Neutral Citation [2013] IEHC 167

THE HIGH COURT

JUDICIAL REVIEW

[No. 2009/819/J.R.]

BETWEEN

F.T.

APPLICANT

-AND-

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 18th day of April 2013

1. This is a 'telescoped' application for leave to seek judicial review in respect of a decision of the Refugee Appeals Tribunal (the "Tribunal") dated 5th June 2009 refusing the applicant refugee status. The applicant is seeking, *inter alia*, an order of certiorari quashing the decision and an order of mandamus directing that the matter be remitted to the Tribunal for full reconsideration. (Where certiorari is granted, the matter may be remitted to the decision maker under Order 84 Rule 26 (4) RSC; mandamus for this purpose is not appropriate.)

Background:
2. The applicant is from Cameroon and arrived in the State via France on 22nd April 2008, making an application for refugee status on the same day. The applicant claims he fears persecution on the basis of his political opinion and membership of a particular social group. In particular, the applicant claims that he faces persecution on the basis of his membership of the Social Democratic Front (SDF), an opposition political party in Cameroon. The applicant claims that his role in the political party was the mobilisation and organisation of participants, especially youths, in protests and marches against the government. It was this involvement which brought the applicant to the attention of the authorities and which led to his arrest and detention. The applicant claims that while in detention he was informed that a commanding officer had ordered his death for the role he played in organising the protests. However, the applicant managed to secure his release from detention with the aid of a relative of a fellow detainee. After two months spent in hiding following his escape, the applicant subsequently fled Cameroon with the assistance of a smuggler or 'agent'.

Grounds of Challenge:
3. The decision of the Tribunal Member rejecting the application for refugee status is based primarily on the lack of credibility of the applicant. The applicant sets out some twelve grounds challenging the Tribunal decision in his statement grounding the application for leave to seek judicial review. However, counsel for the applicant helpfully distilled the grounds to three substantive arguments which I propose to examine in turn.

4. In conducting this examination I am guided by the general principles enunciated by Cooke J. in the decision of *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 510 and also by my decision of *R O (An Infant) v. Minister for Justice and Equality* [2012] IEHC 573. Further, I am guided by my decision in *A.A.S. v. Refugee Appeals Tribunal* [2013] IEHC 44 in respect of the requirement that a Tribunal Member assess the core claim made by an applicant for refugee status.

Reliance on peripheral issues for credibility findings / Failure to assess applicant's core claim:
5. Counsel for the applicant contends that the Tribunal Member erred in placing reliance on peripheral issues in making adverse credibility findings against the applicant and thereby failed to deal with his core claim. The credibility findings made by the Tribunal Member are listed 1 - 6 in the decision and are categorised by the applicant in his submissions as follows:

> "Grounds 1 - 3 concern the narrative of the Applicant's travel to Ireland. Ground 4 is based on a disbelief that the Applicant could have hid at his aunt's house in Baffoussan for two months without being discovered. Ground 5 does not appear to contain a credibility finding, but rather appears to be a comment on the probative value of the Applicant's SDF card, together with a novel explanation for not raising any suspicions about it with the Applicant...the first Respondent goes on to raise only one credibility issue, Ground 6, in relation to the Applicant's core claim..."

6. It is clear from the decision of the Tribunal Member that he places significant emphasis on the manner of the applicant's travel to Ireland as three of his six credibility findings make reference to this. In particular, the Tribunal Member refers to the provisions of s. 11B of the Refugee Act 1996 in his first credibility finding. In this regard the Tribunal Member states that:

> "The submission of his solicitor that the appellant showed great maturity for his age...tends to undermine the explanation given by the appellant for not applying for asylum in France (being the first safe country he encountered) was that his will was effectively overborne by the trafficker who determined that his asylum claim should be made in Ireland and nowhere else and his alternative explanation that he was overcome by leaving his country and the fact of the travel itself. The Tribunal does not accept that these were reasonable explanations for his failure to claim asylum in the first safe country, particularly given that French was his mother tongue, per the terms of section 11B of the Refugee Act 1996."

