Neutral Citation Number: [2007] IEHC 479

THE HIGH COURT

2006 No. 183 J.R.

**IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000,
AND THE REFUGEE ACT, 1996 AS AMENDED
AND IN THE MATTER OF THE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

BETWEEN

V. B.

APPLICANT

AND
DES ZAIDAN ACTING AS THE REFUGEE APPEALS TRIBUNAL

RESPONDENT

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

FIRST NOTICE PARTY

AND
ATTORNEY GENERAL AND IRELAND

SECOND NOTICE PARTY

Judgment of Mr. Justice Birmingham delivered the 13th day of July, 2007

1. In this case the applicant seeks leave to apply for judicial review. The matter is one to which s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 applies. Accordingly it is necessary for the applicant to establish substantial grounds. In that context, I recall the observation of the Supreme Court in In Re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999 [2000] 2 I.R. 360, that the obligation was not an onerous one going on to cite with approval the judgment of Carroll J. in *McNamara v. An Bórd Pleanála (1)* [1995] 2 I.L.R.M. who interpreted the phrase in the context of the Planning Acts as being equivalent to "reasonable", "arguable", "weighty" and that the grounds must "be trivial or tenuous".

The test applicable

2. The reliefs sought include a declaration that the rule of law governing the scope of judicial review set out in the case of *O'Keeffe v. An Bórd Pleanála* [1993] 1 I.R. 39 is incompatible with the European Convention on Human Rights. While referred to in the Statement of Grounds this issue was not pursued in written submissions or oral argument. In touching on this issue the applicant is raising the question of whether a more exacting approach sometimes described as anxious scrutiny is appropriate in cases involving fundamental human rights. I am aware that this approach has been endorsed by McGovern J. in *I. v. The Minister for Justice, Equality and Law Reform* 2nd March, 2007. That being so I have taken the view in other applications for leave that there are substantial grounds at a leave stage for contending that the standard is the exacting standard of anxious scrutiny and I have approached applications for leave as I do this one from that perspective.

3. I simply observe that the occasions when a different result would be achieved by applying the self discipline of anxious scrutiny will be few and far between. In cases where fundamental human rights are engaged our whole legal tradition requires the matter be approached with care and caution.

The scope of the present challenge

4. No less than twenty-five grounds appeared in the statement of grounds which range far and wide. However the written submissions are confined to criticising the approach of the Tribunal member to the issue of credibility. This issue was central to the oral arguments that were advanced on behalf of the applicants, though two other issues were raised; namely a delay that had occurred between the date of the Refugee Appeals Tribunal (RAT) hearing and the decision issuing and an alleged failure to adjudicate on the claim for asylum based on a well-founded fear of being persecuted by reason of race, religion and membership of a particular group.

The factual background

5. The applicant, whose date of birth is 30th December, 1975, states that he is a national of the Ivory Coast/Coté d'Ivoire and entered the State on the 30th December, 2004 and subsequently made a claim for asylum. That claim was unsuccessful at first instance and indeed again on appeal to the Refugee Appeals Tribunal the decision of which is dated the 12th January, 2006. The application form completed by the applicant indicates that he is a Muslim and a member of the Dioula ethnic group.

6. Central to the applicant's claim for asylum is that he states he was politically active in his home country as a member of the party of Republicans Rally Youth (J.R.D.R.) and in addition was a member of Movement of Alassene Demare Ouatlana's Unconditionals (M.I.A.D.O.). While he had a history of political activity, it does not appear that this gave rise to any difficulties for him until the 4th November, 2004, a significant date in the recent history of the Ivory Coast. The applicant states that after afternoon prayers at the Mosque that day, he addressed a gathering of Dioula Youths and urged them to display solidarity and to oppose the government because Bouake, the second city in the country was under attack by government forces. He states that he had addressed similar gatherings previously without incident. However, on this occasion when that evening he was at home in the company of a younger brother, there was a knock on the door and the callers identified themselves as gendarmarie. While this was happening he hid in a shower where he had a hunting rifle with him. His brother objected to the gendarmarie entering the house without a warrant but was shot dead by them. When the applicant inadvertently made a noise this attracted attention to his presence. In these circumstances he discharged a shot and then managed to escape by exiting through a window.

