

THE HIGH COURT
JUDICIAL REVIEW

2007 376 JR

BETWEEN**M. B. H.****APPLICANT****AND****THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND****THE REFUGEE APPEALS TRIBUNAL****RESPONDENTS****JUDGMENT OF MS. JUSTICE CLARK, delivered on the 24th day of March, 2009**

1. This is an application for **leave** to apply for judicial review of the decision of the Refugee Appeals Tribunal (RAT), dated the 21st March, 2007, to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner (ORAC) that the applicant should not be granted a declaration of refugee status. Mr. David O'Neill B.L. appeared for the applicant and Mr. David Conlan Smyth B.L. appeared for the respondents. The hearing took place at the King's Inns, Court No. 1, on the 11th March, 2009.

Factual Background

2. The applicant claims to be a national of Sudan, a Muslim and a member of the Fur tribe. He says he was born in 1966 and speaks Arabic and a little English. He does not speak Fur and says this is because he lived in Khartoum from 1966 to 1981 where he received his elementary schooling. In 1981 his family moved to Al Fasher in the Darfur region and he attended intermediate and secondary school there from 1981 to 1986. From 1986 to 1990 he was employed in the private sector including for an Italian company that did work for the U.N. and where he says he worked as an administrative accountant.

3. In 1990 he started attending university while still working. His course was not completed as after one and a half years he was forced to sign on with the security forces. He says this was a result of being detained by the authorities owing to a strike in his company and for failing to give them information. He also said that while working on a particular project with the Italian company in 1990, he was detained and a threat was made to his life. The government and the U.N. became involved and the applicant's company paid the abductors some money to secure his release. He says his father was also arrested and detained for a period of one and a half years. From 1990 until he left in 2006, he then traded in tobacco and had a small business trading in cars.

4. In 2003, he became a member of the SLM (Sudanese Liberation Movement) and was involved in printing and distributing leaflets published by the SLM and reports from Human Rights Watch and other organisations. On the night of the 22nd March, 2006, an attack was carried out on his house in which photocopied SLM leaflets were seized. He says the attack can only have been carried out by the security forces as cars were heard coming up the road to his house at night which would not normally be permitted during curfew hours. The applicant jumped a fence into a neighbour's house but was seen and was shot at but he continued running and managed to escape. He spent one night with a friend before leaving. He paid an agent to facilitate his travel out of Sudan. He crossed the border into Libya and from there took a ship, spending around seven days at sea and then arriving in Ireland. He said his wife, father, two sisters and three brothers all remain at the same address in Al Fasher.

The ORAC Stage

5. The applicant made an application for asylum upon arrival in the State on the 24th April, 2006. He completed a questionnaire in which he claimed to fear persecution by reason of his race. When he attended for his usual interview with ORAC he furnished a letter from the Chairman of the Italian office of the SLM, dated 5th July, 2006, indicating that the applicant is "an active member" of the SLM. He also furnished a letter from the Secretary of Darfur Solidarity Ireland, dated the 28th May, 2006, indicating that he is a member of that organisation, a native of Darfur and a member of the Fur tribe. He claimed that he could not return to Sudan as the security forces now knew that he was a supporter of the SLM. The ORAC officer suggested that the U.K. Home Office Operational Guidance Notes (OGN) on Sudan advises that low-level SLM members are not subject to persecution outside of Darfur but the applicant did not agree. The s. 13 (1) report made a negative recommendation with a number of adverse credibility findings but particularly found that the option of internal relocation within Sudan could have been explored by the applicant. Various country of origin information (COI) reports were appended to the report, including an extract from a U.K. Home Office O.G.N. on Sudan dated 5th May, 2006.

The RAT Stage

6. A Form 1 Notice of Appeal was submitted in which it was indicated that the applicant's fear of persecution was on the ground of his political opinion. Translations of the applicant's driving licence, his birth certificate, his Sudanese military service document and a letter of reference from the Italian company for which he had worked were furnished as well as a document from a Sudanese Doctor of Anthropology from NUI Maynooth about the Fur tribe from Darfur referring specifically to Mr Hassoum as a member of that tribe.

