Neutral Citation Number: [2011] IEHC 77

THE HIGH COURT

JUDICIAL REVIEW

2009 3 JR

BETWEEN

K. J. J.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL,

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 4th day of March 2011

1. This is an application pursuant to Order 84 of the Rules of the Superior Courts and s. 5 of the Illegal Immigrants (Trafficking) Act 2000, for leave to apply for judicial review of a decision of the Refugee Appeals Tribunal dated the 28th October, 2008, which rejected an appeal against the report and negative recommendation of the Office of the Refugee Applications Commissioner dated the 11th July, 2007, on an application for asylum by the applicant.

2. The applicant is a national of Afghanistan and claims to have been a former member of the Taliban who was forced to flee that country in fear of his life because of his involvement and association with his brother who was a commander in that force and who is now in hiding in Pakistan. The applicant arrived in the State on the 13th December, 2006, his flight having been arranged by his father in law (to whom he had sold some of his family's farmland) with an agent who brought him to Dublin via Dubai and through some other airport he was unable to identify, but which was about one and a half hours from Dublin.

3. The application for asylum was rejected by both the ORAC and the RAT primarily because the story which the applicant gave of having been a bodyguard to his brother as a Taliban commander and the circumstances of his arranged flight was found to be incredible. The RAT additionally concluded that even if he was considered to be a credible person, he was not entitled to international protection because the country of origin information indicated that low ranking former Taliban members are not at risk in Afghanistan provided it is clear that they are not in opposition to the government. Whatever subjective fear he might have, therefore, was not objectively well founded.

4. As counsel for the applicant readily admitted, the application for leave faces a considerable obstacle in seeking to establish that this is an instance in which the High Court would intervene to upset a finding on credibility when it has been made in similar terms by two administrative decision makers who have had the benefit of hearing the applicant personally and observing the manner in which he gave evidence and his reaction to the questions put to him. The application is further complicated by the fact that an extension of the fourteen day time limit prescribed by s. 5 (2) is also required. The decision of the RAT was communicated to the applicant by letter of the 6th November, 2008. The proceeding was not commenced until the 6th January, 2009. The applicant concedes that he received the decision on or shortly after the 7th November, 2008 and that he had wished to challenge it. He says that he consulted the solicitor he had retained at that point but was advised that there were no grounds for instituting judicial review proceedings. On the 17th December, 2008, he went to a second solicitor who again advised him that instituting judicial review proceedings was not possible. He then consulted his present solicitor on the 22nd December, 2008 and it was decided to obtain the opinion of counsel and give instructions for the preparation of the necessary proceedings. It was in those circumstances following the delay caused by the closure of offices over the vacation period that the proceedings came to be initiated.

5. The Court must therefore be satisfied not only that there is a substantial ground raised as to why the decision ought to be quashed, but also that there is good and sufficient reason to extend the time in order to enable the application to be brought. Given that the applicant had been twice advised against bringing judicial review proceedings, it cannot be said that any initial delay in abiding by the fourteen day time limit was attributable to any ignorance on the part of the applicant of the available remedy or the non availability to him of legal advice and representation. The Court is, however, entitled and obliged to consider whether there is nevertheless an important issue to be examined in the judicial review proceedings such that there is good and sufficient reason to extend the time in order to ensure that no injustice is done by depriving an applicant of the opportunity of having that issue examined. (See the judgment of Hardiman J. in *G.K. v. Minister for Justice* [2002] 2 I.R. 418 at 423.)

6. It is necessary therefore, to examine whether any serious error has been committed in reaching the decision to affirm the recommendation of the ORAC in this case and, particularly, whether the approach to the assessment of credibility is shown to have been flawed in a material way. Before doing so, one preliminary observation may be helpful. When a challenge is raised on judicial review to the lawfulness of a decision based on an assessment of a claimant's credibility, it is important to bear in mind the nature of the administrative decision making process in understanding why the High Court will not intervene unless satisfied that it is necessary to do so in order to remedy some material error in the way the assessment has been made. An asylum seeker does not become a refugee by successfully pursuing an asylum application in a country of refuge. Individuals are refugees when they find themselves in one of the circumstances as giving rise to the entitlement to international protection in the Geneva Convention. The outcome of the asylum process is merely declaratory of that pre-existing status.

