Neutral Citation [2015] IEHC 479

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 765 J.R.]

BETWEEN

A.T. (DRC)

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

REFUGEE APPEALS TRIBUNAL

ATTORNEY GENERAL

RESPONDENT

JUDGMENT of Ms. Justice Stewart delivered on the 23rd day of July, 2015

1. This is a 'telescoped' application for judicial review seeking an order of *certiorari* quashing the decision of the Refugee Appeals Tribunal and remitting the matter for reconsideration by a different tribunal.

BACKGROUND

2. The applicant is a national of the Democratic Republic of Congo (hereafter referred to as the DRC), who was born on 3rd November, 1966, in Kasai-Oriental province, DRC. He applied for asylum in Ireland in July, 2008.

3. The applicant states that he was a member of the UDPS (*Union pour la Démocratie et le Progrès Social*) political party and suffered persecution in the form of imprisonment and torture in his country of origin on account of his political involvement.

4. The applicant claims that he is married and had five children, two of whom were killed. He claims that he joined the UDPS in or about February, 2002 for the stated reason that the country was not governed properly and the UDPS was fighting for democracy. The first incident he alleges gave rise to his claim for asylum occurred on 25th June, 2005, when there was an announcement that the president had fled and people went out on to the streets to celebrate. He claims that he was arrested and detained. After six months, on 1st January, 2006, he claims that his brother spoke to the guards at the prison and, upon payment of US$400 he was released whence he fled to Katuba village in Katanga province where his father was a traditional chief.

5. He claims that he replaced his father as traditional chief because his father had been ill as a result of being beaten in prison and he could not work. He claims that he lived peacefully until 19th September, 2007, when people from the neighbouring village attacked the village because the area is rich in diamonds and coltan. He claims that when the government became aware of the fighting, soldiers were sent and as the chief he had to explain to the soldiers the reason why fighting had erupted. He claims that after three days soldiers told him that they were looking for him for a long time and he was taken to ANR (*Agence Nationale de Renseignements*/ National Intelligence Agency) headquarters in Kinshasa where he was held for three months. He claims that after three months imprisonment his brother paid the prison guards US$300 and he was freed.

6. The applicant states that he travelled to the Republic of Congo (Congo- Brazzaville), leaving the DRC (Congo-Kinshasa) on the 17th January, 2008. The applicant remained in Brazzaville for two months. He states that he did not claim asylum in the Republic of Congo because of its proximity to the DRC and his belief that he would be returned to the authorities in DRC if he were to present to officials in the Republic of Congo. The applicant claims that he paid an agent US$8,500, who provided him with a European passport, an airline ticket and travelled with him to Dublin. The applicant transited through Paris, France arriving in Ireland on 5th March, 2008. He states that the agent took the passport from him at Dublin airport and pointed him to a bus.

PROCEDURAL BACKGROUND

7. The applicant completed the ASY1 form on 10th March, 2008, and a questionnaire on 20th March, 2008, in French. The s.11 interview was conducted on 28th May, 2008, and was reconvened on 26th June, 2008 for completion. Both interviews were conducted in Lingala, through an interpreter.

8. A report pursuant to s.13(1) of the Refugee Act 1996 (as amended) was prepared by the ORAC on 26th July, 2008. Therein it recommended that the applicant should not be declared a refugee because he had failed to establish credibility, pointing to perceived inconsistencies in his statements.

IMPUGNED DECISION

9. The impugned decision in this set of proceedings, dated 11th July, 2011, affirmed the recommendation of the Refugee Applications Commissioner refusing to declare the applicant a refugee. The decision of the RAT was notified to the applicant by letter dated 18th July, 2011. At p.24 of the decision, the heading 'analysis of the applicant's claim', the tribunal member sets out the reasons for the negative recommendation. They are, *inter alia*, as follows:

> "The applicant's testimony lacked credibility and coherence, nor was it plausible for the reasons set out hereunder, and he cannot therefore be afforded the benefit of the doubt…
>
> A. The applicant's claim that he only gave a summary of the events which caused him to flee the DRC is disingenuous and wholly lacking in credibility. The applicant being an educated man would be aware on reading the Guidelines and the bullet points at page 8 that he had to, inter alia, provide full answers to the questions in his questionnaire.
>
> He did not state in his questionnaire or at his interview, despite his claim that he so did, that he and his father were put in a container after their alleged arrest in June 2005 which is a very important detail to establish that he has suffered from inhuman and degrading treatment. Furthermore, he did not state in

his questionnaire that he was tortured after his alleged arrest in June, nor did he volunteer this information at his interview.

