Neutral Citation Number: [2009] IEHC 71

THE HIGH COURT

2007 353 JR

BETWEEN/

A. A.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE,

EQUALITY AND LAW REFORM, THE ATTORNEY GENERAL

AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered on the 4th day of February, 2009.

The applicant came to Ireland from Afghanistan and claimed asylum here in 2006. The Contested Decision of the Refugee Appeals Tribunal of 8th March, 2007, ("the Contested Decision") refused his claim for refugee status and confirmed the earlier report and recommendation of the Refugee Applications Commissioner. While the personal history of the applicant which forms the basis of his claimed refugee status is almost entirely based on his own evidence, uncorroborated by any personal identification documents, in the absence of any express findings of negative credibility in the Contested Decision, this court must proceed on the basis that the following facts are established; 1) he is a member of the Hazara tribe or ethnic group; 2) he earned his live living in Afghanistan before flight by selling arms, an activity which is illegal in that country; 3) he was arrested and detained for a day for that activity and was beaten while in detention; and 4) he escaped by bribing his way out of prison and fled. He now claims to fear that if he was returned he might face persecution and might be summarily executed.

The extensive grounds set out in the statement of grounds have been helpfully reduced at the hearing to two and can be stated in slightly larger terms than are put in the remaining paragraphs in question as follows; ground No. 2 can be articulated to this effect:

> - that the Tribunal erred in law in failing to assess the evidence and information available to it as to the basis of the applicant's claim to a well founded fear of persecution on return to Afghanistan by reason of his Hazara ethnicity;

The ground given as number three can be said to be:

> - that the Tribunal member in finding, in effect, that the evidence did not establish that there was a reasonable likelihood of that persecution for a convention reason, applied a wrong test.

To put that first and principle ground more precisely, the essential flaw alleged in the Contested Decision is that it does not explicitly mention or make any finding in respect of the claimed basis of the applicant's fear of persecution, namely that as a known arms dealer, previously detained he will, if returned to Afghanistan and rearrested, suffer persecution in a form of mistreatment over and above the uniformly bad treatment meted out to all prisoners because he is a Hazara. It is true that this precise claim is not expressly mentioned in the text of the Contested Decision, as such. It is also true and submitted that it can be said to have been raised, if not in such an exact formulation, in the letter accompanying the appeal to the Refugee Appeals Tribunal at paragraphs 6 and 7 of that letter. The decision undoubtedly concentrates, and understandably, on the applicant's fear of re-arrest as an arms dealer and on the appalling conditions he would face if detained in prison again but, as counsel for the applicant concedes, if the uniformly bad conditions, mistreatment and general lawlessness of the Afghan prisons were the only issue arising as the basis of the fear, it would not constitute a convention ground in itself.

In this case, the country of origin information undoubtedly confirms two general propositions; Firstly, that the prison conditions throughout Afghanistan are uniformly bad and that prisoners of all kinds can be mistreated and abused; secondly, that the Hazara group have, until the recent past and particularly under the Taliban regime, suffered marginalisation, victimisation and economic discrimination. It also contains evidence of families being killed by local war lords or fleeing to safety in Kabul where they can achieve some protection in the Shiite community. There is also some evidence in the country of origin information that, fortunately, the position of the Hazara has materially improved in more recent times.

What the latter country of origin information does not corroborate, in the court's view, is the proposition that a member of the Hazara, as such, inevitably suffers a different form of mal treatment, amounting to persecution, whenever detained on any charge or no charge. All that evidence appears to be consistent with the applicant's own testimony in interview, where at question 33 he was asked whether he had, himself, ever been personally harmed because he was a Hazara to which he answered "no".

There is little doubt in the court's mind that the issue as to the applicant's risk as a Hazara was before the member of the Tribunal giving the decision of 8th March, 2007. The fact that he is a member of that group is mentioned in the opening sentence of section 3 and at the end of section 4 the Tribunal records his submission:

> "It is submitted on the appellant's behalf that he will suffer persecution on the grounds of imputed political opinion and race if he returns. It is submitted that he will not be afforded a fair trial if he returns, that he is credible and had no other option but to engage in the work that he did to earn a living. It is submitted that can he not relocate and that, given the interethnic clan warfare, he fears both Tajik and Pashtun. It is submitted that can he have no confidence that he would be safe if returned".

At section 6, the final section but one in effect, of the Contested Decision the Tribunal member comes to a conclusion in these terms:-

> "It must be remembered that if the appellant's evidence is to be believed he has committed a criminal offence. The punishment for same is not so disproportionate that one could say that his prosecution is, in effect, persecution. Notwithstanding the report submitted concerning the conditions of detention in Afghanistan there is no evidence that he, as a detainee, would be treated any differently than another. The standards of the detention are, by all accounts, uniformly bad".

That conclusion, it seems to the court, has a clear basis in the evidence and information that was before it, both in the testimony of the applicant himself and in the country of origin information. So, the question that arises is whether it is now arguable that that conclusion could be upset by the court as irrational or manifestly unreasonable in the light of that evidence and information. If leave was granted to seek judicial review on the first of the two grounds the court concludes that it is not so arguable. It is true, as counsel for the applicant has submitted, that the decision does not go into the detail of finding one might wish to have on such an issue but a narrative decision of this kind is not like a conveyance or a will, where it is necessary to construe precise words and sentences to make sure that the property has genuinely vested, as required by law. The decision must be read as a whole and in the light of the submissions and the documents which are said to have been considered and those include, in this case expressly, as mentioned at section 4 of the decision, the letter accompanying the notice of appeal which contain the two paragraphs, 6 and 7, which I have mentioned.

The court also considers that the second ground advanced as to the incorrectness of the test is not of sufficient substance to warrant the grant of leave to seek judicial review on that basis. The member of the Tribunal does, in one of the last sentences of the decision, expressly mention that she is looking at the evidence and finding it insufficient: "… even on the low standard of proof applicable in cases such as these".

The fact that the words that "there is a reasonable likelihood that he would be persecuted for a convention reason" are used immediately afterwards in that sentence does not, in the court's view, indicate sufficiently that the member of the Tribunal has, in fact, adopted any higher test than that appropriate in law in these cases. In conclusion, therefore, the court finds that there is no reasonable prospect of either of these grounds resulting in the court finding that the essential conclusion reached in the Contested Decision were either irrational or manifestly unreasonable and, for that reason, the court must refuse to grant leave.

J.