

THE HIGH COURT

2006 No. 1388 J.R.

JUDICIAL REVIEW

BETWEEN

N.M.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM
AND

DES ZAIDEN, TRIBUNAL MEMBER, REFUGEE APPEALS TRIBUNAL

RESPONDENTS

Judgment of Mr. Justice Brian McGovern delivered on the 7th day of May, 2008

1. This is an application for leave to apply for Judicial Review by way of an order of *certiorari* quashing the decision of the second named respondent made on 6th October, 2005, refusing the applicant's application for refugee status and for an order of prohibition prohibiting the first named respondent from taking steps to deport the applicant pending the outcome of the enquiry into his claim for refugee status. The applicant also seeks other ancillary relief including an order extending the time for bringing the proceedings.

Time issue

2. The legislation provides that an application for leave to apply for Judicial Review shall be made within a period of fourteen days commencing on the date on which the person was notified of the decision " . . . unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made". Section 5 (2) (a) Illegal Immigrants (Trafficking) Act, 2000.

3. The applicant was notified of the decision on 9th October, 2006, and the notice of motion granting the application was dated 23rd November, 2006, which is outside the time limit provided. An affidavit was submitted by Ms. Moira Shipsey, a solicitor of the Refugee Legal Service, outlining the steps taken by the applicant to process his claim for leave to apply for Judicial Review, and it is clear that he had formed an intention to challenge the decision of the Refugee Appeals Tribunal within time, and the delays in bringing the application were due to the processing of the claim through the Refugee Legal Service and the Legal Aid Board. A Legal Aid Certificate was required in order to obtain counsel's opinion and then when that opinion was obtained, it was necessary to obtain a further Legal Aid Certificate in order to initiate Judicial Review proceedings. Counsel for the respondents informed the Court that she was not opposing the application to extend time and I am satisfied that in the circumstances of this case there is good and sufficient reason for doing so. Accordingly, I extend the time for bringing this leave application.

The facts

4. The applicant sought asylum in this jurisdiction on 30th September, 2004. He claims to have been born in February 1973 in Ethiopia. He is married man with two children, a son born in October 1996 and a daughter born in December 1999. He says that he left Ethiopia on 22nd September, 2004, and arrived in Ireland on 27th September, having travelled first to Kenya and then on to Ireland through a country which he was not able to name. He claims to be a member of the Oromo Liberation Front (OLF) which is a group seeking independence from Ethiopia in order to preserve the culture and tradition of the Oromo people. In the questionnaire completed by him in his application for refugee status, he said that he was claiming fear of persecution on the grounds of religion and nationality. He said that he was a member of the OLF and was serving with them as a propagandist from 1994 until 2004. He claimed that his wife was imprisoned and his elder brother was killed. .

5. The applicant claimed that he was arrested by the authorities in Ethiopia on a number of occasions and that he was tortured, and he described the method of torture used. He says his wife was in prison and he didn't know whether she was dead or alive. She was arrested one month before his last detention which he claims to have been in October 2002. The applicant gave an account to the second named respondent that he was released from prison by a friend who raised bail money on his behalf. He says his friend was rich and had contacts. After his release, he claims to have gone back to his home but was unable to speak with other citizens, fearing that there were spies who would listen to his conversation. He did not attempt to relocate internally but left Ethiopia on 22nd September, 2004, and travelled to Kenya. His friend, who had organised his release from prison, organised his travel for him. He travelled to Dublin through an unknown country. He left his children in Ethiopia in the care of his mother in his home town.

6. The applicant submitted a number of documents with his application including three medical reports. The medical reports established that the applicant saw Dr. Agnes Bourke and gave a history of imprisonment in Ethiopia for two years and he described how during that time, he was tortured by suspension and beatings. She found he was suffering from sleeplessness and flashbacks and she referred him to SPIRASI, the humanitarian organisation in the State which assists asylum seekers and refugees. He was also referred to a local counselling service. He then became very depressed and totally forgetful of everything about daily life and she referred him as an emergency case to the psychiatric services in the Mercy Hospital in Cork. She saw him in November 2004. She noted that after he had been referred to the psychiatric services, medication had helped him but he continued to be extremely anxious, nervous and forgetful. There is a report from Dr. Finian O'Brien of the Centre for the Care of Survivors of Torture and this is countersigned by Dr. Patrick O'Sullivan. The report is dated 30th April, 2006. This report states that at the time of examination, the applicant was suffering from a moderate to severe depressive disorder which had markedly affected his functioning and coping abilities and the disorder appeared to have been exacerbated by the refusal of his asylum application. He was demonstrating symptoms of Post Traumatic Stress Disorder in the mild range and appeared to be terrified at the prospect of being returned to Ethiopia. There is a report by Dr. John Dennehy, a Consultant Psychiatrist, dated 21st June, who found that the applicant understood what was going on at the Refugee Appeals Tribunal and expressed a great deal of anxiety about the prospect of being returned to his country. He was exhibiting signs of agitation and distress. Dr. Dennehy felt that his symptoms were typical features of anxiety such as you would find with Post Traumatic Stress Disorder. He said that "undoubtedly this would affect his ability to respond to questions and recall details". He added "in that regard, he would find it more difficult to give full and complete instructions to his legal team, in that his function or performance during the tribunal process would be likely to be impaired to some extent, though I would find it impossible to adjudge precisely to what extent. However, he is not cognitively impaired as such; he does understand the nature and purpose of the process and does appreciate the importance of the outcome to his personal circumstances". His view was that he had testamentary capacity but his responses to the Refugee Appeals Tribunal would be impaired by levels of anxiety and that he would be likely to give a less complete set of instructions than he would do in the event that he was not so anxious.

