1" form was completed in respect of the applicant on the 28th April, 2010, in which he claimed, *inter alia*, to be of Pashto origin and a student. He claims he left Afghanistan on the 25th February, 2010, with the assistance of an agent who was paid $10,000 by his brother, travelling by sea and road to Iran, Turkey and several other unknown countries to Ireland.

3. The applicant stated in his application that his father and brother are members of Hezb-e-Islami, the Islamic Party, the membership being predominantly ethnic Pashtuns. However where his family live, most people are Tajiks and members of the Jamiat-e-Islami, a political party in government in Afghanistan at the time. He claims that his brother, who had been abducted a year and half previously, was also a member of Hezb-e-Islami. He claimed that there had been a long battle between the two parties and the Jamiat-e-Islami members are taking revenge. He stated that the Jamiat-e-Islami gave false information about his father to the government and his father was arrested and taken into police custody. His brother intended to get revenge, and advised the applicant to leave because as the youngest in the family he was likely to be kidnapped. The applicant stated that he was not a member of any political party.

4. The applicant completed a questionnaire on the 6th May, 2010, and two s.11 interviews on the 27th May, 2010, and 21st June, 2010, in which further detail as to the nature of his claim was provided. The applicant did not present any documents in support of his claim at first instance as none were to hand at that time. The s.13 report issued from the Office of the Refugee Applications Commissioner in respect of the application on the 9th July, 2010, recommended that the applicant should not be declared a refugee, making negative findings in respect of the applicant's credibility and the feasibility of internal relocation.

5. The applicant appealed this decision and was granted an oral hearing on the 24th March, 2011, after a previous hearing of the 20th October, 2010, was adjourned to allow for the submission and translation of documents received by the applicant from Afghanistan subsequent to the ORAC hearing and determination. By letter dated the 10th November, 2010, a number of documents were submitted by the applicant to the tribunal. These documents consisted of the applicant's identity card, his brother's Hezb-e-Islami identity card and a document issued to Afghan security personal by the Helmand Sub-Directorate of Intelligence and Situation Analysis, which names the applicant and his brother as being involved in terrorist activities and calls for them to be arrested.

Impugned Decision

6. The applicant's appeal to the Refugee Appeals Tribunal was rejected by letter dated 20th April, 2011. The tribunal set out a number of findings in relation to the applicant's credibility. The tribunal stated that "it was not generally satisfied as to the applicant's credibility in relation to the particular claim for asylum advanced by him. Some of his evidence just ran contrary to common sense and was implausible and on other occasions his evidence was contradictory."

7. The tribunal stated that it had considered various country of origin information reports and information submitted by or on behalf of the applicant.

Submissions

8. The applicant and the respondents filed extensive written submissions in relation to this judicial review. The applicant dealt with the matter under various headings in the written submission.

9. At the outset of the hearing it was apparent that the applicant was technically out of time as the current proceedings were initiated outside the 14-day limitation period for bringing such applications. Mr. Anthony Hanrahan B.L. submitted that the applicant acted promptly and formed the intention to challenge the decision within the relevant 14-day period and further submitted that the applicant has an arguable case when considering whether to grant an extension of time. He said the applicant's case far exceeded such a threshold. He relied on the judgment of the Supreme Court in *C.S. & ors. v. Minister for Justice Equality and Law Reform & anor.* [2004] IESC 44 in relation to the general principles covering the granting of an extension of time. He submitted that there were good and sufficient reasons for extending time in the present case which was evidenced by the affidavit of the applicant and that of his solicitor, Ms. Evelyn Larney. Ms. Elizabeth Cogan B.L. on behalf of the respondents indicated at the outset that there was no objection to an extension of time. In the circumstances I was satisfied that there were good and sufficient reasons to extend time within which to bring these proceedings.

