

**THE HIGH COURT
JUDICIAL REVIEW**

[2015] No. 596 J.R.

BETWEEN

S. H. I.

APPLICANT

AND

**THE REFUGEE APPEALS TRIBUNAL AND
THE MINISTER FOR JUSTICE AND EQUALITY**

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the day of 29th day of April 2016

Introduction:

1. This is an ex parte application for leave to seek judicial review of the decision of the Refugee Appeals Tribunal of the 5th October, 2015, which affirms the recommendation of the Refugee Applications Commissioner that the applicant not be declared a refugee. The question for the court to consider is whether the applicant should have been afforded an opportunity to address a negative credibility finding where it arose for the first time on appeal to the R.A.T..

Background:

2. The facts of the applicant's case are set out in his affidavit sworn on the 28th October, 2015, in which he avers that he is a South African citizen of Indian ethnicity. From May to December 2013, the applicant worked as a truck driver in South Africa. He received regular racial abuse from his work colleagues throughout this period because of his Indian appearance. He avers that racial abuse was a daily occurrence for him while he lived in South Africa and that the situation for ethnic minorities deteriorated following the death of Nelson Mandela.

3. The applicant arrived in the State on the 16th January, 2014, and applied for asylum on the same day. By decision dated the 31st January, 2014, the O.R.A.C. recommended that the applicant not be declared a refugee. The Commissioner made two findings which are relevant to this application for leave to seek judicial review. First, she found that "no credibility issues arose during the assessment of the applicant's claim." Therefore, the applicant went to the R.A.T. with the view that the issue of credibility had been resolved in his favour. Second, the Commissioner determined that as the applicant is a national of a "safe country" pursuant to s. 13(6)(e) of the Refugee Act, 1996 (as amended), he would have no right to an oral hearing on appeal.

4. At the R.A.T., the applicant was disbelieved as to a core aspect of his claim for asylum - that he was subjected to xenophobic racially motivated abuse at his work place - because he had not raised the point prior to his appeal. The decision maker found as follows:-

"...I do not find it plausible that this occurred and that the appellant would not report it to the police or bring it to the attention of his employer."

Submissions:

5. Counsel on behalf of the applicant Mr. Colm O'Dwyer (S.C.) submits two broad grounds of challenge in respect of the R.A.T.'s decision. One that the decision maker failed to put the applicant on notice that he disbelieved a core aspect of his story relating to the alleged racial abuse suffered by the applicant at his place of work. Supplemental written submissions were received on this point, dealing with relevant case law referred to counsel by the court. The second ground of challenge relates to the alleged failure of the decision maker to assess the future risk of the applicant suffering harm if returned to South Africa.

6. The grounds upon which relief is sought are set out as follows:-

"A. The Tribunal Member (hereafter 'the first Respondent') acted in breach of fair procedures and natural and constitutional justice, and in particular the principle of *audi alteram partem*, in failing to put to the Applicant for comment a number of issues in respect of which the first Respondent went on to make adverse credibility findings against the Applicant.

B. The first Respondent has erred in law and acted in breach of statutory duty in failing to apply a forward-looking test to assess whether, as a South African with an ethnic Indian appearance, the Applicant would be likely to suffer racist abuse and persecution in South Africa.

C. The first Respondent's decision is invalid as it is based on a fundamental error of fact.

D. The first Respondent has acted unreasonably and irrationally in finding that it is implausible that the Applicant suffered racially motivated abuse at his work place, on the basis that the Applicant did not report this abuse to his employer or to the police."

Case law:

7. Counsel for the applicant relies on the recent decision in *B.Y. (Nigeria) v. Refugee Appeals Tribunal* [2015] I.E.H.C. 60, delivered on the 5th February, 2015, in which Stewart J. quashed the decision of the R.A.T. and remitted the appeal for a determination de novo by a different member of the R.A.T., in circumstances where credibility findings were made at the R.A.T., on a papers only appeal, which were not confined to the s 13(6)(b) findings that the O.R.A.C. had given. The learned Judge found:-

"However, if the tribunal member is to effectively ignore and/or abandon the findings made by the Commissioner and upon which the s. 13(6)(b) decision was arrived at and then proceed to make further adverse credibility findings in respect of the applicant, it seems to me that natural and constitutional justice, fair procedure and *audi alteram partem* require that the applicant should be afforded the right to be heard and/or have an input into the process prior to the matter being determined."

8. Counsel for the applicant further submits that in *Idiakheua v. Minister for Justice* [2005] I.E.H.C. 150, Clarke J. set out the following principle, which has been followed in the case law since (including, for example, in the decision of Barr J. in *J.A. v. R.A.T.* [2014] I.E.H.C. 565):-

"If a matter is likely to be important to the determination of the RAT then that matter must be fairly put to the applicant so that the applicant will have an opportunity to answer it."