7. The applicant was legally represented for the appeal hearing. A witness from Darfur was called to verify his identity. A contemporaneous note of the hearing made by the applicant's solicitor is before the Court. Although the Tribunal Member seemed to accept that the applicant is from Darfur he confirmed the ORAC recommendation and the RAT decision is the subject of challenge in these proceedings. The Tribunal Member's main reason for rejecting the applicant's claim of future persecution was mainly because the applicant's profile did not indicate that he was at risk in Sudan. The Tribunal Member relied on the U.K. Home Office O.G.N. on Sudan of 30th November, 2006, citing the following passage:-

"[...] There is no evidence to suggest that low or mid-level activists or affiliates, who allege ill-treatment amounting to

persecution in the Darfur region, and fear similar threats in the future, are likely to come to the adverse attention of the authorities in Khartoum. The grant of asylum in such cases would therefore not be appropriate."

8. The Tribunal Member found that a person involved in publishing and distributing leaflets and information for the SLA and could not be regarded as a leader and therefore likely to be persecuted. The applicant's wife and other family members continue to live in Al Fasher without evident problems and as the applicant had grown up in Khartoum he could relocate.

The Applicant's Submissions

9. Mr. O'Neill B.L., counsel for the applicant, urged the Court to take account of the fact that no negative credibility findings were made in the decision of the Tribunal Member and it was accepted that the applicant's account was true and the sole basis for the rejection of the applicant's appeal was the Tribunal Member's finding that the applicant either could or should have internally relocated within Sudan. He argued that this consideration was limited to a small part of the U.K. Home Office Operational Guidance Notice on Sudan which relates to low and mid-level activists and affiliates of the SMA and he argued that the Tribunal Member failed to take account of the information contained in the rest of the O.G.N. and omitted consideration of other passages which set out the risk of persecution faced by "*students, educated persons or influential members of a tribe or community*". He relied specifically on a passage which stated:-

"There is a strong likelihood that leading members and prominent figures in the SLM / A of JEM, those with significant involvement in these organisations and affiliated persons considered by the authorities to be "intellectual" will be subject to treatment amounting to persecution in Khartoum or the Darfur states. Therefore, for these categories, a grant of asylum will be appropriate."

10. He also referred to a passage from the decision of the U.K. Immigration Appeal Tribunal in *LM (Sudan)* [2005] UKIAT 00114 set out in the O.G.N., which states that there is no general risk to Sudanese returning from IDP camps "*except for students, lawyers, traders, merchants and possibly those with a known or perceived rebel profile from African ethnic groups.*" In addition, counsel pointed to a summary from the decision in *HGMO (Sudan)* CG [2006] UKAIT 00062, also set out in the O.G.N., where it was stated:-

"However, persons whose conduct marks them out as oppositionist or anti-government activists remain a current risk category. Persons in this category may include some (but certainly not all) students, merchants / traders, lawyers, journalists, trade unionists, teachers and intellectuals. Such conduct may take the form of being a political opponent of the government or of speaking out against the government. It may also take the form of being a member of a student organisation that is allied to an opposition part of that is opposed to the government's policies."

11. It was argued that if the Tribunal Member had regard to those passages then the applicant could have fallen within a number of those categories being a non-Arab from Darfur, an intellectual and a merchant whose prior conduct and involvement with the authorities including when he was detained while working for the Italian Company and whose father had also been detained would mark him out if he was returned to Sudan. It was argued that if the Tribunal Member had taken these factors into consideration, the only rational conclusion he could have reached would have been that the applicant did not have a viable option of internally relocating.