7. Although the onus remains with the asylum seeker to make good the claim, the process is one of enquiry and verification rather an adversarial contest. As is frequently pointed out, particularly in the guidance of the UNHCR, an asylum seeker with a genuine fear of persecution will frequently be someone who has fled an area of conflict and civil disorder in circumstances of urgency and peril and for that reason will arrive elsewhere without belongings or the means of establishing identity and nationality and without the possibility of acquiring original documentation because of the absence of civil administration which has caused the flight. Thus the plausibility of

the account given, its susceptibility to verification by other sources and the personal believability of the claimant assume a central importance to the enquiry. In the absence of other factors raising doubts, the personal history recounted and the language spoken may suffice to establish the probability that the claimant has come from an area from which refugees are known to be in flight and has experienced the mistreatment described. Where, however, other factors are present such as an account of travel at variance with known means of available transport or transit; unexplained delay in claiming protection; the use of forged documents or the destruction of travel or other papers, the application examiners will necessarily be put upon inquiry as to the truth of the claim being made. They may be faced with the not infrequent dilemma of judging whether the account given, however unusual or implausible it may seem, is true: or whether the claimant is making use of facts or events known to be capable of confirmation by reference to news or other reports in an attempt to attract credibility to a story which is untrue. It is this type of issue which presented itself to the two decision-makers in the present case. Because they have experience and training in the exercise; have available to them the resources necessary to verify facts and events in countries of origin and particularly because they have had the advantage of making a fact-to-face assessment of the applicant asserting the claim, the High Court must be careful not to depart from the principles summarised in paragraph 12 below when asked to review the conclusions they have reached.

8. In this case as the Tribunal member had regard to the s. 13 report and to the reply to particular questions asked during the s. 11 interview, it is appropriate to note first the basis upon which the authorised officer of the Commissioner arrived at the negative recommendation. The officer identifies a number of particular points in the applicant's story as being lacking in credibility:

> (a) The applicant had described an incident where his brother, Brigadier Zabet Nazeer, a Taliban commander, had been attacked and some of his friends killed, but the applicant and other bodyguards surrounded him and he survived. The applicant said he was required to carry a gun and fire shots on occasion, but had never killed anyone: but it was found incredible that a bodyguard defending a highly sought after target would never have had to fire shots to defend that person's life. "It is considered that this would only be possible if he and the applicant's brother did not have as high a profile as he claims or that he was never a bodyguard".
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> (b) The applicant avoided giving direct answers as to what his duties were as a bodyguard and twice avoided affirming that he possessed a gun.
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> (c) The applicant named as one of the commanders an "Ustad Akbar" and said that he subsequently became Minister for Refugee Affairs in the Kabul government. The authorised officer found that, according to country of origin information, a "Ustad Akbari" was one of the Taliban figures successful in elections in 2005. The applicant maintained that Ustad Akbar was a commander under Saiaf and not a former member of the Taliban and this was thought to damage his credibility.
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> (d) The applicant claimed that he joined the Taliban only at his brother's request and that his father and another brother did not join. He says he left the Taliban when the American forces came to Afghanistan. If this was so and he was never involved in fighting or killing he would appear to have been a low level member of the Taliban and therefore not at risk. He claimed that his other brother and an uncle were murdered because of the association with commander brother, but this dichotomy between the importance of his brother as a commander and his own claim to have not been involved in any fighting or killing, was found to damage his credibility.
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> (e) Doubt was also raised by his claims to have given his father in law land to the value of US$10,000 in order to arrange his travel. He also claimed that his family's land had been seized when they were forced to move away. It was found doubtful that he would have sold land to that value and yet be unsure whether his family was in possession of that land or not.

9. According to the authorised officer of the Commissioner, the cumulative effect of these areas of doubt was such as to place his lack of credibility at a level where he could not be given the benefit of the doubt. In addition, however, it was pointed out that in accordance with s. 11B of the Refugee Act 1996 (as amended) the applicant had failed to provide a reasonable explanation or to substantiate the claim that the State was the first safe country in which he had arrived and that he had given a full and true explanation of how he travelled to the State and arrived here. It was found to be not credible that when such steps had been taken to arrange his flight from Afghanistan, no one had told him what the destination was to be.

