Neutral Citation Number: [2007] IEHC 320

THE HIGH COURT

JUDICIAL REVIEW

[2005 No. 954 J.R.]

BETWEEN

S. M.,
A. M. M., (A MINOR SUING BY
HER MOTHER
AND NEXT FRIEND S. M.)

APPLICANTS

AND
THE REFUGEE APPLICATIONS COMMISSIONER,
THE REFUGEE APPEALS TRIBUNAL,
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,
ATTORNEY GENERAL
IRELAND

RESPONDENTS

AND
HUMAN RIGHTS COMMISSION

NOTICE PARTY

Judgment of Mr. Justice Hedigan delivered on the 17th day of May, 2007.

1. This application is for leave to seek judicial review on the following grounds. Firstly, adverse credibility findings were made in circumstances where the Tribunal member failed to have regard to the evidence of the first applicant and failed to make an assessment by reference to objective country of origin information, failed to consider in a reasonable manner the circumstances of the second applicant, failed to have regard to the medical report furnished in relation to the first applicant and failed to consider evidence of past persecution such that the said adverse credibility findings were irrational, unreasonable and fly in the teeth of common sense. Secondly, that errors of fact were of such significance as to render the decision *ultra vires* and in breach of fair procedures and thirdly, that there was a foreclosure, as it is put, which I take to mean that there was no decision made, in relation to the future risk of persecution arising in respect of the applicant's return to the Democratic Republic of Congo.

2. The first matter that I was asked to deal with in this case today was to extend the time in relation to the application and the grounds on which I was asked to do this were that whilst there was a delay of two weeks that nonetheless this delay could be attributable to the Refugee Legal Services. I found those special circumstances to be sufficiently convincing to agree to extend the time and I do so.

3. In relation to the daughter's application I would accept the submissions which were made on behalf of the respondents in this case, it appears clear to me that the first applicant in this case authorised the Commission first of all and subsequently the Tribunal to deal with the matter taking the two of their cases together. That seems to me in the light of the cases which have been opened to me to have been an eminently sensible and appropriate course to adopt. In relation to the grounds which are advanced on behalf of the applicant today they appear at p. 171 of the papers submitted by the applicant here and I propose to take those one by one. Firstly, the applicant appeared to be an articulate and reasonably educated person but was vague, hesitant and unconvincing. It was pointed out that the UNHCR Handbook put an onus on the applicant to put forward their case and that it should then be up to the person in charge to determine the status of the applicant and to assess the validity of any evidence on the basis of credibility of the applicant's statements. It seems to me that there is nothing much that hangs on that particular finding, nonetheless it is part of a patchwork if I could put it that way of factual determinations that were made which ultimately lead to a certain conclusion on the part of the Tribunal. Secondly, there was reference to the applicant claiming to be a member of RCD-Goma so called, yet not apparently knowing what the emblem of the organisation looked like. Being unable to say when it was founded and despite the fact that she and her husband were allegedly involved in a hands-on situation with it. Those absences of knowledge in relation to this organisation, I think are significant individually on their own they might not be sufficient but taken together, they are significant. Thirdly, the applicant gave evidence of being badly treated by the security forces because she would not tell them what was on the tapes. I think that counsel for the applicant has conceded and I think rightly so, that this was a ground on which the Tribunal could have found the applicant to be not entirely credible and I accept that. Fourthly, she stated that she joined the organisation in March, 2003, but later she changed this to May, 2003. The Tribunal indicated she ought to know when she joined the political party. She also says she joined because her husband was already a member but stated that he did not join until late 2003. Again on its own I wouldn't consider those to be significant mistakes on the part of the applicant, I wouldn't find it particularly incredible that a few years afterwards under the stress and strain of everything that had occurred that an applicant might forget the exact date which she joined the organisation. Nonetheless it does form a part of the patchwork as I have already said. Fifthly, she was unable to provide basic information concerning the party and considering that that party is now in Government it is reasonable to expect that if she was an active member of it she would display reasonable knowledge of the movement. Lastly, her claim that she was arrested because of her membership of RCD-Goma and its involvement in the coup of March 2004, was improbable at the very least in that the very party that she was a member of actually supported the Government which condemned the attempted coup.

4. In relation to the test that I am to apply, I accept the test that is outlined in *McNamara v. An Bord Pleanála*. There must be substantial grounds before I can grant leave to apply for judicial review.

5. So I turn to the question of credibility, I would have to say that reading through the papers in this case as carefully as I can I do have the feeling that I might well have come to a different decision from that which was made by the Tribunal in this case. However as I think has been well demonstrated already in the various cases which have been opened to me that is not enough, I need to go further than that. I accept the dictum that has been outlined to me by counsel for the respondents in relation to the test that was set out by Peart J. In that regard I have taken particular account of *Imafu v. The Tribunal* (Unreported, High Court, 9th December, 2005).

> "This Court must not fall into the trap of substituting its own view on credibility for that of the Tribunal Member. The latter, just as a trial judge is at trial rather than the appellate court, in the best position to assess credibility based on the observation and demeanour of the applicant when she gives her evidence. These are essential tools in the assessment of credibility, and it is always essential to remember that what appears as the spoken word in a transcript or in a summary of evidence contained in any written decision cannot possibly convey the necessary elements for the assessment of credibility. That is why a Court will be reluctant to interfere in a credibility finding by an inferior tribunal,

other than for the reason that the process by which the assessment of credibility has been made is legally flawed."

6. There are other cases which are opened to me on much the same basis. I accept the restriction that lies on this court in attempting to interfere with the findings of a Tribunal in the circumstances that we meet here. The test that I am to apply in this case has been proposed as being something different from the *O'Keeffe* test. A test of "anxious scrutiny" has been submitted to me on behalf of the applicants in this case as the appropriate risk. What this actually means is not entirely clear and these legal labels sometimes do carry their own inherent dangers. If it was suppose to mean that, were the evidence to be considered by this court to be somewhat greater on one side than another, that the court should intervene then I certainly would not agree that that is the appropriate test. However I do feel that the test to which I was referred, I presume obiter, by McGuinness J. and Fennelly J. in the Supreme Court may well be higher than that which has normally been associated with the *O'Keeffe* test. Whether that is so or not I gather remains to be determined by the Supreme Court and I am sure we all await that determination with great interest. For the present moment however on either test it appears to me that notwithstanding a very careful examination of the decision of the Tribunal and notwithstanding the fact that as I say I suspect I might have come to a different conclusion myself it appears to me that on either test the decision of the Tribunal in this case is not open to question in accordance with the test which is to be implied in an application for leave to seek judicial review before this court. For that reason I refuse to grant leave in this matter and I must make an order for costs in favour of the Minister as well in the ordinary way.