

THE HIGH COURT

2007 No. 66 J.R.

BETWEEN

J. A.

APPLICANT

AND

DAVID MCHUGH, SITTING AS THE REFUGEE APPEALS TRIBUNAL AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

Judgment of Mr. Justice Hedigan, delivered on the 15th day of October, 2008

1. The applicant is a national of Angola. He is seeking leave to apply for judicial review of the decision of the Refugee Appeals Tribunal ("RAT") to affirm the earlier recommendation of the Office of the Refugee Applications Commissions ("ORAC") that the applicant should not be declared a refugee.

Factual Background

2. The applicant lived with his wife and their three daughters in Cabinda, a province of Angola. He says that since 1995, he has been a member of the Front for the Liberation of the Enclave of Cabinda (FLEC), a separatist movement in Cabinda. There is some ambiguity as to his precise role as a FLEC member, but it seems that as a primary school teacher, he employed the political strategy of teaching his students that the Angolan authorities were taking the wealth of Cabinda, in an effort to inspire patriotism in them. He would also speak informally to young people at soccer matches, dances and church, and provide information to FLEC members and sympathisers, both orally and in the form of leaflets and brochures. He also says that his efforts to publicise the FLEC cause were carried out in a clandestine manner.

3. It seems that one of the applicant's students told a parent who was a member of the secret police about the applicant's teachings, and that parent began to enquire about him. At 3am on 10th June, 2004, members of the Angolan army attacked the applicant's family home. His house was searched and his papers taken. His wife was beaten with a gun, and his daughters were locked in their room. The applicant was taken away and detained in a camp in an underground cell. During questioning about FLEC, he was subject to harassment and acts of brutality and torture, including stabbing. He says his release was secured by a General of the Angolan army who is an informer for FLEC. With the General's assistance, the applicant and his family fled to Ireland.

Procedural Background

4. The applicant and his family arrived in Ireland on 12th July, 2004. The applicant applied for asylum and specified that his children were to be included as dependants on his application. He was interviewed by an authorised ORAC officer on 13th April and 22nd June, 2005. The officer compiled a section 13 report on 25th June, 2005, recommending that the applicant should not be declared a refugee. Appended to the section 13 report were a UK Home Office Report on FLEC of April, 2004 and the response of the Swiss Federal Office of Refugees to a query about FLEC activities. Negative credibility findings were drawn from what were seen as inconsistencies between the information contained in those reports and the applicant's account of events.

5. The applicant appealed to the RAT. He submitted the following documentation: a Human Rights Watch report of December, 2004; a medical report concerning the mental health of two of his daughters, compiled by the HSE Child and Adolescent Mental Health Services Unit; and a medical report relating to the applicant, compiled by his GP. A week after his first RAT oral hearing, the applicant forwarded a letter from the FLEC European Headquarters in Belgium affirming his affiliation with the movement, and a photocopy of his FLEC membership card, which had also previously been submitted to ORAC. Receipt of each of these documents was acknowledged by the RAT.

6. The Tribunal Member's decision to reject the appeal, dated 16th February, 2006, was challenged in judicial review proceedings which were settled and the matter was remitted for re-hearing before the RAT. A new oral hearing was scheduled for 13th September, 2006 but that hearing was adjourned as the applicant's wife and the three children disappeared in July, 2006. Their disappearance was reported to the Gardaí but they are still missing. A new oral hearing proceeded with respect to the applicant's appeal on 20th November, 2008. The applicant was legally represented and a translator was present. The Tribunal Member decided on 29th November, 2006 to reject the appeal, basing his decision on a number of negative credibility findings. It is that decision that is challenged in the within proceedings.

Extension of Time

7. The within proceedings were commenced outside of the 14 day time-limit set by section 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000. In the present case, the period of delay includes the Christmas and legal vacation period and the respondent has made no objection to the extension of time. In the circumstances, I am satisfied that there is good and sufficient reason for extending time.

The Submissions

8. The applicant complains that the RAT decision is flawed in the following way:-

- a. Failure to take account of documentation submitted; and
- b. Failure to adequately consider a medical report; and
- c. Flawed credibility assessment.