7. Counsel for the applicant contends that this finding is based on an error of law and fact because the applicant did not *"claim that the State is the first safe country in which he or she has arrived since departing from his or her country of origin ..."* which would require a *"reasonable explanation to substantiate it"* as prescribed by s. 11B (b) of the Refugee Act 1996. Rather, it is clear from the report of the s.11 interview and from the typed note of the Tribunal hearing that the applicant at all times stated that he travelled to the State via France. When the applicant was questioned as to why he did not claim asylum in France he stated: "She told me we were going to go somewhere safe for me, I was just following her, I wasn't thinking whether it was going to be Ireland or wherever, I could only agree with her, because I wanted to go somewhere where I wanted to continue my studies and live in peace..." and

further that "It would have been very good for me, because I speak French, I could have integrated much easier, but I just don't know why she didn't leave me in France. If I had been asked do I want to go to Ireland or France I would have said 'France'." When it was put to the applicant at the Tribunal hearing that there was "an element of coercion" from the trafficker and that she was forcing him to go to Ireland, he stated: "It's not that she forced me, it's just that I believed in her. I followed her."

8. I accept that the applicant did not claim that the State was the first safe country he entered and indeed freely admitted that France would have been a preferable destination as he speaks fluent French. In this connection I note what O'Keeffe J. said in *A.M.K (A Minor)* [Afghanistan] *v. Refugee Appeals Tribunal* [2012] IEHC 479:

> "39. As a matter of basic principle, the failure of an asylum seeker to apply for asylum in the nearest safe country or in the first safe country to which he flees is not a bar to refugee status per se and is not necessarily inconsistent with a genuine fear of persecution. In theory, asylum seekers are entitled to choose their country of asylum. The person may, for example, wish to apply for asylum in a country where his native language is spoken, where his family or close friends have settled, or where there is a community of people from his country of Hathaway, *The Law of Refugee Status*, at p. 50). The assessment of an applicant's credibility may, however, include an assessment of the reasonableness of any explanation given for passing through safe third countries without applying for asylum there."

9. The terms of s. 11B(b) of the Refugee Act 1996, are worth bearing in mind. The section requires that a decision maker "shall", when assessing the credibility of an applicant for international protection, have regard to: "...whether the applicant has provided a reasonable explanation to substantiate his or her claim that the State is the first safe country in which he or she has arrived since departing from his or her country of origin or habitual residence."[emphasis added]

10. It seems to me that it was not open to the Tribunal Member to state that he did not accept the explanations given by the applicant for his failure to claim asylum in France "*per* the terms of s. 11B of the Refugee Act 1996" where no 'first safe country claim' had been made by the applicant. (I understood the reference to section 11B to mean s. 11B(b) and this was not disputed at the hearing.) There is a suggestion in the statement made by the Tribunal Member that the law requires an applicant for asylum to provide an explanation why asylum was not claimed in the first safe country encountered by the person in flight. There is no such rule of law. The provisions of s. 11B(b) of the Act are applicable where a claim is made by an applicant that Ireland was the first safe country encountered after he or she departed his or her country of origin. No such claim was made by the applicant in this case. It is, of course, perfectly permissible for a decision maker on an application for international protection to have regard to the failure of an applicant to seek refuge in a safe country encountered en route to Ireland. However, given the mandatory terms in which s. 11B of the Act is expressed ("The Commissioner or the Tribunal ... shall have regard to the following ...") it seems to me that the provision should only be cited in the connection with a credibility finding where its strict terms are met. In these circumstances I find that the Tribunal Member erred in making the above finding in respect of the credibility of the applicant.