7. Thereafter he contacted the leadership of his political party and they arranged for an individual to escort him to Ireland so that he could seek refuge.

The delay in issuing the decision

8. In this case the oral hearing before Mr. Desmond Zaidan took place on 4th October, 2005 and the decision of the Tribunal is dated the 12th January, 2006. Having regard to this delay the applicant says that he is entitled to have the decision quashed as being unsafe and invalid. In his oral arguments Mr. Hugo Hynes, S.C emphasised the fact that the interval between hearing and decision exceeded three months.

9. This argument has its origin in a ruling of the U.K. Immigration Appeals Tribunal in the case of *Secretary of State for the Home Department v. Kenneth Waiganjo*, (17th October, 1997). In that case the Tribunal upheld an appeal brought by the Secretary of State against a determination of the special adjudicator. There was an interval exceeding six months between hearing and determination. However, that ruling must be seen in the context of the fact that shortly before the Tribunal determination, a

memorandum had been distributed to all Tribunals indicating that subject to particular circumstances of the case, a delay in excess of three months between the date of hearing and the date of promulgation would be unacceptable. It is noteworthy, though that the Tribunal commented that if a contemporaneous record of findings in relation to credibility existed, that would be a different matter.

10. The *Waiganjo* approach and other English cases on the topic, were considered by Finlay Geoghegan J. in *Messaoudi v. The Refugee Appeals Tribunal*, (29th July, 2004). She analysed the English approach as being that the three month period is a rule of thumb which maybe useful but must always be subject to an assessment of the particular circumstances of an individual case. Here, the delay is just one week over the three month period. Moreover, the first draft of the decision was sent for typing on the 15th day of November, 2005.

11. In these circumstances I do not regard the delay as being such as to require that the decision be quashed and the matter sent back for a new hearing. In that context I note that counsel for the applicant has not really been able to point to any inaccuracies in the recital of the facts in the decision which might tend to suggest that with the passage of time memory had blurred, though he does draw attention to the fact that the decision refers to "several gendermarie" having been at the applicant's home, whereas he states that the applicant's account was that there were two present.

Alleged failure to adjudicate on a claim advanced on grounds of a well-founded fear of persecution on grounds of race and religion and membership of a social group

12. When the applicant completed the initial questionnaire, he responded to Q. 29 as follows:-

> "Question 29: What do you fear may happen to you or any of the people included in this application if you return to your country of origin? Please explain giving as much detail as possible. If you need more space please attach extra pages with the details and state the number of additional pages at question 40.
>
> Answer: It is certain and I am convinced that they would kill me for the following reasons;
>
> 1. I am a Muslim. The Government wants to suppress this religion.
> 2. I am head of a branch of the J.R.D.R.; the President wants to be rid of the R.D.R.
> 3. A Dioula; the Dioula ethnic group is seen as a formentor of troubles.
> 4. I fired on a gendermarie; the gendarmerie would kill me if they can.

13. When completing the grounds of appeal at question 3(1) where the applicant is asked on what grounds he claims to have a well-founded fear of being persecuted and is asked to place an X against the list of grounds he places an X opposite, race, religion, membership of a particular social group and political opinion leaving blank only "nationality". It should be noted that when asked to undertake the same exercise in the application form, he had completed it in the same way.

14. Moreover, the body of the appeal at para. 2 states as follows:-

> "In stating that the applicant claims refugee status only on one ground (being that of political opinion; para 1, s. 13 report) when on the contrary, the applicant claims the same on the basis also of his religion, (Islam) and ethnicity (Dioula) and membership of a particular social group J.R.D.R. and M.I.A.D.O, the mores and rules of which have come into conflict with those of his persecutors, the Gendermarie. The commissioner failed to consider the applicant's claim in the context of such further Convention grounds and clearly failed to consider the following sections of the applicant's interview notes and/or application form – a number of quotations and extracts are then set out as follows:
>
> (i) When asked at question 22 of the application form on what grounds do you claim to have a fear of persecution, the applicant ticked the boxes represented by four convention grounds, namely race, religion, membership of a particular social group and political opinion.
>
> (ii) It is certain and I am convinced that they would kill me for the following reasons:
>
> · I am Muslim. The government want to suppress this religion.
> · I am head of a Branch of J.R.D.R. The President wants to be rid of the R.D.R.
> · The Dioula ethnic group is seen as a formentor of trouble.
> · I fired on a gendermarie. The gendermarie wants to kill me if they can. (application form question 29).