B. The applicant's claim at his appeal of the events leading up to his alleged arrest on 25th June 2005 […] contradicts his answers to Dr. Leonard. If the applicant was celebrating the event he describes he would be aware if he was inside or outside the house when the soldiers allegedly approached particularly because of his account of what allegedly transpired in the house. The applicant did not respond when asked to describe the celebrations and demonstrations when asked by Mr. Carroll.

He clams when the soldiers allegedly entered the house they did not know him but knew his father who was a member […] However, he later alleged that he was well-known although he was an ordinary member.

He also claims that the demonstrations on 25th June was spontaneous which contradicts his allegation that he realised he was arrested because he told people to demonstrate and that he was the main actor […] and that he was well known.

However, he could not categorically state if he was formally charged and his answers were vague. The Tribunal Member was unable to find any reference to a demonstration held on 25th June 2005 as he alleges.

Taking into consideration the contradictions set out above and at A above I believe the applicant was not arrested and detained as he alleges and I further believe that he has concocted a story to bring him within the definition of refugee.

C. (i) The applicant gave an account of an outbreak of violence on 19th September 2007 and to his subsequent arrest. COI appended to the Section 13 report states that fighting broke out when residents of Bena Muembi village attacked their neighbours from Bena Nishumba some 50km south of Mbuji-Mayi provincial capital of Katanda.

(ii) The applicant in his questionnaire merely stated he was tortured after he was allegedly arrested on 19th September 2007. I have referred to the applicant's education, the Guidelines and the bullets points at page 8 above. It would be expected if the applicant was allegedly tortured as he described to Dr. Leonard that he would have set out in some detail the torture he allegedly underwent.

(iii) The reasons advanced by the applicant for not stating in his questionnaire that he was inaugurated the chief as he alleges is wholly lacking in credibility.

(iv) If the applicant was allegedly arrested in September he would be certain whether or not he was formally charged with any offence. When asked by Ms. Carroll on three occasions whether he was formally charged he did not answer directly and on the third occasion of being asked he said that he was charged although the charge was not read out to him by the police […]

I, therefore, believe that the applicant has embellished his account of the events throughout the asylum process and I further believe that he was not arrested and detained in September 2007 as he alleges.

D. A report from Dr. Ciaran Leonard was submitted on behalf of the applicant […] I do not accept the conclusions in the reports for the reasons set out at A and B above […]

E. Dr. Leonard concludes that the evidence for the PTSD is extremely strong in the applicant's case but a full understanding of all he has suffered and the full background to his story would require a few interviews by the same person over a period of time and that the applicant is already on a list for the ancillary services offered by the CCSD of Spirasi.

As is pointed out by Symes and Jorro (Second Edition, para 16.103) that an asylum seeker suffers from Post-Traumatic Stress Disorder does not of itself indicate that it derives from the source to which they attribute it. The mental health assessment much be considered in the context of the applicant's entire account […]

I have had regard to the mental assessment of the applicant in the Spirasi report and have considered it in the context of the applicant's account in the round.

F. The Applicant's account of his journey and his entry into Ireland using a passport which did not bear his photograph is not credible. It is not credible that a trained immigration official at Dublin Airport would not detect that the passport was false. Clarke J. in *Imoh-v-RAT* stated that the practice of the immigration authorities at Dublin Airport was 'based on a common sense approach as to the procedures which any person travelling through Dublin Airport would be aware of. Such matters are therefore such as may be taken as common knowledge rather than matters that would require evidence'.

G. I am satisfied from the facts before me that the Applicant's failure to seek asylum in any other country than Ireland, is not consistent with a person seeking to flee his pursuer and, therefore, it is imperative to seek asylum wherever one can. It is reasonable to expect a person to seek help at the first safe venue if one is in the grip of fear and thereby eradicate his fear when the opportunity first arises, and his reasons for not doing so is disingenuous and wholly lacking in credibility […]

H. I do not accept the applicant's personal credibility and it follows I do not have to consider the likelihood of the applicant facing arrest and imprisonment on his return to DRC as per Clark J in I.T. Nfokor, 13th October 2009.

I further believe that the applicant was not persecuted in the DRC as he alleges."

The tribunal member, in the proceeding sections, goes on to state that he "found the applicant to be deliberately vague and evasive" (p.28) and then details case law to which, he states, he had regard to when deciding upon the applicant's credibility.