Supplemental submissions:-

9. Supplemental submissions were received to permit the applicant to deal with a recent decision of this court in *M.A. v. R.A.T.* [2015] I.E.H.C. 528 on the issue of putting matters to the applicant for comment.

10. In *M.A.*, the *R.A.T.* made a number of fresh credibility findings in respect of the applicant's claim for asylum. This court refused to grant orders of certiorari holding that the decision maker had not breached fair procedures in not putting discrepancies in the applicant's narrative to him for comment prior to making fresh credibility findings. This court held at para. 22:-

"No reliance could be placed on material unknown to an applicant to defeat a claim for asylum. Thus, country of origin information which contradicts an applicant's narrative must be disclosed and an opportunity afforded to address it. Contrarily, it must be assumed that an applicant is aware of what he or she has said during the asylum process. It is noted that an applicant has full opportunity in an appeal, even a 'papers only' appeal to address any inconsistency, contradiction, implausibility or any other problem arising from what has been said during the asylum application process."

11. Counsel for the applicant seeks to distinguish *M.A.* from the present case in the following ways. First, the Office of the Refugee Applications Commissioner had made adverse credibility findings in respect of the applicant in *M.A.*, whereas no credibility findings were made against the applicant by the O.R.A.C. in this case. Second, in *M.A.* the basis for the O.R.A.C.'s decision that the applicant was not entitled to an oral appeal was s. 13(6)(c) of the Refugee Act 1996 (failure to make an application for asylum as soon as reasonably practicable after arriving in the State), whereas in this case the applicant had no right to an oral appeal based on s. 13(6)(e) (national of a 'safe country'). In this regard, the applicant relies on the dicta of Cooke J. in *S.U.N. (South Africa) v. Refugee Applications Commissioner* [2012] I.E.H.C. 338 that:-

"...the removal of the opportunity to avail of an oral re-hearing is the result of a factor which has no necessary or logical connection with the issue to be raised on appeal."

12. Third, the nature of the credibility findings are said to differ. In *M.A.* the findings related to discrepancies in the applicant's account in respect of which the applicant had no explanation, whereas in this case, it is submitted that the credibility findings related to the applicant's failure to 'develop' his claim that he was subject to increased racial abuse following the death of Nelson Mandela. In that regard, the applicant avers that he would have offered explanations if he had been asked about the alleged racial abuse, although he does not state what those explanations might be.

13. Finally, it is submitted that a further distinguishing factor between *M.A.* and the present proceedings lies in the applicant's notice of appeal to the R.A.T. and that, unlike the applicant in *M.A.*, the present applicant raised an objection to the O.R.A.C. not having dealt with the problems he allegedly suffered prior to Nelson Mandela's death. In circumstances where the failure to co-operate on the part of the decision maker was raised as a specific ground of appeal, it is submitted that the R.A.T. was under an increased duty to actively co-operate with the applicant to establish the facts necessary to determine whether he was a refugee, and, in particular, the facts relating to his claim that he suffered racial abuse.

Decision:

14. In my view, the applicant has made out a substantial ground (as required by s.5 of the Illegal Immigrants (Trafficking) Act, 2000 (as amended) in respect of the matter set out at para. 6(A) above.

15. I accept that it might have been unlawful for the decision maker not to revert to the applicant on a credibility issue raised for the first time on a papers only appeal where credibility had been accepted at first instance. The failure to give the applicant an opportunity to deal with this issue could well be a breach of the standard of inquiry required in respect of a papers only appeal. This is particularly so where the papers only appeal results not from a perceived weakness in the applicant's narrative, but rather from the unrelated fact that South Africa is a so called "safe country," and pursuant to s. 13(6)(e) a papers only appeal results.

16. If the papers only appeal had resulted from a rejection of credibility or from the absence of a Convention nexus, an applicant would be on notice that such issue is in play, and that it is required to be addressed by the applicant in the notice of appeal/appeal submissions. Failure to do so could be fatal and a decision maker is not required in such circumstances to revert on that issue.

17. I grant leave to seek judicial review in respect of the ground as pleaded at 5(A) in the statement grounding the application for judicial review.

18. I refuse leave in respect of the other grounds. In particular, I say that having rejected credibility, the decision maker was not required to conduct a forward looking test to assess whether, as a South African with an ethnic Indian appearance, the applicant would be likely to suffer racist abuse and persecution in South Africa. This would only be required if credibility were accepted. As this court has pointed out on numerous occasions, it serves no purpose to make any other inquiries - whether as to internal relocation, state protection, the treatment of ethnic minorities, etc - if the applicant is fundamentally disbelieved. That is what happened in this case, and, therefore, it was not a legal error to not make the inquiry sought as to treatment of persons of the applicant's ethnicity in

South Africa.