Neutral Citation [2015] IEHC 471

THE HIGH COURT
JUDICIAL REVIEW

[2010 No. 737 J.R.]

BETWEEN

H.J. [ZIMBABWE]

APPLICANT

AND
MINSITER FOR JUSTICE, EQUALITY AND LAW REFORM
REFUGEE APPEALS TRIBUNAL
ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 15th day of July, 2015

1. This is a telescoped application for judicial review wherein the applicant seeks an order of *certiorari* quashing the decision of the second named respondent made on the 24th May, 2010, affirming the recommendation of the Refugee Applications Commissioner to refuse to grant the applicant a declaration of refugee status, and remitting the matter for de novo consideration by a different tribunal member.

BACKGROUND
2. The applicant is a Zimbabwean national, who was born on 4th November, 1975. The applicant is a married man and has one daughter. His wife and daughter reside in South Africa. The applicant holds a diploma in aircraft avionics and formerly worked with the air force of Zimbabwe, at Tambo airport, South Africa and Park Aviation Dublin /SR Techniques. The applicant stated that he served in the air force of Zimbabwe from November, 1997 to May, 2008 and that he attained the position of flight sergeant.

3. The alleged persecution claimed by the applicant resulted from his disagreement with the Zanu PF farm seizure policy. All members of the air force were required to have a farm as a statement of support for government policy. The applicant refused to own what he referred to as 'blood farms'. The applicant states that he was arrested at a protest on 9th May, 2008, was mistakenly released by police and fled to South Africa. He remained in South Africa until 21st January, 2009, when he came to Ireland on a temporary contract of work. He returned to South Africa on 26th May, 2009. On 12th November, 2009, the applicant attempted to return to Zimbabwe but was arrested at the border. He states that he escaped when the guards went to the toilet and he returned to South Africa.

4. The applicant arrived in Ireland and applied for asylum on 26th November, 2009, and completed the ASY1 form on that date. The s.8 questionnaire was completed on 7th December, 2009. The applicant attended a s.11 interview on 3rd February, 2010, and a report pursuant to s.13(1) of the Refugee Act 1996 (as amended) was issued on 23rd February, 2010. The commissioner concluded that the applicant had not established a well-founded fear of persecution as required by s.2 of the Refugee Act 1996 (as amended) and recommended that the applicant should not be declared a refugee. Further, the commissioner recommended that s.13(6)(a) of the Refugee Act 1996 (as amended) was appropriate, which had the effect that any proposed appeal to the Refugee Appeals Tribunal would be a papers-only appeal.

5. A form 2, notice of appeal, was completed on behalf of the applicant on 23rd March, 2010, and submitted to the Refugee Appeals Tribunal. The notice of appeal was completed by the Refugee Legal Service on behalf of the applicant. It was an extensive document comprising of ten pages and also attached country of origin information in respect of Zimbabwe. The Refugee Appeals Tribunal issued a determination in the matter on 24th May, 2010, affirming the recommendation of the Refugee Applications Commissioner.

IMPUGNED DECISION
6. The decision, exhibited from p.146 to p.162 of the booklet, sets out the background to applicant's claim and recites the applicable law. The tribunal member, under the heading 'analysis of the applicant's claim', examines the reasons for the refusal of the declaration of refugee status, which can be summarised as follows:

> i. The applicant stated that when he returned to South Africa in November, 2009, he thought the human rights situation in the country had improved The tribunal member then looked at the country of origin information submitted and stated, "considering the situation in Zimbabwe in September / November, 2009, it is difficult to understand why the Applicant would have believed that 'everything had died down completely' in Zimbabwe in early November, 2009 and to understand why he, as a wanted man, would have believed that he could safely return to Zimbabwe". The tribunal member found that the applicant's return to Zimbabwe on 12th November, 2009, seriously undermined the well-foundedness of his stated fear and the credibility of his account.
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> ii. The applicant's account of his release by mistake lacked credibility.
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> iii. The ease of the applicant's escape from an armed officer after apparently being specifically brought by Roland to the authorities in Zimbabwe was not credible.
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> iv. The tribunal member set out details of the applicant's life in South Africa between May, 2009 and November, 2009 and found that it was reasonable to suggest that if people were looking for him in South Africa they would have sought him out between May and November, particularly as he was working as an airport technician in an airport there.
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> v. Considering the fact that the applicant had a limited political profile and prominence in Zimbabwe, it was not plausible that the Zimbabwean state would invest resources into specifically locating the applicant in South Africa and the applicant's testimony in that regard was not plausible.
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> vi. The tribunal member found that credibility issues arose with the applicant's claim, as set out in the decision, and he could not be given the benefit of the doubt.