The Respondents' Submissions

12. Mr Conlan Smyth B.L., counsel for the respondents, argued that the applicant has failed to reach the threshold of substantial reason set out in s. 5 of the *Illegal Immigrants (Trafficking) Act 2000*. He opened various passages of the COI report to the Court and submitted that the applicant, by his own evidence, does not fall within the categories of person who might come to the adverse attention of the authorities in Khartoum. The applicant never asserted any fear of persecution by reason of his membership of the Fur tribe or because he is a non-Arab Darfuri. The language of the O.G.N. centres upon prominent members of such tribes who might be at specific risk and the applicant was not such a person. This is evidenced by the fact that his wife and other members of his family are continuing to live safely in Al Fasher. The applicant was not a prominent member of the SLA / SLM either and the s. 11 interview makes it clear that the applicant was not arrested by government or State authorities in 1999 as argued: he was kidnapped because he worked for a company who would pay a ransom. They did so and he was released. Nothing in any documents furnished by the applicant including the letter from the Italian office of the SLM indicates that he was a prominent member of that movement. The applicant himself never asserted that he was a leading or prominent member of the SLM, or a student, an intellectual, an educated person or a successful trader who might be at particular risk of persecution. Counsel also argued that it was never asserted in the appeal submissions that the applicant was anything more than a low or mid-level member of the SLM. In any event, counsel had doubts as to whether the applicant could fit into the category of an intellectual or a merchant as the car trading was in a very small way with no employees.

The Court's Assessment

13. As this is an application to which section 5(2) of the *Illegal Immigrants (Trafficking) Act 2000* applies, the applicant must show substantial grounds for the contention that the decision of the RAT ought to be quashed. As is now well established, this means that grounds must be shown that are reasonable, arguable and weighty, as opposed to trivial or tenuous.

14. This is a case where it is argued that the Tribunal Member failed to have regard to the entire COI report from the UK Home Office Operational Guidance Note and relied on selective passages. As is well established, there is no obligation on a decision-maker to make express reference to each and every piece of information in a report relied on as obviously this would make the decision unwieldy and incomprehensible. No inference can therefore be drawn from the Tribunal Member's reliance on passages which he deemed relevant to the appeal and to the issue of internal relocation to the exclusion of other passages. The primary issue is whether that reliance on that passage was fair in all the circumstances.

15. An assessment of applicant's evidence of his role in the SLM and in his community is found first in the questionnaire and interview. He said he left Sudan because the authorities discovered he was a "major" in the SLM and had carried out some missions for them. At his s. 11 interview he described his role in the SLM as "*Printing of leaflets and then I distributed them to Fashir people.*" He said he started printing leaflets in April, 2003 when the city of Al Fasher was attacked. He printed SLM leaflets and reports by Human Rights Watch and other human rights groups with the aim of educating the population on what was happening. Originally he received material to copy but eventually created the leaflets using his own funds and photocopier. In his appeal submissions it was stated that the applicant "*often had to use his own funds to pay for photocopying leaflets which he would later distribute among local people.*" It was also stated that he "*tried to attract young people in an effort to promote the SLA objectives.*" At his oral appeal hearing he said he printed leaflets on information downloaded from the SLM website on the internet. He also organised meetings and had paid for two people to go to an IDP camp which had been dressed up by the Sudanese authorities for a visit from the UN leader, Mr. Kofi Annan, and to complain to the UN party about how the people were really being treated. As they were not allowed to speak in public, members went to special occasions like functions and weddings and distributed information. He himself would go to meetings where

there would be people gathered and he would distribute information about twice a month.

16. All of this partisan activity was clandestine and confined to Al Fasher and is not indicative of a high profile or prominent position in the SLM. The Tribunal Member considered the option of internal relocation in this context. That being so, there can be nothing either unreasonable and irrational in his reliance on the paragraph of the O.G.N contained in the report and which came at the conclusion of a section dealing with the assessment of asylum applications made by members and associates of the SLM / A or JEM. The O.G.N. at this stage reiterates what has been earlier recorded in the same section (3) of that document which states:-

"There were no reports to suggest that members of the SLM / A or JEM, other than those in prominent positions, were at risk of being arrested or detained in Khartoum in 2005."