15. Giving that the notice of appeal criticises the Commissioner for not giving specific consideration to grounds other than asylum, it is disappointing to find that there is no specific reference to fear of persecution on grounds of race or religion of membership of a particular social group in the decision.

16. However, that is not end of the matter. From all of the papers it is clear that the applicant's claim to fear persecution is fairly and squarely grounded in the events of 4th November, 2004. It is clear that the Tribunal member was conscious of the ethnic and religious background to the claim. So, dealing with the issue of false documentation he records the applicant as saying "in the Ivory Coast Dioula holds false documentation…". More dramatically he records the applicant saying he feared persecution in the Ivory Coast because young Muslims in that country are killed by the gendermarie like sheep. In parenthesis one may observe that these comments about the plight of young Muslims do not sit easily with the applicant's comments when interviewed by the commissioner that the relationship between the different faiths, Christians, Muslims and Buddhists was, since the foundation of Cóte d'Ivoire harmonious and that despite the efforts of certain politicians to break this up harmony still exists.

17. One cannot ignore the reality that the applicant accepts that he was able to pursue his political objectives as a young Muslim of Dioula ethnic origin without hindrance until the 4th November, 2004. That on his account it was the events of that day that caused him to flee the country.

18. I am satisfied that the Tribunal member was fully aware of the claim being advanced, however categorized, and proceeded to

adjudicate on it.

19. Accordingly, I am not prepared to grant leave on this ground

An attack on the findings in relation to credibility
20. There is no doubt whatever that issues of credibility are absolutely central to the outcome of the appeal. Equally there is absolutely no doubt that the Tribunal member took a very strong view that the claim advanced by the applicant was incredible as can be illustrated from the following extracts.

> "(i) I have considerable hesitation in believing the whole story of the applicant for reasons outlined below:
>
> (ii) I am satisfied from the facts before me, that the lack of credibility in this case fundamentally infects the subjective element of a well-founded fear of persecution.
>
> (iii) The applicant was simply not believed for reasons outlined below.
>
> (iv) I do not find the applicant's evidence in relation to this incident [the incident of the 4th November, 2004] credible or plausible. I have arrived at this conclusion based on the answers provided by the applicant at the hearing before me. I find it without credibility that an individual could escape from several armed Police Officers in the manner so described. Equally, the suggestion that he had a charm or a talisman to protect him from being hit by bullets is to say the least difficult to accept and incredulous (sic)."

21. The reference to a charm or talisman is explained by the fact that when the applicant was asked to describe how a trained gendarmerie could miss him at close range in such a confined space he replied "this is the work of God. I have a charm/ talisman that protected me". I will return to this aspect later.

Assessment credibility
22. The authorities are clear that the assessment of credibility is a matter for the Tribunal of fact and that it is only in rare circumstances where the High Court on an application for judicial review will intervene. In C*amara v. The Minister for Justice, Equality and Law Reform* (26th July, 2000), Kelly J. referred to the principle of curial deference. In that case Kelly J. refused to quash the decision of the Tribunal notwithstanding the fact that the applicant's body was scarred in a way that seemed to be consistent with the evidence given in relation to having been subjected to torture. In *Krechun v. The Minister for Justice, Equality and Law Reform*, Peart J. commented as follows:-

> "Credibility is very properly a matter entirely within the remit of those persons who have the opportunity of seeing and hearing a witness give his/her evidence. For that reason the court must be slow to intervene in such matters provided fair procedures have been observed in a manner in which credibility has been decided."