10. The first point of complaint made by the applicant was in relation to the documentary evidence before the tribunal member. Mr. Anthony Hanrahan B.L. on behalf of the applicant submitted that the documentation furnished by the applicant to the tribunal is personal to the applicant and his family, as opposed to being general country of origin information, and constitutes strong corroboratory evidence of his claim of being at risk from the Afghan authorities. The applicant submits that these documents go to the core of his claim and were not dealt with in the decision, nor were they specifically listed in the tribunal conclusions as having been considered at all. He submitted that the failure of the tribunal to reconcile the existence of these documents with the conclusion of the decision constitutes a serious error of law and renders the decision irrational. He relied, *inter alia*, on the decision of Cooke J. in *I.R v. Minister for Justice Equality and Law Reform & Ors* [2009] IEHC 353, which provides that where case specific documentation is submitted to a decision-maker, the decision-maker has a duty to deal with same properly. Further by virtue of reg. 5 (1) (b) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518 of 2006), the applicant submits that decision-makers must take into account "the relevant statements and documentation presented by the protection applicant".

11. The second ground of complaint related to the s.13 report of the ORAC. The applicant submitted that because the lack of corroboratory evidence was so central to the s.13 report and because the applicant did not submit documentary evidence until the appeal stage that it is unreasonable that the tribunal would rely on the conclusions of the Commissioner's report to the extent that he did. Counsel referred the Court to *J.M. (Cameroon) v. Minister for Justice Equality and Law Reform & Ors* (Unreported, High Court, Clark, J., 16th September 2013) and *N.M (Togo) v. Refugee Appeals Tribunal & Ors* [2013] IEHC 436 and contended that both cases support the proposition that basic fairness is contravened where the tribunal fails to deal with documents that were submitted after the Commissioner's report was issued.

12. The third ground of complaint made by the applicant relates to alleged errors of fact on the part of the tribunal member. The applicant submitted that an erroneous statement made in the tribunal decision is fundamental to the applicant's claim and therefore undermines the respondent's credibility findings. This relates to the last point on p.163 of the booklet of pleading furnished to the Court, para. 6 of the tribunal decision which states:

> "The appellant contended in his questionnaire that his mother had actually been abducted yet his brother chose to send the applicant out of the country despite the appellant never having been abducted".

In fact, the questionnaire at p. 42 of the booklet, q.21 the last part of the answer supplied to the question: "Why did you leave your country of origin?" he states:

> "My father and my brother were members of Hezb-e-Islami [Islamic Party of Afghanistan], and because the Tajiks oppose the Hezb-e-Islami [Islamic Party of Afghanistan] they were giving [false and misleading] reports to the government against my father and brother, in order to get them arrested [by the government], as they kidnapped my brother whose name is Maqsod, about a year and half ago which we have no news about him ever since."

Further on p. 45 of the report, q. 29 there is a reference to "people who kidnapped my brother…" Again in response to q. 30 the applicant stated in the questionnaire "a year and a half ago when my brother was kidnapped…" The applicant submitted that it is impossible to discern the tribunal member view of the factual situation pertaining due to there errors.

13. The fourth ground of complaint made on behalf of the applicant related to the specific findings in relation to the applicant's political opinion which were made at the initial stage and were specifically upheld by the Tribunal. This finding states that the applicant himself was not a member of Hezb-e-Islami so would not be at risk. The applicant submitted that it is exactly because of this imputed political opinion that he claims asylum and it is therefore a fundamental misunderstanding of the applicant's claim for refugee status.

14. The fifth ground of complaint related to the issue of internal relocation. The applicant submitted that the tribunal, although purporting not to be making any findings in regard to internal relocation, expressly upheld the Commissioner's finding in this regard. The applicant argues that because the Commissioner did not have before it the documentation submitted subsequently at the appeal stage and because, it is claimed, those documents specifically show that it is the national authorities that seek the arrest of the applicant, internal relocation is both irrational and unreasonable.