17. The previous paragraph refers to persons who have a "low or mid level affiliation to the SML / A or JEM" and provides:-

"[T]he Janjaweed operate exclusively in Darfur and there is no evidence that they operate in any other part of Sudan. As low-mid level affiliates may return to a part of Sudan where these persecutory agents are not present, the availability of adequate protection from the authorities in other regions is irrelevant."

and a little later states:-

"Low mid level affiliates are not at risk of persecution outside the Darfur States and it is considered that it is not unduly harsh to expect them to relocate to an area within Sudan in which they will be safe."

18. The general thrust of the report is undoubtedly as found by the Tribunal Member. The applicant now argues that because he is an intellectual known to have anti-government sympathies he will even if a low to mid-ranking member of the SLM be at additional risk of persecution. He may well be considered a relatively educated person in his community having been a part time student for a brief period in 1990 but it is difficult to envisage that this equate to an "intellectual" and a risk category to the Sudanese government. Since he ceased working for the Italian Company he has worked as a small time trader of tobacco and then cars and finally at a market. He was not associated with any university or with students or with writings and there is no evidence that he was involved in any other activities that would lead the authorities to view him as an "intellectual". It also seems to me that it is stretching the meaning of "student" to apply the term to a person who has not been at university for the previous fifteen years at least. His previous employers in the Italian Company stated that he joined the company as a cashier and also worked as an acting Administrator, managing people and supervising their work. While described as *"trustworthy and very honest and hard working"* there is no indication that he occupied a senior or high profile position in the company.

19. The U.K. Home Office O.G.N. describes those categories of political activists from Darfur who are considered at risk of persecution by the Khartoum government in the following terms *"some (but certainly not all) students, merchants / traders, lawyers, journalists, trade unionists, teachers and intellectuals"* and says that unless a person falls into one of the high risk categories, that person can safely relocate outside of Darfur. Does this applicant therefore fit into the remaining category of merchant? At his oral hearing he described his car trading as *"every two months I bought one or two cars if somebody called me for a car"*. The business as a sole trader lasted less than three years, was on a small scale and neither high profile nor full time. It is difficult to see how the Tribunal Member should have viewed the applicant as having held a position as a merchant or trader of the type that might indicate he would be at any particular risk of persecution. I also note that whether he was a merchant or a trader was not relied on by the applicant for his asserted fear of persecution and it is difficult to see how it can now be posited that the Tribunal Member was obliged to take this into account when assessing the viability of internal relocation.

20. A finding with respect to the viability of internal relocation was also made in the s. 13 report. An earlier UK Home Office O.G.N. on Sudan was referred to and relied upon at that stage. The question of relocation was not a new ground taking the applicant by surprise at the appeal. He was aware that a finding had been made that low-level SLM members are not subject to systematic persecution outside of Darfur and that the applicant could have explored the option of internal relocation before deciding to leave Sudan. Although the applicant was on notice that it had been found that he could internally relocate, no submissions were made with respect to the internal relocation option in the appeal submissions. It was open to the applicant and his legal representatives to argue in the appeal submissions that the applicant was more than a low-level member of the SLM or that he fit within various other categories of Darfuri set out in other paragraphs of the O.G.N., but they did not do so.

21. When this finding was specifically put to him at his oral appeal hearing no submissions were made directing the Tribunal Member to any passage of the O.G.N. to dispel this finding, or to any passage the s. 11 interview notes or the questionnaire completed by the applicant. When his legal representative asked him at the hearing if he could live elsewhere in Sudan he replied *"[even] if I'm not involved in politics maybe they know me everywhere"*. When asked if he could be safe in the capital the applicant said he would have to hide himself and asked *"What kind of life is this?"* When the Presenting Officer put it to him that low to mid-ranking members of the SLM were not at risk of persecution especially outside Darfur, the applicant effectively said that every member of the organisation would be persecuted if returned to Sudan. No attempt was made to present any COI which confirmed this assertion. In the circumstances the impugned assessment is both reasonable and rational.

Conclusion

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