23. A very similar approach was taken by Gilligan J. *Roman v. The Refugee Appeals Tribunal* (10th July, 2003), in which case he referred to "presumptive judicial reluctance to interfere with the findings of the Tribunal with regard to the witness's oral evidence." He also stated that "an appellate Tribunal or the Court of Review is in no position to comment on the demeanour of a witness; this is the rational for the general reluctance of the court to upset findings based on oral evidence. In *Memishi v. The Refugee Appeals Tribunal* (25th June, 2003), Peart J. stated as follows:-

> "What is clear is therefore that the applicant is obliged to establish that he has, from a subjective point of view, a fear of persecution, and that this fear must be objectively justifiable and that in assessing whether the fear is a well founded one, both from a subjective and an objective point of view, the Tribunal is entitled to take into account the applicant's credibility and to consider that in the light of a knowledge of the conditions in his country of origin."

24. In *Imafu v. The Minister for Justice, Equality and Law Reform* (9th December, 2005), Peart J. deals with the issue of whether the Tribunal must have regard to country of origin information in assessing credibility commented as follows:-

> "It does not mean that there cannot be an exceptional case of the type 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 in seeing whether the applicant's story fits into a factual context in her country of origin."

25. Interestingly, and significantly in the context of the fact that this is a leave application, Peart J. referred to the fact in that case leave had been granted by Clarke J. and Peart J. observed that relief was properly granted.

26. While adhering to the principle that credibility is a matter for the decision maker this court must ensure that the stage is not reached where simply by referring to the issue of credibility a decision can be rendered review proof. In this case the Tribunal member has not simply said that he found the applicant's account incredible but went on to say why he had reached that view and demonstrated the process by which he reached that conclusion.

27. So, while the Tribunal member states at one stage that he did not find any aspect of the applicant's evidence to be either plausible or credible the matters leading to that conclusion are set out in some detail.

28. I have already referred to the Tribunal member's view in relation to the alleged incident at the applicant's house. This, perhaps, provides a valuable example of why an appeal or review court will be slow to become involved in issues of credibility. During the course of argument I invited Mr. Hugo Hynes S.C., counsel for the applicant to comment on the view of the Tribunal member that the reference to a charm or talisman to protect the applicant from being hit by bullets was to say the least difficult to accept and incredible. Mr. Hynes speculated that it was possible the remark was the equivalent of an Irish person who in a similar situation might well say "only the grace of God allowed me to escape". However, the Tribunal member who heard the question posed and saw and heard the response is in an infinitely better position than an appeal court or review court to judge the significance of the remark.

29. The Tribunal member goes on to state that he does not accept that the applicant has provided a full and true explanation of how he travelled and arrived in the State. The member goes on to say that he had reached that conclusion based on the answers provided by the applicant at the hearing. He noted that the applicant did not provide any proof of travel in the form of used airline tickets, handling passes or other documents and observed that he finds it totally implausible that an individual from the Ivory Coast would travel into the EU without a passport. He says he finds that the suggestion that the applicant did not know what passport he travelled on incredulous (sic) and difficult to accept.

30. It is my view that the approach of the Tribunal member to this issue is not such that it could ever be classified as irrational.

31. The Tribunal member goes on to consider the fact that the applicant did not seek asylum in France, given that he is a French speaker and finds the reasons that he gave for not doing so incredible. The applicant had suggested that he did not know what asylum was, which caused the Tribunal member to observe that this defied common sense and begged the question what he was doing in Ireland in the first place. Again, I cannot see that the Tribunal member's approach to this aspect could be categorised as irrational or flying in the face of reason and commonsense.

32. The applicant has made a number of specific criticisms of the approach of the Tribunal and it is necessary to consider these.

33. The applicant complains that the Tribunal member did not have regard to country of origin information and a contrast is drawn between the failure of the Tribunal member to analyse country of origin information and the approach at first instance where it was accepted that country of origin information was consistent with the account being given by the applicant.

34. The first point is that the decision states specifically and directly that all country of origin information was considered in the light of the judgment of O'Leary J. delivered on the 28th February, 2005, in the *Baindue* case.