11. The Tribunal Member's second and third credibility findings refer to the issue of whether the applicant checked the name or nationality on the passport he used to enter the country and whether he in fact personally handled the passport used. It is contended by the applicant that these findings relate to peripheral and minor matters. The principles enunciated by Cooke J. in *I.R.* specify that a decision "must be read as a whole" and it is accepted that a series of seemingly minor adverse findings can cumulatively create "... the full picture that emerges from the available evidence and information" sufficient to find a lack of credibility, as the Tribunal Member appears to conclude in this case. However, it must also be borne in mind that reasons given for a lack of credibility "must relate to the substantive basis of the claim made and not to minor matters or to facts which are merely incidental in the account given." It is my view that the second and third findings of the Tribunal Member in relation to the manner in which the applicant dealt with the passport he used to enter the State are merely incidental to the personal account given in this case and do not go towards his core claim. This is particularly so when a very detailed account of his life and circumstances is given by the applicant and this is reported by the Tribunal Member in a lengthy section of the decision (about 2,500 words).

12. The fourth credibility finding made by the Tribunal Member IS m the following terms:

> "The appellant's claim that he was not discovered for two months whilst staying at his aunt's house in Baffoussam is found to undermine any objective element to the appellant's stated fear of persecution. Why he thought he would be discovered on going out of the house and not by remaining inside is inherently implausible, especially given that the appellant claims that the police were able to trace his mother's house, where he had not lived for most of his life."

13. This finding is difficult if not impossible to understand. Self evidently, remaining indoors reduces the chance of being discovered. I find that the Tribunal Member erred in making an adverse credibility finding against the applicant in the above terms. I believe the basis for this credibility finding to be irrational.

14. The fifth and sixth credibility findings made by the Tribunal Member may possibly be construed as the attempt by the Tribunal to address the core claim of the applicant, namely that he fears persecution owing to his membership of, and involvement with, the SDF opposition party in Cameroon.

15. I propose to refer to the fifth credibility finding in respect of the manner in which documentary evidence was assessed, however I note that the Tribunal Member in addressing the production of what the applicant claims to be an SDF membership card states simply that: "The Tribunal does not find that it is fraudulent but merely attaches low probative value to it given the inherent difficulties in assessing whether same are genuine or not in the context of asylum claims." As suggested by counsel for the applicant this does not appear to contain a credibility finding, but rather appears to be "a comment on the probative value of the Applicant's SDF card". As such, it is the view of the court that this credibility finding, such as it is, has a neutral effect on the overall decision of the Tribunal Member and appears to neither advance nor diminish the credibility of the applicant in any respect.

16. The final credibility finding made by the Tribunal Member is to the effect that the applicant's "...claim that he was unaware of what happened the SDF organiser because he was arrested in 2007 does not explain why he did not bother to find out upon his release and tends to undermine the claim of his political commitment given that the reason he was arrested was that he was protesting specifically at the treatment of this person by throwing stones at the police". It appears from the face of the decision that the Tribunal Member is merely casting doubt over the applicant's "political commitment". In my view this finding falls short of specifically addressing the applicant's core claim, namely that he fears persecution owing to his membership of, and involvement with, the SDF opposition party. It was incumbent on the Tribunal Member to make an express finding on this point in order to adequately assess the claims made by the applicant.

17. The Tribunal Member states that the credibility findings made satisfy the materiality requirement as described by Kelly J. in *S.C. v. Minister for Justice* (Unreported, High Court, Kelly J., 26th July 2000), however it is the view of this court that his findings in reality

fail to meet the requisite standard. I am guided in this view by reference to my decision *A.A.S. v. Refugee Appeals Tribunal* [2013] IEHC 44, in which the ethnicity of the particular applicant was the core issue and about which I stated:

> "I find that the decision is flawed by reference to the standard of decision making required in these cases as described by Murray C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3: *"An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context. Unless that is so then the constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective. In my view the decision of the Minister in the terms couched is so vague and indeed opaque that its underlying rationale cannot be properly or reasonably deduced."* If the Tribunal's decision is one rejecting Somali ethnicity, it is of no legal effect because of its opacity. In rejecting the respondents' case, I uphold the applicant's complaint that the Tribunal failed to decide the central controversial issue which was before it - the ethnicity and nationality of the applicant. On the facts of this case, it seems to me that such a decision was required in clear and reasoned terms."

