Neutral citation no. 2005 IEHC 182

THE HIGH COURT

Record No. 2004 1162 JR

BETWEEN

MABEL IMAFU

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND ELIZABETH O'BRIEN, REFUGEE APPEALS TRIBUNAL

RESPONDENTS

Judgment of Mr. Justice Clarke delivered on the 27th May, 2005

1. The applicant is a female citizen of Nigeria, born in Benin City on 20th June, 1974. In these proceedings she seeks leave to issue an application for judicial review seeking primarily to quash a decision of the second named respondent in her capacity as a member of the Refugee Appeals Tribunal ("RAT") given on 29th November, 2004, in which the RAT determined that the applicant is not entitled to a declaration of refugee status.

2. This application is one to which s. 5 of the Illegal Immigrants (Trafficking) Act, 2000, applies and therefore, it is necessary for the applicant to establish substantial grounds for contending that the decision is invalid or ought to be quashed.

Background facts

3. In her grounding affidavit the applicant deposes to the fact that she arrived in Ireland in April of 2003 with her son and applied for asylum in this State. She then would appear to have gone through the refugee process by completing a questionnaire for the purposes of the Refugee Applications Commissioner ("RAC"), attending an interview at the offices of the RAC and, subsequent to a rejection of her application by the Commissioner, was the appellant in an application heard by the RAT on both the 12th and 19th of August, 2004.

4. One unusual feature of that process concerns a change in the case put forward by the applicant as the basis for her seeking refugee status. When dealing with the RAC the applicant had described religious difficulties in Nigeria which she claimed to have suffered and which she deposes were in fact similar to difficulties encountered by her half-sister. However, subsequent to the decision of the RAC and prior to the hearing before the RAT the applicant had a detailed consultation with her solicitors and informed them of having been trafficked into Italy where she states that she was beaten, threatened and forced to become a prostitute in Naples for the purposes of repaying a debt incurred in the sum of 6,000 Niara connected with her travel to Europe from Nigeria.

5. On foot of that consultation the applicant's solicitors wrote to the RAT to explain that the claims which would be made at the hearing before the RAT would be different to those made in both the questionnaire and interview completed before the RAC. It should be noted that in the course of its determination the RAT did not reach any adverse conclusions as a result of this alteration in the applicant's account. In the course of its conclusions the RAT noted that:

> "In coming to this conclusion I have purposefully set aside or excluded the evidence provided by the appellant prior to the hearing."

The decision

6. Having reviewed the history of the application, the evidence given at the hearing, the submissions made and analysed the legal issues involved, the operative part of the determination of the RAT is to be found on pp. 11 and 12 thereof. I quote it in full:-

> "I have had the opportunity of observing the appellant on two separate occasions. On the first occasion the appellant launched into her story without any embarrassment or any reticence, despite her claim that she was ashamed to tell her story originally to a man. If the appellant was indeed ashamed to tell her story I would have expected her to be a little more reticent, however, she launched into a very fluid account of what had happened to her in her earlier days as a child, and how she had arrived in Italy before I decided to stop the hearing owing to the fact that her child was causing a disturbance, and therefore making it difficult to concentrate fully on what the appellant was saying, and also potentially making it distracting for the appellant. I do note that the appellant did not appear to be distracted, however for the sake of procedure I decided to adjourn the hearing.
>
> On the adjourned date the appellant continued to tell her story. Whenever the appellant was asked to provide details, or names, or answer questions which may have provided a difficulty for her, she hesitated and either avoided the question by giving alternative information in answer to a different question, or would state 'I will tell you' and pause. Whenever the appellant was asked what might have been considered a 'difficult' question which required her to give some more detail or explanations as to why she would have embarked on a particular course she would pause and repeat the words 'I will tell you' before answering the question. In every other respect the appellant appeared to have no difficulty telling her story.
>
> It is significant that para. 197 of the UNHCR Handbook specifically accepts that the burden of proof lies on the person submitting a claim. While the standard of proof is that of a reasonable degree of likelihood of persecution in order for me to conclude that there is such a reasonable degree of likelihood of persecution for a Convention reason, I must first be happy with the appellant's evidence. While I appreciate that it is not always possible to substantiate all, or in some circumstances, indeed any aspect of an asylum seekers claim, the evidence provided must nonetheless be coherent and plausible. In circumstances where it is difficult to verify the appellant's claim, the Tribunal may be entitled to give the appellant the benefit of the doubt, however, this may only arise in cases where the appellant has made every effort to substantiate her story and is found to be credible. I consider that in this case, in order to conclude that the appellant suffers from a well founded fear of persecution for a Convention reason, I would first have to apply the benefit of the doubt, however, I do not feel in this case that the appellant has made every effort to substantiate her story nor do I consider the appellant to have been truthful in providing her account. In coming to this conclusion I have purposely set aside or excluded the evidence provided by the appellant prior to the hearing. Even having done this I am still unable to conclude that the appellant's account is credible and in the circumstances cannot give her the benefit of the doubt.
>
> As noted in the UNHCR Handbook a finding of credibility is indispensable where the case is not sufficiently clear from the facts on record, in this case I am unable to conclude that the appellant is credible, I believe this conclusion is amply supported by the facts and considerations outlined above."