15. The sixth and final ground of complaint made by the applicant related to the alleged failure of the applicant to claim asylum earlier. The applicant submitted that expressly upholding the finding in relation to the s.13(1) report, the tribunal has adopted the Commissioner's reasoning to the effect that s.11B(b) of the Refugee Act 1996 (as amended) applies to the applicant's case and he was under a legal obligation to apply for refugee status in the first safe country entered. This, the applicant submits, is legally wrong. The applicant states that according to Professor Hathaway in the Law of Refugee Status (Butterworth's, Canada, 1991 ed.) at p.46:

> "There is no legal requirement in the Convention that a refugee seek protection in the country nearest her home, or even in the first state to which she flees. Nor is it requisite that a claimant travel directly from her country of first asylum to the state in which she intends to seek durable protection."

The applicant relied upon the decision of Mr. Justice MacEochaidh in *F.T. v. Refugee Appeals Tribunal & anor.* [2013] IEHC 167 in this regard.

16. Counsel for the respondents, Ms. Elizabeth Cogan B.L., submitted that as a matter of law, a person claiming that evidence or representations have been overlooked must provide evidence, either direct or inferential, of that proposition before an arguable case can be made out (*per* Hardiman, J. in *G.K. & ors. v. Minister for Justice, Equality and Law Reform & ors.* [2002] 2 I.R. 418 at p. 427 and Feeney J. in *Banzuzi v Refugee Appeals Tribunal & ors.* [2007] IEHC 2). The applicant is not in a position to demonstrate that the documents relied on by the applicant at appeal stage were ignored or disregarded by the tribunal. The applicant ought to be in a position to so demonstrate if such an allegation is to ground any relief in judicial review. Insofar as the tribunal was not persuaded as to the applicant's credibility having had regard to the aforementioned evidence, this, the respondents contend, was a matter for the tribunal and the applicant's objection to the outcome of this consideration is not in these circumstances a ground for relief in judicial review. Furthermore, the respondents submit that the weighting of the evidence was a matter for the tribunal. The respondents refer to *M.E. v. Refugee Appeals Tribunal & ors.* [2008] IEHC 192 and *Kikumbi & anor. v. Refugee Applications Commissioner & anor.* [2007] IEHC 11, in particular the finding of the Court in the latter case that the weight of evidence is a matter for decision-maker: "Once properly admitted, the weight (if any) to be given to any evidence is exclusively a matter for the decider of fact". Counsel submits that the tribunal member was not obliged to recite all of the evidence in the decision.

17. The respondents argue that it operated against the applicant's credibility that the basis on which he claimed the state were pursuing him was the claim that someone else had given his name to the authorities (according to what his mother had told him, in his

evidence to the tribunal). Counsel for the respondents contends that the applicant said very little about this aspect of the claim and the origin of these documents in his evidence to the tribunal and the tribunal did not find his evidence on the matter persuasive. The tribunal cannot reasonably be said to have ignored documents going to the credibility of this aspect of the claim having regard to the above statements, where the documents are specifically mentioned, according to the respondents. Referring to *I.R. v. Minister for Justice, Equality & Law Reform & anor.* [2009] IEHC 353, it is submitted that insofar as the tribunal did not find the documents furnished at appeal stage to be supportive of the applicant's claim, the tribunal did indicate consideration of the documentation and set out why it was not persuaded by them. Therefore, it is contended that the tribunal was entitled to rely on aspects of the Commissioner's report as it did not accept that there is any probative value in the documentation submitted.

18. The respondents submit that the reference to the mother was clearly a typographical error. The respondents submit that if there was an error of fact that it was not sufficiently material to impugn the decision and in this regard I was referred to the judgment of MacEochaidh J. in *S.N. v. Refugee Appeals Tribunal & Ors* [2013] IEHC 282 at para 18 where he stated *inter alia*:

> "…thirdly, an error of fact whether within or in excess of jurisdiction will not attract a remedy where the error had no material effect on the outcome."