Similarly, in this case, if the sixth credibility finding of the Tribunal Member is one addressing the applicant's membership in and involvement with the SDF then it is one of no legal effect because of its opacity. Nor could the five remaining findings on credibility be said to address the central controversial issue before the Tribunal in clear and reasoned terms and reach the standard of decision making set out by Murray C.J. in *Meadows* (supra).

Failure to assess credibility of the claim and future risk in the context of country of origin information:
18. It is contended on behalf of the applicant that the Tribunal Member also failed to assess the credibility of the applicant and his future risk of torture in the context of country of origin information. Counsel relies upon the dicta of Pearl J. in the UK Immigration Appeals Tribunal decision of *Horvath v. Secretary of State for the Home Department* [1999] INLR to the effect that: "It is our view that credibility 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."

19. The Tribunal Member seeks to rely on the dicta of Peart J. in Folarin v. Minister for Justice (Unreported, High Court, Peart J., 2nd May 2008) [following *Imafu v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Peart J., 9th December 2005)] that "Once such a fundamental lack of credibility is found, the Tribunal is not obliged to refer to country of origin information to see whether her story could be true". In any event, the Tribunal Member does go on to consider an Operational Guidance Note from the UK Home Office despite making these observations.

20. The court notes that Peart J. in *Imafu* remarked that the above approach to country of origin information was appropriate in "... an exceptional type of case where the Tribunal Member can quite adequately and completely assess and reach a conclusion on the personal credibility of the applicant, such that there would be no possible benefit to be derived from seeing whether the applicant's story fits into a factual context in her country of origin." Indeed, in *Folarin* Peart J. was of the view that the applicant's case was "... not even arguable on the facts as disclosed in the grounding affidavit" and that there were "very detailed reasons which based the credibility finding". Further, Peart J. believed "No amount of country of origin information would assist in assessing credibility in this case since the facts asserted by the applicant are personal to her and family-related."

21. While it is logical to adopt the approach outlined above by Peart J. in an appropriate case where there is a fundamental lack of credibility, this case is not in the same category as that referred to by the Tribunal Member. As submitted by counsel, the applicant's claim involves references to significant political events in Cameroon which are documented in the country of origin information. It is my view that the Tribunal Member erred in failing to adequately address such claims in the context of these sources. Insofar as the Tribunal Member did have recourse to country of origin information the applicant submits that the extract used is a selective quote to the effect that "The grant of asylum in such cases [involving SDF members] is therefore not likely to be appropriate." The applicant highlights that the Tribunal Member omitted the remainder of the paragraph from the UK Home Office Operational Guidance Note which emphasises that certain SDF members "...may, depending on their particular profile and circumstances, continue to be at risk. Therefore, the nature of the political activity and level of involvement with any political party, including the SDF, should be thoroughly investigated as the grant of asylum may be appropriate in some cases." It is clear that the Tribunal Member has been selective even insofar as he has had reference to country of origin information in this case and I find him to be in error in this regard also.

22. The applicant also contends that the Tribunal Member failed to apply the forward looking test as to whether the applicant had a well founded fear of persecution if returned to Cameroon. The applicant cites the decision of Clark J. in *M.L.T.T.* [Cameroon] *v. Minister for Justice, Equality and Law Reform* [2012] IEHC 568 who granted leave on the sole ground that the Tribunal Member erred in law in failing to apply a forward-looking test when assessing whether the applicant had a well-founded fear of persecution. In that case Clark J., taking into account the dicta of Peart J. in *Imafu*, was of the view that in a situation where the core claim of the applicant had been accepted "...the Tribunal Member ought to have gone on to ask himself whether the applicant has a well-founded fear of persecution if returned to Cameroon, in the light of the accepted past experiences and having regard to objective COI relating to previously arrested students there." While it is not manifest that the Tribunal Member completed this task in this case, he does make a bald statement to the effect that he "...does not accept that there would be a reasonable likelihood that the appellant's fear would be realised if he returned to his country of nationality". The Tribunal Member simply states that he reaches this view "Taking all of the foregoing into account". It would appear that insofar as the "foregoing" refers to his previous findings on credibility which were based on error, it follows that the conclusion reached in attempting to apply the forward looking test in this case is, itself, therefore, based on error.