35. I have considered, myself the body of country of origin information that was before the Tribunal member to see if it contained matters of such obvious significance and relevance that they required specific comment. Four documents were submitted the first of these is an article titled "Coté d'Ivoire" - History and Politics". This document is of only very limited relevance given that it concludes in 2000, and so casts little if any light on events in November, 2004. The second document is "fact monster" analysis of ethnicity and race by countries. The relevance of this is that at the s. 13 interview the applicant had been asked about the ethnic composition of the country and the interviewer had concluded that his response was inaccurate, a conclusion with which the applicant disagreed. However, no reliance was placed on this aspect by the Tribunal member and I do not regard this document as being of any real significance.

36. The next document emanated from the United State Institute of Peace and deals with what is known as the Linas – Marcoussis Agreement, an agreement named after the location of a round table conference of Ivorian political factions brought together in January 2003, by the French President. The conference saw the groups represented agreeing to establish a Government of National Reconciliation.

37. The fourth and final document is a short press release from the US State Department dated the 4th November, 2004, condemning aerial attacks in and about the city of Bouake carried out by Government aircraft.

38. This documents does have some significance in that it confirms that November 4th, 2004 was a significant day in the modern history of the Ivory Coast in that it was the occasion of a Government onslaught against Bouake the second city of the country.

39. However, while of some significance the relevance is limited in that it deals with what is happening in Bouake rather than in Abidjan. There is nothing in the country of origin material to suggest that the security forces throughout the rest of the country intensified their response to Government opponents at the time of events in Bouake.

40. The applicant has criticised the fact that the decision refers to a number of High Court judgments. He says that his legal team were given no notice of the intention to rely on these decisions.

41. I see no substance in this criticism. There is nothing unusual in a RAT decision referring to relevant High Court decisions. I am prepared to accept that there may be situations where decisions of some obscurity are relied on, or where decisions are being relied on for propositions that are not obvious where it might be appropriate to indicate to the parties an intention to have regard to the decision. I regard it as significant that counsel for the applicant has not sought to suggest that the decisions to which reference was made were not relevant or were not authority for the propositions relied upon.

42. The applicant has also criticised the fact that the Tribunal member did not refer to the fact that additional documentation was actually submitted by him subsequent to the recommendation of the Commissioner in the form of his original university ID card, original certificate of his mother's nationality and original certificate confirming eligibility for voting.

43. This has to be seen in the context of comments made by the Commissioner in the first instance in relation to some of the documentation submitted to him. He had commented in relation to a driving licence that the quality of lamination was very poor and that it showed evidence of having been tampered with. In the case of a political party membership card and a death certificate for the applicant's brother the Commissioner had commented that the typeface for these two documents was the same and it was a matter of surprise. So far as the membership card for M.I.A.D.O. is concerned the decision at first instance drew attention to the fact that the photo on this appeared to be the same photo as the one that appeared on his party membership card. Dealing with a national ID card the observation was made that it again showed signs of being tampered with.

44. It does seem to me that the issues raised in relation to documents at first instance were not so much directed to the question of the identity of the applicant but rather the implications of altering documents for his general credibility.

45. The applicant has criticised the fact that a Tribunal member might appear to suggest that in order to find in favour of the applicant that he had to believe the entirety of the applicant's story. If this were correct it would seem to me to be a fundamentally erroneous approach going to jurisdiction. The argument is based on the following two sentences from the decision "the applicant must satisfy me that he has a well founded fear of persecution for one of the reasons set out under s. 2 of the 1996 Act. I have considerable hesitation in believing the whole story of the applicant for reasons outlined below". If those two sentences are read in isolation then they are certainly ambiguous and would seem to be equally open to the interpretation that the Tribunal member was saying that he rejected the story he was told in its entirety or alternatively he may have been indicating that he required to be satisfied on every aspect of the story. However, with these sentences are seen in the context of the decision as a whole, there is absolutely no doubt whatever that the Tribunal member was indicating that he rejected the story in its entirety.

46. The criticisms of the Tribunal while ostensibly arguable lack substance in the face of very specific and firm conclusions relating to credibility. In the words of Carroll J. they may bee seen as "trivial or tenuous".

47. Accordingly I do not propose to grant leave on any of the grounds advanced.