(a) Failure to Take Account of Documentation Submitted

9. The applicant contends that the Tribunal Member failed to take account of three pieces of documentation submitted by him in support of his appeal, namely:

- a. His FLEC membership card;
- b. The letter from the European HQ of FLEC in Belgium;
- c. The medical report relating to his two daughters.

10. The applicant submits that the membership card and letter are evidence of his membership of FLEC. The RAT decision makes

reference to submissions made by the applicant's counsel at the oral hearing in respect of his FLEC ID document, but no further reference is made to them in the decision. The applicant says that the children's medical report substantiates his account of the attack on his home and his arrest. The report states that the children were exhibiting behaviour that was consistent with having been exposed to trauma prior to travelling to Ireland. It also says that the younger girl describes hiding under a bed when soldiers abused her parents, and is frightened of people in uniform. No express reference is made to this document in the course of the decision.

11. The respondents contend that there is no evidence that the documents were not taken into account, and that it was sufficient for the Tribunal Member to state that all relevant documentation in connection with the appeal was considered.

(b) Failure to adequately consider a medical report

12. The applicant complains that although the Tribunal Member made express reference in the decision to the medical report that was compiled by the applicant's GP, he failed to adequately consider that medical report. That report states that the applicant has a wound on his left armpit that is "consistent with a stabbing". The applicant submits that the Tribunal Member should have explained why this report did not bolster the applicant's credibility. Reliance is placed on *Khadazi v. The Refugee Appeals Tribunal* (Unreported, High Court, Gilligan J., 19th April, 2005).

13. The respondents submit that the evidence that was at issue in *Khadazi* is distinguishable from the medical report compiled by the applicant's GP, which the respondents say is of little or no probative value.

(c) Flawed credibility assessment

14. The Tribunal Member doubted the applicant's credibility owing to the following:-

- (i) That after the section 13 report, the applicant reconstructed his account of his role with FLEC so as to accord with country of origin information;
- (ii) That it was highly improbable that a highly educated man such as the applicant would be so foolish as to publicly teach about the separatist movement in schools, given the risks associated with FLEC membership;
- (iii) That there was a significant inconsistency in his account of whether he was awake or asleep when the army attacked his house at 3am on 10th June, 2004;
- (iv) That if – as he claimed – the applicant was an influential FLEC member, he would have known that FLEC had a representative in Ireland and he would have been familiar with the FLEC slogan;
- (v) That it was doubtful that a General in the Angolan army would risk his life and career so as to arrange for the applicant's escape;
- (vi) That it was implausible that the applicant was unable to draw the national identity card.

15. The applicant says that the Tribunal Member acted irrationally in drawing the negative credibility findings that he did. In relation to (i), (ii), and (iii), the applicant seeks to down-play the apparent inconsistencies. As to (iv), the applicant says he was merely speculating that he might become FLEC's representative in Ireland and simply did not understand the meaning of the term 'slogan'. As to (v), he says that the Tribunal Member engaged in impermissible conjecture and speculation and as to (vi), he says that when asked, he set about drawing the Angolan identity card but that the picture against which the Tribunal Member sought to compare the applicant's drawing was, in fact, that of the proposed Cabinda national identity card, which does not yet exist.

16. The respondents submit as to (i), (ii) and (v) that the Tribunal Member's findings are squarely based on the country of origin information that was before him, and that it was open to the Tribunal Member to come to finding (iii). As to (iv), the respondents suggest that the applicant's complaints ring hollow as the applicant is an educated man and was legally represented at the oral hearing. As to (vi), the respondents submit that the complaint is trivial and tenuous, and is not a ground upon which leave should be granted.

The Court's Assessment

17. This being a leave application, section 5 of the Illegal Immigrants (Trafficking) Act 2000 applies and the applicant must establish substantial grounds for contending that the RAT decision should be quashed. It is now well established that this means that grounds must be shown that are arguable and weighty as opposed to trivial or tenuous.