APPLICANT'S SUBMISSIONS

10. Counsel for the applicant, Mr. Michael Conlon S.C., submitted the decision is not appropriately reasoned because the applicant's case was very strongly supported by documentation and the rejection of these documents was not set out appropriately by the tribunal member. The applicant provided a voter registration card, an identity card, country of origin information that the applicant maintained is supportive of his claim and which, the applicant submitted, was not appropriately dealt with in the decision.

11. The applicant contended that there was a breach of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, O.J. L 326/13/ 13.12.2005 (hereafter referred to as the Procedures Directive) , and specifically article 8.2, which states:

> "Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that:
>
> (a) applications are examined and decisions are taken individually, objectively and impartially."

The applicant submitted that the tribunal member based negative credibility findings on gut feelings, in breach of the above cited directive and the principles enunciated by Cooke J. in *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 353.

12. The applicant maintained that the conclusion regarding him never disclosing that he was kept in a container is illogical. The applicant contended that he was in this container in the prison and it merely amounts to him not having described his living quarters in prison.

13. The tribunal member stated that the applicant lacks credibility; the applicant contended that this was done without giving reasons for rejecting his credibility. In this regard the applicant relied upon the case of *C.A.A. v. Minister for Justice and Equality & anor*. [2014] IEHC 569 and the questions quoted therein at para.24 as follows:

> "Finally, when giving judgment at the leave stage in this case, Mac Eochaidh J. stated as follows in relation to the adequacy of reasons for credibility findings:-
>
> *'In my recent judgment in Omidiran (an infant) v. Minister for Justice and Equality (12th December, 2012), I examine the relevant case law with regard to the assessment of the adequacy of reasons for credibility findings and say that the following questions may be asked to discern if adequate reasons were given for credibility findings:-*
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> *'(i) Were reasons given or discernible for the credibility findings?*
>
> *(ii) If so, were the reasons intelligible in the sense that the reader/addressee could understand why the finding was made?*
>
> *(iii) Were the reasons specific, cogent and substantial?*
>
> *(iv) Were they based on correct facts?*
>
> *(v) Were they rational?'"*

14. The applicant argued that the Spirasi report is rejected without appropriate reasons being given for its rejection. The decision states that it has been considered "in the round", without, the applicant submitted, having regard to the principles enunciated in the *I.R. (supra)* case.

15. The applicant submitted that there is country of origin information in the applicant's favour; however, this is not referred to at all in the report. The applicant argued that the information that is supportive of the applicant's claim is ignored as the decision states that the applicant has created a story so that he may fall within the legal definition of refugee.

16. The applicant submitted that country of origin information can only be disregarded in exceptional circumstances and in this case there is no exceptional reason why it should not be engaged with. The applicant relied, *inter alia*, upon a decision of Finlay Geoghegan J. in *A.M.T. v. Refugee Appeals Tribunal & anor.* [2004] IEHC 219, arguing that the tribunal member's reliance on this judgment in his decision was taken out of context.

17. The applicant submitted that the tribunal member's reliance upon *Imafu v. Minister for Justice, Equality and Law Reform & ors.* [2005] IEHC 416, was an incorrect interpretation of same. The applicant argued that country of origin information should have been looked at in a case such as this, where that information is supportive of the applicant's claim. The applicant opened Hathaway and Foster's *Law of Refugee Status* (2nd Ed., Cambridge, 2014) at pp.136-138, wherein, the applicant submitted, it states that country of origin information should be engaged with by the status determination decision-maker when dealing with perceived inconsistencies in an applicant's account of events giving rise to the alleged persecution.

18. The applicant submitted that the tribunal member's finding that the applicant should have sought asylum in the first safe country was a text book error of law. The applicant stated that there is no such rule in refugee law and this should not have adversely affected the applicant's credibility.

RESPONDENTS' SUBMISSIONS

19. Ms. Catherine Duggan B.L., appearing on behalf of the respondents, submitted that the issue here is not whether the applicant is in fact entitled to asylum but rather are the findings on credibility reasoned. Counsel contended at hearing that the tribunal fully considered all of the evidence put forward by the applicant including country of origin information.