The Challenge
7. In legal terms the applicant mounts her challenge to that decision under a number of headings:-

(a) an allegation of failure to take into account relevant considerations;

(b) errors in law; and

(c) unreasonableness.

8. However, in each case the contentions focus on a number of what are claimed to be unsatisfactory elements of the determination.

9. As is clear from the operative part of the determination referred to above the sole basis upon which the applicant's case fell was a finding of lack of credibility. The applicant contends that that finding is legally flawed for a number of reasons which may be briefly stated as follows:-

(a) It is stated that the basis for the finding of lack of credibility does not stand up ("pure credibility issue");

(b) It is stated that the Tribunal failed to consider the applicant's credibility in the context of relevant country of origin information ("context issue"), and

(c) It is stated that no basis is set forth in the determination for the finding by the Tribunal to the effect that it did not "feel in this case that the applicant has made every effort to substantiate her case" ("substantiation issue").

10. I will deal with each in turn.

Pure Credibility Issue
11. While there is not, as yet, a definitive ruling of this court (let alone the Supreme Court) as to the extent to which it is appropriate for this court to review the reasoning of a Tribunal such as the RAT with particular regard to its findings in relation to the credibility of an applicant, there are a number of decisions of this court at the leave stage from which it may be gleaned that the following propositions have been considered by the court to be at least arguable to a sufficient extent to justify a finding of substantial grounds.

(i) The assessment by the RAT of the credibility of an appellant and his/her story forms part of the decision making power conferred by the Refugee Act, 1996 and therefore, in accordance with the principles set out in *East Donegal Cooperative Limited v. The Attorney General* [1970] I.R. 317 such assessment must also be carried out in accordance with the principles of constitutional justice: *Traore v. The Refugee Appeals Tribunal and Anor*. (Unreported, Finlay Geoghegan J., 14th May, 2004).

(ii) Where the assessment of the credibility of an appellant places reliance upon a significant error of fact in a manner adverse to the applicant such error renders the decision invalid; *Traore*.

(iii) While the assessment of credibility is a difficult and unenviable task it is not permissible to place reliance "on what one firmly believes is a correct instinct or gut feeling that the truth is not being told". Such a process is an insufficient tool for use by an administrative body such as the Refugee Appeals Tribunal. Conclusions must be based on correct findings of fact.

Da Silveria v. The Refugee Appeals Tribunal and Others (Unreported, High Court, 9th July, 2004, Peart J.)

(iv) A specific adverse finding as to the appellant's credibility must be based upon reasons which bear a legitimate nexus to the adverse finding. *Kramarenko v. Refugee Appeals Tribunal and Anor.* (Unreported, High Court, 2nd April 2004, Finlay Geoghegan J.) placing reliance on the decision of the United States Court of Appeals for the Ninth Circuit in *Aguilera-Cota v. INS* 914 F. 2d 1375, (9th Cir. 1990).

(v) A finding of lack of credibility must be based on a rational analysis which explains why, in the view of the deciding officer, the truth has not been told. *Zhuchkova v. Minister for Justice, Equality and Law Reform and Anor*. (Unreported, High Court, 26th November 2004, Clarke J.).

12. It should also be noted that in a number of judgements (including some of the above, *Bujari v. Minister for Justice Equality and Law Reform and Anor*, Unreported, High Court Finlay Geoghegan J. 7th May, 2003 and C*amara v. Minister for Justice, Equality and Law Reform*, Unreported, High Court, Kelly J. 26th July, 2001) the Court has found guidance in relation to the Refugee and Asylum process in the relevant UNHCR materials. In my view it is arguable that such materials are persuasive as to the appropriate process to be followed save to the extent that they cannot alter or displace substantive and established law.

13. In *Gashi and Others v. Minister for Justice, Equality and Law Reform and Others* (Unreported, High Court, 3rd December 2004, Clarke J.) I also indicated that I was satisfied that it is at least arguable that the standard of judicial scrutiny as set out in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 may fall short of what is likely to be required for the protection of important constitutional rights. Whether the additional level of scrutiny to be applied to credibility reasoning on the part of a Tribunal such as the RAT stems from such a principle or from the evolution of more traditional principles it seems to me to be at least arguable on the basis of the above authorities that the court is entitled to, and, indeed, obliged to analyse a finding of lack of credibility to ascertain whether:-

(a) the determination on its face sets forth a rational and substantive basis for a finding of lack of credibility; and

(b) whether on the evidence before the court it appears that there were materials properly before the Tribunal which would have allowed it to come to the conclusions which grounded such rational basis.