19. With regard to the finding regarding political opinion the respondents submit that it is clear from the decision that the applicant's claim was incredible in certain respects. The applicant's argument in this regard are premised on his having made a coherent case that he was regarded as being a member of Hezb-e-Islami but he has at all times claimed he is at risk because of imputed political opinion. The applicant claimed to fear all Tajiks and that he was in danger that he might be killed or kidnapped by the people who had kidnapped his brother because of his brother's plan to kidnap Tajiks for the purposes of exacting revenge and obtaining information, although his brother never carried out that plan. The applicant repeatedly stated he was not a member of Hezb-e-Islami.

20. The respondents submitted that the tribunal member expressed misgivings as to the evidence adduced at appeal stage regarding his purported involvement in the Hezb-e-Islami, and was not persuaded by the substance or weight of the applicant's claim. The state authorities believed him to be associated with Hezb-e-Islami. The respondents further submit that it was because the applicant was claiming that he was believed to be a member of Hezb-e-Islami, that it was not unreasonable to refer to country of origin information concerning the organisation, particularly where they stated that members who renounce violence were not prosecuted.

21. With regard to the internal relocation finding, the respondents submit that the tribunal was entitled to consider this aspect of the applicant's evidence and in particular his claim that he could not go elsewhere in Afghanistan, and that the tribunal was entitled to assess how it impacted on the question of whether he had a well-founded fear of persecution. The respondents submit that this question was pertinent where the applicant had claimed that there was a majority of Tajiks in his area relative to the number of Pashtuns and where country of origin information indicated that overall in Afghanistan the Pashtuns were in the majority. The respondents submit that this ground does not constitute a substantial ground in those circumstances.

22. In relation to the finding that the applicant failed to claim asylum earlier the respondents submit that this was not the Commissioner's finding. The respondents submit that the tribunal's finding was that it was implausible that the applicant had failed to engage with the trafficker to such an extent that he was unaware of the countries that he transited through en route to Ireland, even though he had paid the trafficker a substantial sum of money. This goes to the crux of the applicant's credibility rather than being a finding in relation to the applicant's obligation to claim asylum in the first safe country.

Findings

23. The applicant when he first presented seeking asylum presented his case in the absence of any supporting documentary evidence. The Commissioner issued the s. 13(1) report based on the evidence presented by the applicant and commented on the absence of supporting documentary evidence. The applicant appealed to the Refugee Appeals Tribunal. In the period intervening between the decision of the Commissioner and the matter eventually being heard by the tribunal, the applicant received documentation from Afghanistan to support his claim. I accept that this documentation was personal to the applicant and was, *prime facie*, capable of corroborating his story. I am further satisfied that it was incumbent on the tribunal member to consider that documentation as it related to the core of the applicant's claim and it further appears to me that this exercise was not carried out in the manner required. I am further satisfied that the tribunal member placed an over-reliance on the Commissioner's report and relied on findings made by the Commissioner and did not have sufficient regard to the fact that those findings were made without the documentary evidence which was before the tribunal member at the tribunal hearing.

24. The tribunal member, in my opinion, overly-relied upon the findings of the Commissioner's s.13(1) report, rather than discharge his own function which is to consider the appeal having regard to the matters contained in s.11B, the documentary evidence before the tribunal and, of course, any oral evidence adduced at the oral hearing. I fully agree with the comments of Ms. Justice H. Clark in the *J.M. (Cameroon) (supra)* where she stated at para. 25:

> "…-it is not appropriate that a reader should be required to have the s.13 report to hand in order to understand the tribunal decision. Of more importance, this method of decision-making ignores the possibilities that an appellant might wish to go through his claim again by presenting his evidence afresh before an appellate and different decision-maker. It also ignores the requirement for the appellant tribunal to make his or her assessment of the evidence as a whole including any evidence which may not have been available."

25. With regard to the statement provided by the tribunal member, on p. 163 of the booklet at the last bullet point, part 6 of the analysis of the appellant's claim, which states:

> "The appellant contended in his questionnaire that his mother had actually been abducted yet his brother chose to send the appellant out of the country despite the appellant never having been abducted."