APPLICANT'S SUBMISSIONS
7. On 3rd June, 2010, a notice of motion together with the statement of grounds and a grounding affidavit issued on behalf of the applicant seeking, *inter alia*, an order of *certiorari* quashing the decision of the Refugee Appeals Tribunal. The grounds upon which the

applicant sought to challenge the decision of the Refugee Appeals Tribunal as set out of para.(e) in the statement of grounds and are generally pleaded. Written submissions on behalf of the applicant were prepared on an unknown date in January, 2015. The applicant essentially complained that the matters raised in the applicant's notice of appeal were not properly addressed by the tribunal member and the impugned decision is largely based on the 'gut feeling' of the tribunal without any objective analysis taking place of the applicant's claim. The applicant asserts that the denial of an oral hearing to the applicant was inappropriate and relied on the *S.U.N. (South Africa) v. Refugee Applications Commissioner & ors.* [2012] IEHC 338 in this regard. The applicant contended that the assessment of credibility of the applicant's claim should have been undertaken first of all. If the applicant's account of events could have happened or could happen by reference to country of origin information then it would be appropriate to assess the merits of the applicant's story by reference to that background information and other considerations. The failure to approach the matter in this way, it was alleged, renders the decision of the tribunal member invalid. The applicant relied on s.5(1) of European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518 of 2006) which provides as follows:

> "The following matters shall be taken into account by a protection decision-maker for the purposes of making a protection decision:
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> a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied;
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> b) the relevant statements and documentation presented by the protection applicant including information on whether he or she has been or may be subject to persecution or serious harm".

8. The applicant contended that the minimum standards in accordance with the above regulations and domestic law were not adhered to in the decision-making process by the Refugee Appeals Tribunal. The applicant alleged that the country of origin information was not properly consulted; and further that the country of origin information was utilised in an attempt to discredit the applicant's claim. The applicant's core claim as to what might happen to him if he were to be returned to Zimbabwe was not addressed by the tribunal member. The applicant asserted that his claim was not investigated individually and further was not assessed objectively. The applicant relied on the decision of Kelly J. in *Camara v. Minister for Justice, Equality and Law Reform & ors.* (Unreported, Kelly J., High Court, 26th June, 2000) which considered the UNHCR Handbook and procedures and criteria for determining refugee status and further, the applicant quoted from Goodwin-Gill, *The Refugee in International* Law 2nd Ed., (Oxford, 1996).

RESPONDENTS' SUBMISSIONS

9. The respondent filed written submissions that set out the background to this matter as well as the information furnished by the applicant at the s.8 interview; in the ASY1 form; in his questionnaire; and at the s.11 interview. The respondent pointed out that there are seven grounds in the applicant's statement of grounds, three of which relate to the issue of effective remedy and are now moot. The balance of the applicant's claim concerned:

> i. The denial of an oral appeal, which the respondents pointed out was not included in the statement of grounds;
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> ii. The alleged failure of the tribunal member to apply a forward-looking test;
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> iii. The lack of an objective or individual assessment of the applicant's case;
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> iv. The lack of proper regard to the matters contained in the notice of appeal and accompanying documentation, and the applicant criticised the assessment of credibility carried out by the tribunal member although this was not pleaded in the statement of grounds.

10. In relation to the denial of an oral hearing at appeal stage, while pointing out that this issue is out of time, the respondents, without prejudice, submitted that the decision to apply s.13(6) of the Refugee Act 1996 (as amended) was a decision taken by the Refugee Applications Commissioner and any challenge to that decision ought to have been levied against the commissioner. The respondent relied on the judgment of Noonan J. in *N.E. & anor. v. Refugee Appeals Tribunal & ors.* [2015] IEHC 8 in that regard. At para.14 of that judgment Noonan J. stated as follows:

> "Dealing first with the applicant's complaint that he was not afforded an oral hearing of his appeal, it was the decision of ORAC that determined that issue, not the RAT decision challenged here. The applicant did not seek to impugn the ORAC decision in this respect and on the contrary, in making submissions to the RAT, made no reference to it. If a complaint were to be made, as in the *S.U.N.* case, the appropriate respondent to that complaint is ORAC, and the complaint ought to have been made before any appeal to the RAT was taken. Accordingly, it seems to me to be beyond argument that this issue cannot be raised in these proceedings."