10. On appeal the Tribunal member identified the following particular points as the basis for the finding of lack of credibility:

> (a) The applicant was unable to provide any documents to corroborate core aspects of his claim namely, that his brother and he were members of the Taliban and sought by the government forces as such and not able to provide any documents that "recall such significant events as the death of his uncle and brother".
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> (b) The applicant's claim that the country of origin information relating to "Ushtad Akbar as a former of the Taliban was incorrect".
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> (c) His uncertainty as to whether the family was in possession of the land which he had sold for US$10,000.
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> (d) His claim that he was not involved in fighting and had never killed anybody and was uncertain as to whether he carried a gun.
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> (e) He was vague and evasive in answers to questions and unable to identify precisely who was likely to harm him if returned. Apart from referring to his involvement with his brother and the fact that he was a former member of the Taliban.
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> (f) The Tribunal member also agreed with the Commissioner in finding that the applicant had not provided a reasonable explanation to substantiate the claim that the State was the first safe country in which he had arrived since leaving Afghanistan.

11. The Tribunal member concluded: "Any one of the above reasons is sufficient, in my mind, to cast doubt upon the credibility of the applicant. A combination of any two or more of them indicates to me that the applicant is not a credible person and not entitled to the benefit of the doubt with regard to his claim".

12. In exercising its function in judicial review, the criteria to be applied by the Court when called upon to intervene to quash the findings of an administrative decision maker based upon credibility is well settled. This Court endeavoured to list and summarise the main authorities on this subject in the case law of the High Court in asylum matters in its judgment of the 24th July, 2009, in *I.R. v.*

Minister for Justice, Equality and Law Reform [2009] I.E.H.C. 353. Amongst the important principles which emerge from the listed case law the Court identified and now reiterates are the following:-

> 1. The decision on credibility rests with the administrative decision maker and the High Court must not succumb to the temptation or fall into the trap of substituting its own view;
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> 2. Assessment and credibility must be based on the full picture emerging from all available information taken as a whole when rationally analysed and fairly weighed;
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> 3. It must not be based upon any instinct as to what is correct or any gut feeling as to what is true.
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> 4. A finding of lack of credibility must be based on correct facts and not upon conjecture or speculation.
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> 5. The decision on credibility must be read as a whole and the Court should be wary of attempts to deconstruct an overall conclusion by examining individual parts in isolation in disregard of the cumulative impression which the evidence has had on the decision maker.

13. The Court would add that narrative decisions such as those contained in a report under s. 13 or an appeal decision of the Tribunal must be read in the light of the material upon which they are based, including, notably, the interview of the applicant by the authorised officer and the content of the evidence given at the appeal hearing. This is well illustrated by the first complaint made against the RAT decision in the present case where it is said that the Tribunal member was imposing a wholly unreasonable and unlawful requirement upon an asylum seeker that he should produce documentary corroboration of facts such as membership of the Taliban or the deaths of an uncle and brother from a country which is currently the subject of a notorious war and effectively devoid of civil administration. While that argument has a powerful superficial attraction, it must be seen in the light of the exchanges in the s. 11 interview, where, for example, at p. 24 of the report, the applicant was asked:-

> "Question: Did you ever receive any certificates of death for uncle and brother or any documents relating to that?
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> Answer: There should be some documents to prove they died. There is no specific certificates, but Hesb-i-Islami would have published something about their deaths, but I don't have at present time."

14. At para. 4.2.2 of the ORAC report the authorised officer had made the point that: "the applicant did not produce any documentary evidence to support the murders of his brother and uncle". Thus the significance of the Tribunal member's observation lies in the fact that at the interview the applicant had indicated that such documents might exist, but had taken no further step to produce such documents, notwithstanding the fact that a point had been made in the s. 13 report. Furthermore it is by no means apparent that the two decision-makers had only official documents such as death certificates in mind in these findings. It is not obviously unreasonable for the Tribunal member to have queried why a record might not have been found in news or agency reports of a particular attack by US forces on a given day, in an identifiable location, in which two civilians, the applicant's uncle and brother, were killed. Nor was it beyond the scope of acceptable enquiry for the Tribunal member to have asked why no third party mention of the other brother or his activities could be found in reports if he was, as the applicant claimed, the commander of a significant Taliban unit.

15. The doubts expressed by the Tribunal member in relation to the sale of farmland to the applicant's father in law for US$10,000 also arise out of what he had said in the interview. He had told the Authorised Officer that the family had lost possession of its lands when the American forces came and killed his other brother and uncle. They moved away and the forces occupied the lands. When asked how he then managed to sell the land to his father in law he replied: "That was not official agreement. We write down an agreement on paper saying "I am willing to sell my property to you" for US$10,000, he accepted it". When pressed upon this issue he had said: "I sold my land to him in law. I don't know if he is able to manage it or not".