Failure to deal adequately with documentary evidence:
23. The third and final ground upon which the applicant is challenging the decision of the Tribunal relates to the manner in which the documentary evidence submitted on behalf of the applicant was dealt with and decided upon. In particular, the applicant submitted his SDF membership card as corroborative evidence. In addressing the card in his decision, the Tribunal Member states:

> "The Tribunal has considered the document which the appellant claims to be an SDF membership card and is unable to attach much weight to same given the prevalence of document fraud in Cameroon which is well noted in country of origin information. It was not put to the appellant that there were suspicions surrounding the card given that to do so would not produce any probative evidence other than a bare denial. However, despite the appellant stating that he had joined the SDF in 2006, a date of 2001 is marked on the card. The Tribunal does not find that it is fraudulent but merely attached low probative value to it given the inherent difficulties in assessing whether same are genuine or not in the

context of asylum claims."

24. It is the view of the court that the Tribunal Member thereby breached fair procedures and constitutional justice. As Clarke J. stated in *Idiakheua v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Clarke J., 10th May, 2005) "...the principles which have been developed by the courts since the decision of the Supreme Court in *Re Haughey* [1971] I.R. 217 are equally applicable, in principle, to inquisitorial bodies. The precise way in which those principles may be applied may, of course, differ. However the substantial obligation to afford a party whose rights may be affected an opportunity to know the case against them remains. In those circumstances it seems to me that whatever process or procedures may be engaged in by an inquisitorial body, they must be such as afford any person who may be affected by the decision of such body a reasonable opportunity to know the matters which may be likely to affect the judgment of that body against their interest." Thus, the applicant was denied the opportunity to address the Tribunal's concerns and was therefore denied the basic fair procedures enumerated in *Re Haughey* [1979] I.R. 217 in the manner in which this evidence was assessed. The concerns of the Tribunal Member about the card should have been put to the applicant. It was inexcusable for the tribunal member to assume the result of any such inquiry, thereby avoiding the need to make the inquiry.

25. McMahon J. in *P.S. v. Refugee Applications Commissioner* [2008] IEHC 235 that said : "[...] the obligation on the relevant body is an obligation to give 'a reasonable opportunity' to the applicant and that the obligation arises only where the relevant matter is 'important to the determination' so that the applicant will have the opportunity to respond. Clearly, not every matter must be put to the applicant or to her advisors...It is quite clear to all who participate in this exercise, especially where the applicant is assisted by legal advisors, that the application will be at risk if the applicant is not believed, and that the principal onus of proof lies on the applicant, who is in appropriate cases to be given the benefit of the doubt." In this case, the Tribunal Member manifestly failed to provide such 'a reasonable opportunity' to the applicant in respect of "documentary evidence of manifest relevance and of potential probative force" (per Cooke J. in *I.R.*).

26. It is evident that in this case the Tribunal Member not only failed to failed to put any of his suspicions to the applicant in respect of what is clearly a piece of documentary evidence of manifest relevance to the applicant's claim, he also failed to state an adequate reason for discounting it. The reason provided for discounting the evidence and for the suspicions raised by the Tribunal Member relate to what he describes as "the prevalence of document fraud in Cameroon which is well noted in country of origin information". However, the Tribunal Member fails to reference the particular country of origin material upon which this suspicion rests. While the Tribunal Member is not obliged to provide a reference in every case, it is clear that in the process of discounting this piece of evidence it would have been prudent in the circumstances.

Conclusion:
27. I find that the Tribunal Member has erred in his findings in respect of the applicant and it is evident that the applicant has made out substantial grounds in this case. I therefore formally grant leave and as this hearing was conducted on a 'telescoped' basis, I grant an order of certiorari quashing the decision of the Tribunal and I direct that the matter be remitted for reconsideration before a different member of the Refugee Appeals Tribunal.