20. The test in this regard, the respondents submitted, is in *M.R.C.S. v. Refugee Appeals Tribunal & anor.* [2013] IEHC 326, a judgment MacEochaidh, J. where at para.15 it sets out as follows:

> "This complaint - like many others pursed in these proceedings - bears the hallmark of an ordinary appeal point rather than the sort of matter properly pursued in judicial review. In order for me to accept the applicant's complaint I would be required to ask whether the findings of inconsistencies and vagueness 'flew in the face of fundamental reason and common sense' and plainly in my view, this finding could not be so characterised. It way well be arguable that a different conclusion is possible on the facts but more egregious fault must be attributable to the decision or finding in order for the High Court to set it aside in judicial review proceedings."

21. The respondents argued that the applicant's submissions that some of the inconsistencies in evidence were not put to the applicant are not substantiated and the notice of appeal would have been the appropriate place to argue that point rather than introducing it in judicial review proceedings. The respondents contended that the applicant needs to point to the specific issues with the decision. Without prejudice to the foregoing, the respondents contended that all of these perceived inconsistencies were put to the applicant and the applicant did not provide a satisfactory explanation for same, and this is why the tribunal member's conclusions were such. The respondents submitted that the country of origin information is dealt with in the decision, and the submission by the applicant that it has not been dealt with is not borne out.

22. Counsel for the applicant raised a complaint that there was an issue in regard to a difficulty in translation of key documents, which he submitted might explain perceived inconsistencies in evidence. As this was not raised before the hearing, the respondents argued that it amounts to the applicant's counsel giving evidence to this Court. The respondents contended that this needs to be put on affidavit, sworn by the applicant himself, if it is to be admissible before this Court.

23. The respondents further submitted that the decision-maker is under no obligation to recite all aspects of submissions, relying on the *M.R.C.S. (supra)* judgment where at para.19 MacEochaidh J. stated:

> "The Tribunal was entitled to consider the difference between the evidence at hearing and the version set out in her questionnaire. Further, I accept [there] was no obligation on the Tribunal to recite every aspect of her evidence or parse and analyse her words. It is clear on the facts that there was a difference between versions and the Tribunal Member was entitled to weigh this in the balance as one of many factors used to assess credibility."

The respondents argued that the decision should not be dissected and analysed out of context. The decision should be read as a whole, according to the respondents. Further, the respondents refuted the applicant's claim that case law is inappropriately quoted or relied upon in the decision. This, they maintain, is an attempt by the applicant to inappropriately parse the decision. The respondents relied, *inter alia*, upon the decision of Cooke J. in *I.R. (supra)* and particularly para.11 where he states:

> "When subjected to judicial review, a decision on credibility must be read as a whole and the Court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in disregard of the cumulative impression made upon the decision-maker especially where the conclusion takes particular account of the demeanour and reaction of an applicant when testifying in person."

The respondents further relied upon the *M.R.C.S.* decision, wherein at para.32 MacEochaidh J. approves of the above quoted *I.R. (supra)* section. The respondents argued that the test for this Court is whether the conclusions reached by the tribunal member fly in the face of reason and common sense.

24. The respondents pointed to the decision of *H.R. [Belarus] v. Refugee Appeals Tribunal & anor.* [2011] IEHC 151, and particularly para.7 where Cooke J. states that a tribunal member may base a finding of lack of credibility on "the manner in which an asylum seeker gives evidence and on his or her demeanour when answering questions in relation to the details of facts and events which form the basis of the claim".

25. The respondents submitted that the tribunal member gave a detailed consideration to the country of origin information. The respondents argued that there are clear references to country of origin information through the decision and it is clear from reading the decision as a whole, that this information was central to the tribunal decision.

26. The applicant had stated that violence occurred on 19th September, 2007. The country of origin information states that violence in the applicant's village occurred on 21st September, 2007. This perceived inconsistency was put to the applicant at the s.11 interview where at q.34 (p.83 of the booklet) the applicant states:

> "This date I think the government was officially informed of the trouble […] It started in the farms on the 19th at night, the violence had already started […] On the 21st it was aggravated. It started on the 19th."

The respondents argued that the tribunal member was quite entitled to take this inconsistency into account when assessing the applicant's credibility, where on p.25 (p.39 of the booklet) of the decision, the tribunal member assesses this as contributing to that his finding that "he has concocted a story to bring him within the definition of a refugee".

27. The respondents submitted that the reasons for the decision of the tribunal are clear from the face of the decision and are reasonable and rational in the circumstances. They argued that the credibility findings are cumulative and justify the overall finding by the tribunal member. The respondents stated that, in the alternative, if the Court finds that a legal flaw has infected reasons given by the tribunal then the Court can sever a reason that is peripheral to the overall finding by the tribunal member which is that the applicant was not arrested and detained as he alleges, relying upon *E.S. v. Refugee Appeals Tribunal & ors.* [2014] IEHC 374.