14. That being said it must also be emphasised that any such additional scrutiny could not go so far as to entitle the court to supplant its own judgment in the assessment of those materials for that of the Tribunal decision maker. For the court to do so would be for the court to override the clear intention of the Oireachtas to the effect that, subject only to judicial review, the decision of the RAC, or in the event of an appeal the RAT, should be final. There must, therefore, be a limit as to the extent to which it is

appropriate for the court to seek to analyse the decision making process. In that regard it should be noted that a certain degree of caution needs to be exercised in the adoption of determinations of courts in other jurisdictions which may have been engaged in the exercise of an appellate rather than review jurisdiction.

15. Applying those principles to the first leg of the applicant's contention in this case, I have come to the view that while it might be possible to criticise in a limited way the determination of the RAT there is nonetheless a sufficient basis for the basic determination by the Tribunal as to the applicant's credibility to justify the decision reached.

16. It was implicitly conceded by counsel for the respondents that a reliance upon a mere mannerism such as the repeated statement attributed to the applicant of "I will tell you" would not, of itself, amount to a sufficient basis for a finding of lack of credibility. However, in this case the Tribunal goes on to place significant reliance upon the contention that on a number of occasions when asked a "difficult" question the applicant proceeded to answer a different question notwithstanding the fact that the applicant encountered no such difficulty in relation to other aspects of her account. There is no evidence before me to suggest that this finding of the Tribunal was not based on a permissible view of the course of the hearing. In a case, such as this, where there is very little objective evidence to verify the applicant's claims, it seems to me that the Tribunal has, in the course of its determination, set out on its face a rational and appropriate basis for a finding of lack of credibility. I am further satisfied that there is no evidence before this court to suggest that there was not a basis for the Tribunal coming to the conclusions which provided that rational basis. In all the circumstances I am not, therefore, satisfied that the applicant has established substantive grounds for challenging the determination of the Tribunal on the "pure credibility" issue.

Context issue

17. Different considerations, however, apply to the next aspect of the applicant's case. In *Kramarenko*, Finlay Geoghegan J. approved the decision of Mr. David Pannick Q.C. (sitting as a deputy judge of the High Court) in *R. v.-Immigration Appeal Tribunal ex parte Sardar Ahmed* [1999] INLR 473. Both cases in turn adopted the finding of His Honour Judge Pearl in *Horvath v. Secretary of State for the Home Department* (United Nations High Commissioner for Refugees Intervening) [1999] INLR 7 to the following effect:-

> "It is our view that creditability findings can only really be made on the basis of a complete understanding of the entire picture. It is our view that one cannot assess a claim without placing that claim into the context of the background information of the country of origin. In other words, the probative value of the evidence must be evaluated in the light of what is known about the conditions in the claimant's country of origin".

18. Under this heading the applicant draws attention to the fact that there was before the tribunal what are described as many reports from reputable sources to the effect that there is significant trafficking for prostitution from Edo State to Italy, that Nigeria does not enforce treaties in relation to trafficking and that unfortunately the law in Nigeria criminalises prostitution in other countries so that the victims of trafficking are also prosecuted if returned to Nigeria.

19. Having carefully read the determination of the Tribunal it is not clear that the Tribunal had any regard to the above *Horvath* principle. The fact that an account given by an applicant is either consistent with or, indeed, inconsistent with, country of origin information is, it is arguable, a factor that must as a matter of law be taken into account by the Tribunal in accessing creditability. It should be emphasised, of course, that the mere fact that an applicant gives an account which is consistent with country of origin information does not, of itself, lead only to the conclusion that the applicant's account is correct any more than a Tribunal would be absolved from further enquiry into an account which did not seem to be consistent with country of origin information so as to ascertain whether the facts might nonetheless be true if somewhat unusual. However what has been determined to be at least an arguable proposition in Irish law sufficient for the purposes of leave is that the Tribunal is required, as part of the assessment of creditability process, to have regard to country of origin information. I am satisfied that it is of at least arguable on the evidence that the Tribunal did not address its mind to this aspect of the assessment of creditability and that in so failing it failed to have regard to a material factor. In the circumstances I am satisfied to grant leave on this ground.

Substantiation issue

20. The third leg of the applicant's contentions centres around the finding by the RAT that it was not satisfied that the applicant had "made every effort to substantiate her story". No basis is set forward in the determination of the Tribunal for reaching that conclusion. It does appear, from the papers, that there may well have been a basis for concluding that there was only limited substantiation made available to the Tribunal. However it does not follow that the applicant was at any way at fault. In just the same way as a primary finding on creditability should be rationally explained on a basis that provides a sufficient nexus to the finding so too must a finding of a failure to substantiate be based on a rational analysis of the substantiation which might reasonably have been expected, the perceived failure on the part of the applicant to provide such substantiation, the reasons, if any, offered by the applicant for being unable to provide such substantiation and any other material factors. In this determination of the RAT there is no, let alone no sufficient, such analysis. I am therefore satisfied that it is appropriate to grant leave on this ground as well.

21. As I have granted leave on some but not all of the grounds urged on the part of the applicant I would propose adjourning the matter to afford the applicant the opportunity to submit a revised grounding notice to reflect those grounds in respect of which I have found that leave should be granted.