16. Again, he was asked how he could sell something he no longer had and replied "My mother is in the region and she can explain to the government that we sold this land to this man. We had different parts of land in different parts of the region. The government was not able to know about all of our land".

17. In the judgment of the Court it would be extremely difficult to conclude that the Tribunal member had no justification for raising doubt as to the plausibility of this account. The sum of money involved is an extremely large amount in the circumstances of the country in question. It appears to have been raised very quickly and without difficulty and to have been handed over to a third party (the agent) upon the basis of the wholly informal land transaction.

18. It is equally clear that the Tribunal member had reason to question the coherence of the applicant's evidence as to his involvement in the Taliban. On the one hand he appeared to justify his fear of being targeted by government forces if returned to Afghanistan by emphasising the degree to which he was associated with his brother as a Taliban commander and the importance of the fighting role which his brother played in that force. On the other hand, he appeared to attempt to distance himself from any killing or violence and was ambivalent and uncertain when questioned as to whether he had carried and used a gun. The Tribunal member found explicitly that he was vague and evasive in his responses to questions and particularly so when asked to describe his precise role and activities as his brother's bodyguard.

19. When the cumulative effect of these areas of implausibility is added to the other aspects of the claim upon which there is little room for a dispute, namely, for example, the lack of any substantiated explanation for his manner of travel from Afghanistan to this country, it is clear, in the view of the Court, that the assessment of credibility made in this case could not be interfered with by way of judicial review. It is true that the Tribunal member includes as one of the "credibility issues" the point made in relation to the commander named "Ustad Akbar" at paragraph 4.2.2 of the s.13 Report but it is by no means clear what significance attaches to this in the context. The applicant mentioned this person as a fighter under Saiaf (another party or faction leader it seems,) who was fighting against his brother and was not a member of the Taliban. The authorised officer had a report which identified a person named "Ustad Akbari" as a former Taliban commander who ceased fighting and successfully stood for election in Kabul and become involved in parliament. The applicant said the report was wrong and that the commander in question had not been in the Taliban. Whether or not this was a matter of mistaken identity or a mistake in the report in question, it does not appear to the Court to be a factor which would warrant interfering with the finding on credibility having regard to the assessment taken as a whole.

20. A separate argument was made to the effect that the appeal process had been vitiated by an unfair hearing in that the applicant claims to have complained of difficulty with the interpretation. He claims that he had problems understanding parts of the proceeding and had asked for the hearing to be stopped. This complaint is not, in the judgment of the Court, an adequate basis for the setting

aside of the appeal decision. In the first place it is unsupported by the obvious corroboration. The applicant was legally represented throughout the hearing and no affidavit has been sworn by the solicitor in question to confirm this complaint and the request to stop the hearing or to identify at what point it was made. No reference is made to any such request in the Appeal decision.

21. Secondly, apart from his reference to his difficulty with interpretation as possibly explaining the observations about his evasiveness and hesitation, no attempt has been made to point to any specific findings in the appeal decision as having been affected by the problem. Thirdly, in the absence of any note of the exchanges at the hearing or any account on affidavit from the applicant's solicitor, combined with the fact that much of the decision is based upon evidence drawn from the s.11 interview, the evidential basis for interfering with the decision on this ground has not been provided.

22. Finally, the appeal decision could not in any event be quashed upon the basis of the assessment of credibility unless the Court was also satisfied that the final conclusion reached by the Tribunal member as to the absence of an objective basis for the fear of persecution in Afghanistan was also unsound. As already pointed out, the Tribunal member drew from country of origin information the finding that former low ranking members of the Taliban who had renounced its membership no longer faced any risk of reprisal or ill treatment. Having regard to the applicant's own statements that he had never killed anyone, had never been involved in frontline fighting and that at the time "I was in base and not in fighting" and "I was in the central base in that fighting", it is clear that this was a conclusion which the Tribunal member was entitled to reach.

23. For these reasons the Court considers that no substantial ground has been made out as to why the contested report ought to be quashed. That being so, it is clear that no serious issue has been raised which would justify the substantial extension of time required in order to grant leave. Leave is therefore refused.