28. The applicant criticised the finding by the tribunal member that "it is imperative to seek asylum wherever one can"; however, the respondents contended that this must be read in the context of the entire decision and the paragraph where it appears, where at p.27 (p.41 of the booklet), the tribunal member states:

> "I am satisfied from the facts before me that the applicant's failure to seek asylum in any other country than Ireland, is not consistent with a person seeking to flee his pursuer and, therefore it is imperative to seek asylum wherever one can. It is reasonable to expect a person to seek help at the first safe venue if one is in the grip of fear and thereby eradicate his fear when the opportunity first arises, and his reasons for not doing so is disingenuous and wholly lacking in credibility."

The tribunal member's observation that "it is imperative to seek asylum wherever one can" is made in the context of the overall evidence given by the applicant and in particular that it is not credible that an applicant fleeing his pursuer would not seek asylum where he can. Furthermore, the respondents submitted that the negative credibility finding reached by the tribunal member in light of the explanation by the applicant of travelling through a number of countries prior to arriving in the State was reasonable in the situation where the applicant did not provide any documentary evidence of his journey, relying upon the decision of *F.T. v Refugee Appeals Tribunal & anor.* [2013] IEHC 167.

29. The respondents submitted that the Spirasi report cannot neutralise adverse credibility findings, particular the findings by the tribunal member that the applicant was not detained as he alleges. The respondents relied upon the decision of *R.M.K. [DRC] v. Refugee Appeals Tribunal & anor.* [2010] IEHC 367.

30. The respondents argued that the onus is on the applicant to provide evidence at the appeal stage. The submission by the applicant that he was not asked about a particular part of his story, according to the respondents, cannot be substantiated. The respondents relied upon *A.N. & ors. v. Minister for Justice, Equality and Law & anor.* [2007] IESC 44.

DECISION

31. The applicant herein seeks to challenge a decision of the Refugee Appeals Tribunal. The applicant's claim is based upon persecution by state authorities in the DRC because of his membership of an opposition political party, and the alleged resulting imprisonment and torture.

32. First turning to the tribunal member's finding in regards to the implications of the applicant not having claimed asylum in France or Congo-Brazzaville. The applicant made no claim that Ireland was the first safe country and therefore, s.11B (b) should not have a bearing on the applicant's claim for refugee status. The applicant offered explanations as to why he did not seek asylum in either of the two countries and proper regard should have been given to those explanations. I would refer to a decision this Court, *T.U. (Nigeria) v. Refugee Appeals Tribunal & ors.* [2015] IEHC 61, where at para.22, I endorsed the finding of MacEochaidh J. in *F.T. v. Refugee Appeals Tribunal & anor.* [2013] IEHC 167.

33. The applicant submitted a medio-legal report from Spirasi. The tribunal member, at p.41, states, "I have had regard to the mental assessment of the applicant in the Spirasi report and have considered it in the context of the applicant's account in the round". There is no evidence from the tribunal member's decision that the Spirasi report and its contents have been engaged with, other than the above statement. It is for the decision-maker to decide upon the probative value to be attached to evidence before him; however, clear and cogent reasons should be given if evidence that is, prime facie, supportive of the applicant's claim is to be rejected. The tribunal member stated that he "found the applicant to be deliberately evasive and vague". The doctor's opinion, contained at p.10 of the Spirasi report, states as follows:

> "Mr. T[…] was a difficult historian. The Spirasi records indicate that this difficult disposition was long lasting and not isolated to this interview. As it was clearly in his own interests to cooperate this feature could and probably should be interpreted as a feature of PTSD in that post-traumatic stress disorder is associated with avoidance of issues involved as well as a mental numbness and disassociation."

The applicant submitted that the above medical evidence could, prime facie, provide a reasonable explanation for the applicant's demeanour while giving evidence. The tribunal member is obliged to engage with the evidence before him and provide reasons if the evidence is to be rejected.

34. The function of this Court is to ensure that the process adopted by the tribunal member was fair and that the evidence was considered. Because the applicant's credibility was assessed on a cumulative basis and for the reasons outlined above, I am not satisfied that the applicant's claim was given proper and due consideration in the process of the appeal before the Refugee Appeals Tribunal. I therefore grant an order of *certiorari* and further remit the appeal of the applicant for *de novo* consideration by a different tribunal member.