11. I accept and endorse those views and I reject that ground of complaint.

12. With regard to the alleged failure on behalf of the tribunal member to apply a forward-looking test the respondent relied on the decision of Peart J. in *J.B.R. v. Refugee Appeals Tribunal & anor.* [2007] IEHC 288 and the decision of Dunne J. in *A.G.E.R.B. v. Refugee Appeals Tribunal & ors*. [2009] IEHC 527.

13. Peart J. in *J.B.R.* at p. 9 stated as follows:

> "Once the Tribunal Member was so satisfied [that this applicant's story was unreliable, implausible and unbelievable in material respects] it was not in my view necessary to go further and consider in any more depth than was done whether the applicant's fear of persecution could be well-founded. The finding of lack of personal credibility meant that the applicant's story as to what had happened to him and members of his family was so unreliable as not to have been sufficient to discharge the onus of proof upon him to show that he is a refugee as required by s. 11A(3) of the Refugee Act, 1996.
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> In the present case the applicant was simply not believed as a result of a number of matters which I am satisfied the Tribunal Member was entitled to have regard to in assessing his credibility. An applicant must be credible in order to have his story believed. If that personal story is not believed, and there is shown to be a rational basis for that disbelief, then it serves no useful purpose to consider whether in the light of country of origin information, the story fits that information - in other words could it have happened. There is no purpose in concluding that the story fits available country of origin information if the story told by the applicant is simply not credible or that the applicant is not reliable, consistent and believable, unless of course the country of origin information which is available helps to show that the applicant is

> credible. In the present case that information does not assist in demonstrating that substantial grounds have been shown by the applicant."

14. In the decision of Dunne J. in the *A.G.E.R.B. v. Refugee Appeals Tribunal & ors.* [2009] IEHC 527 she stated at p. 9:

> "In any event, this is a case in which the applicant was found to lack credibility. Accordingly, there is no evidence of past persecution of the applicant and in those circumstances the Tribunal was not obliged to apply a forward looking test based on the applicant's account."

15. In my view when a tribunal member has rationally and reasonably satisfied him or herself that an applicant's story is not credible and that an applicant does not have a well-founded fear of persecution then the tribunal member is not obliged to carry out a hypothetical forward-looking test.

16. The respondents submitted that, in relation to the applicant's claim that the no objective or individual analysis of the applicant's case was carried out by the tribunal member; this is simply not borne out. The respondents stated and submitted that it is patently clear from the decision that tribunal member was particularly cognisant of the applicant's circumstances and the particulars of the claim. I would have to agree with the respondents' submission in this regard. The tribunal member sets out the background of the applicant's case and had before it the ASY1 form, the s.8 questionnaire and the s.11 interview notes.

17. In relation to the alleged failure on behalf of the tribunal member to take account of the notice of appeal and the accompanying documentation, the respondents submitted that there was no evidential basis for this argument. In relation to the criticism of the tribunal member's assessment of the applicant's credibility, notwithstanding that it was not pleaded in the statement of grounds, the respondents submitted that the applicant was simply found not to be credible and that the assessment of the applicant's credibility concurs with the principles set out by Cooke J. in *I.R.* case (*I.R. v. Minister for Justice, Equality and Law Reform & anor.* [2009] IEHC 353) and also of MacEochaidh J. in *R.O. & anor. v. Minister for Justice and Equality & anor.* [2012] IEHC 573.

FINDINGS

18. It seems to me that it is well established that a decision-maker does not have to set out every item of fact in recording his or her decision. Decisions of tribunal members must be read in the round. It is a matter for the individual tribunal member as to what weight to attach to any particular item of evidence before him or her. This is a judicial review application of a decision of the Refugee Appeals Tribunal member. The courts are reluctant to interfere with such decisions unless it can be demonstrated that there was an absence of fair procedures and there was some error or flaw in the manner in which the tribunal member conducted the investigation.

19. It seems to me that no such flaw or error has been demonstrated by the applicant in this case. The applicant is trying to deconstruct a rational decision of a tribunal member, which was arrived at after a full consideration of all the documentation before the tribunal member. I do not accept that the tribunal member did not comply with the minimum standards required both internationally and domestically in the manner in which the decision was arrived at.

20. For the reasons set out above I refuse leave.