This to me is a fundamental error of fact on the part of the tribunal member. I may have been open to persuasion that it was a typographical error, if there had been but a single reference to the abduction of the applicant's brother in the questionnaire. However, there are numerous references as I have referred to above and I am not prepared to overlook that error of fact as I am of the opinion that it is relevant to the outcome of the decision. The tribunal member stated that the applicant's brother "never got the opportunity to kidnap anybody due to the arrest of his father" when in fact the applicant's evidence was that his father had already been arrested at the time in question and that his brother intended to kidnap someone from the Jamiat-e-Islami party in order to gain information about his father and perhaps as leverage to secure his father's release. The applicant provided the same information in the questionnaire and in his s.11 interview in relation to his brother's intentions. The tribunal member found it is not credible that the applicant's brother would not have been sufficiently concerned about the applicant's safety to send him out of the country and yet would jeopardise the lives of his father and mother by his kidnap attempt. It seems to be that this finding is grounded upon the

tribunal member's confused and incorrect view of the evidence and accordingly is unsustainable. These errors undermine the tribunal member's findings in this regard.

26. In relation to the tribunal member's findings regarding political opinion, the tribunal member approves of the finding of the Commissioner at para. 3.3.2 of the s.13(1) report. This finding is to the effect that the applicant would not be at risk of persecution in Afghanistan because he is not a member of Hezb-e-Islami, or even a former member. However, this is to me to misunderstand the applicant's claim as presented to the Commissioner and subsequently to the tribunal member. The applicant's fear of persecution is expressly based on an imputed political opinion. The tribunal member's approval and upholding of the Commissioner's finding in this regard reveals a fundamental misunderstanding of the applicant's core claim and calls into the question the validity of the decision.

27. In relation to the question of internal relocation the tribunal member purports not to make a finding on internal relocation notwithstanding the fact that he expressly upholds the Commissioner's finding at para. 3.3.2 of the s.13 (1) report to the effect that the applicant could avoid persecution by moving outside his local area. The tribunal member failed to differentiate between the information before the Commissioner and the official documentation which was before the tribunal member which named the applicant and called for his arrest and which had come to hand following the decision of the Commissioner. It seems to me that there was evidence before the tribunal member capable of corroborating the applicant's claim that he feared persecution by the state authorities and given the failure of the tribunal member to specifically address those fears that his finding that it would be reasonable for the respondent to move outside his local area and that that would remove the risk of persecution undermines the validity of the decision.

28. In circumstances where I accept that the applicant has adduced prime facie documentary evidence to support his alleged fear of persecution, the purported finding in relation to internal relocation that he could avoid persecution is irrational and unreasonable in the absence of a reasoned engagement by the tribunal member with the core of the applicant's claim.

29. In relation to the applicant's alleged failure to claim asylum earlier the tribunal member upheld para. 3.3.7 of the s.13(1) report and in adopting the reasoning of the Commissioner to the effect that s.11(B)(b) of the Refugee Act 1996 applies in the applicant's case and to find that he was under a legal obligation to apply for refugee status in the first safe country he entered. As set out earlier in the submissions of the applicant and in particular to the judgment of MacEochaidh J, in the case of *F.T. v. Refugee Appeals Tribunal* [2013] IEHC 167 at para. 10 where he stated:

> "There is a suggestion in the statement made by the Tribunal member that the law requires an applicant for asylum to provide an explanation why asylum was not claimed in the first safe country encountered by the person in flight. There is no such rule of law."

It seems to me that the tribunal member erred in law in determining this point.

Decision

30. For the reasons set out above I am satisfied that the decision of the tribunal member is unsustainable and I would therefore propose to grant leave and to grant an order of *certiorari* quashing the decision of the tribunal member dated the 5th day of April, 2011, and I will further make an order remitting the matter for reconsideration *de novo* by a different tribunal member.