(a) Failure to take account of Documentation Submitted

18. It is of course necessary for a Tribunal Member to take account of all relevant statements and documentation presented by an applicant. This obligation is now set out in Regulation 5(1) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006). It does not follow, however, from the absence of an express reference in a decision to a document that account was not taken of that document. It is for the Tribunal Member to decide whether or not a document merits specific reference, depending on his or her assessment of its probative or corroborative value. In *Muanza v. The Refugee Appeals Tribunal* (Unreported, High Court, Birmingham J., 8th February, 2008), Birmingham J. held that "[i]n his decision a tribunal member is entitled to refer to the facts he identified as relevant and he is not obliged to list every argument which he is rejecting or every fact the significance of which he is discounting." Likewise, in *Banzuzi v. The Minister for Justice, Equality and Law Reform* [2007] IEHC 2, Feeney J. held that "the fact that only certain documents are quoted in the decision does not and cannot lead to a determination that all the documents were not considered." Feeney J. also accepted that it is a correct statement of the law that "there is no obligation on a decision maker to refer to every aspect of evidence or to identify all documents within its written decision."

19. In *G.K. & Others v. The Minister for Justice, Equality and Law Reform & Ors* [2002] 2 I.R. 418, Hardiman J. stated as follows (at p. 426-427):-

"A person claiming that a decision making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case."

20. In my view, the applicant has failed to show any direct or inferential evidence that the Tribunal Member did not take account of the documents submitted.

(b) Failure to adequately consider a Medical Report

21. I am not prepared to accept the applicant's argument that the Tribunal Member failed to give adequate consideration to the medical report compiled by his GP. As noted above, the applicant relies on *Khazadi*, where Gilligan J. held that the Tribunal Member was required to consider the medical evidence that was before him as a whole, as part of his deliberations, and to explain, by means of a rational analysis, why the applicant's credibility was undermined. *Khazadi* was distinguished, however, in *M.E. v. The Refugee Appeals Tribunal & Ors*. [2008] IEHC 192, where Birmingham J. found that the medical evidence in question in *Khazadi* was of an altogether different quality and quantity to that in question in *M.E.*, and that the doctors had specifically requested that the medical report would be taken into account in *Khazadi*. More fundamentally, Birmingham J. noted that the Tribunal Member in *Khazadi* had reached an adverse credibility finding before going on to consider the medical evidence. None of these elements were present in *M.E.*, nor are they present in the within case.

22. In the present case, the report states that the applicant's injuries are "consistent" with the applicant's account of events in Cabinda. As Birmingham J. noted in *M.E.*, under the terms of the Istanbul Protocol this means that there are other possible explanations for his injuries and, as was the case in *M.E.*, the medical report in the present case goes no further to explain where, when or in what circumstances the injuries were sustained. The report is not, therefore, of significant probative value and in my view, can be distinguished from the medical evidence that was at issue in *Khazadi*. In the circumstances, in contrast to *Khazadi*, the consideration given by the Tribunal Member to the medical report in the present case was adequate.

(c) Flawed credibility assessment

23. At the outset I would note that it is well established that the Court must be hesitant to substitute its own view for that of the decision-maker (see, among others, *Bujari v. The Minister for Justice, Equality and Law Reform & Ors* [2003] IEHC 18; *Imafu v. The Minister for Justice, Equality and Law Reform & Anor* [2005] IEHC 416. I find no irrationality in the Tribunal Member's assessment of credibility. On the contrary, it was open to the Tribunal Member to make the findings that he did, based on the information that was before him.

24. As to the allegation that the Tribunal Member engaged in impermissible speculation and conjecture, I am satisfied that the findings made were not reached by mere gut instinct. I am fortified in my view by the decision of *M.E.* (cited above), where Birmingham J. held that a Tribunal Member is entitled to weigh, assess, analyse and draw inferences as to the account given to her, and that the applicant's credibility was properly a matter to be considered by the Tribunal Member. Moreover, in *Muanza* (cited above), it was found that it was a matter for the Tribunal Member to assess the plausibility or otherwise of an applicant's account of events. This applies with equal force to the circumstances of the present case.

25. I would accept that there appears to have been a degree of confusion over the drawing of the national identity card but I consider that any error that may have occurred was not fatal to the decision. The decision must be looked at as a whole and in my view, there was sufficient material on which the Tribunal Member could reach the conclusions that he reached even if one accepts that there was an error as to the drawing of the national identity card.

Conclusion

26. In the light of the foregoing, I am not satisfied that substantial grounds have been established and, accordingly, I will refuse leave.