The decision of the Refugee Appeals Tribunal

7. The RAT found against the applicant on credibility issues. This application for leave to apply for Judicial Review comes before the Court pursuant to the provisions of s. 5 of the Illegal Immigrants (Trafficking) Act 2000. Section 5 (2) (b) states that:

" . . . Such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order, is invalid or ought to be quashed."

Substantial grounds are weighty grounds, or grounds which are not trivial or frivolous. Therefore, in reviewing the decision of the Tribunal member, I have to see whether or not the applicant has laid out an arguable case not based on trivial or frivolous reasons that the Tribunal member acted in some way which would make his decision amenable to challenge. The Court cannot act as an appellate tribunal and substitute its view on the facts for that of the Tribunal member. The process adopted by this Court involves examining the decision to see whether the Tribunal member acted improperly or without jurisdiction or in a way which was unfair or capricious. .

8. The decision of the Tribunal member in this case runs to thirteen pages. It sets out a comprehensive statement of the facts and background to the application. The report deals with issues of credibility and states why the Tribunal member made adverse findings on credibility issues. It seems to me that any such findings are supported by the evidence and it cannot be said that there was no evidence on which the Tribunal member could reasonably have reached his decision. In assessing issues of credibility, the Tribunal member referred to the sections of the Act that were applicable and to case law. I hold that he was correct in the manner in which he approached the issue of credibility. The Tribunal member felt that the applicant had given inconsistent information on his account of events leading to his arrival in this State. There were inconsistencies in dates which he furnished and he had regard to the applicant's overall evidence and his demeanour when confronted with inconsistencies. The applicant did not produce any reliable documentation in support of his identity or nationality. Insofar as the applicant says that he arrived on a passport but did not look at the passport to see whether the photograph was of him, or a likeness of him, I find this hard to believe. It is also hard to believe how he did not ask the names of countries in which his plane had stopped on its journey from Kenya to Ireland. At interview he said that the man who was with him showed his passport and that of the applicant to an official at Dublin Airport, but at a later stage he said that he showed it to the official himself. Anyone who is familiar with the procedures at Dublin Airport knows that persons are expected to approach Passport Control with their own passport, unless they are travelling with an infant. The Tribunal member also found it difficult to accept that the applicant would leave his mother and two children behind, given the situation which he had outlined. In my view the adverse findings on credibility would not make the decision of the Tribunal Member reviewable.

9. Medical reports were submitted in this case which tended to show that the applicant was suffering from Post Traumatic Stress Disorder. The Tribunal member took these into account and said he considered ". . . all these medical reports in full and in detail".

10. One of the matters that troubles me about the Tribunal member's decision is that he refers to the Istanbul Protocol, 9th August, 1999, and the way in which it deals with examinations and evaluations following specific forms of torture and the meaning to be attached to words such as "not consistent", "consistent with", "highly consistent", "typical of" and "diagnostic of". The medical report of Dr. Dennehy uses the words "consistent with" at one point, but it is in the context of describing his agitation and distress and how it affects his concentration and memory. What Dr. Dennehy says is that "this would be consistent with typical features of anxiety, particularly when they are sufficiently severe, such as with Post Traumatic Stress Disorder . . . ". But none of the medical reports appear to suggest that the symptoms of anxiety or Post Traumatic Stress Disorder are either consistent with, or not consistent with, the account of torture which he gave. Indeed, the medical legal report of Dr. Finian O'Brien tends to support the applicant's account of his ill-treatment in Ethiopia. He refers to the scars on the applicant's body and says that the applicant told him that the scars on his legs were a direct result of the physical abuse he had received at the hands of the Ethiopian authorities. In general, the medical reports tend to support the applicant's account although they are not conclusive.. But it seems to me that the Tribunal member approached the medical reports on the basis that certain words such as "consistent with" or "not consistent with" were used, whereas, in fact, these words were not used except in the single context I have outlined above. The Tribunal member is entitled to weigh up the account of the applicant and his credibility in deciding whether to accept medical reports. But where the medical reports appear to support the applicant's claim, I think that it is incumbent on the Tribunal member to specifically deal with the medical reports and state why he does not accept them.

11. It is no doubt true that the applicant's anxiety or Post Traumatic Stress Disorder which was found by the doctors, could be due to reasons other than torture. But it seems to me that where the medical evidence is significantly supportive of the applicant's claim, that cogent reasons for rejecting it should be furnished and, in my view, the Tribunal member has failed to do this.

12. In the circumstances, I hold that the applicant has reached the threshold required to be granted leave to apply for Judicial Review in this case.

13. I will grant leave to apply for the relief sought in paragraph D 3.4.5.7. and 9 in the statement of grounds, on the grounds contained in paragraph E.3.6.7. and 8. of the said statement of grounds.