Neutral Citation Number: [2011] IEHC 363

THE HIGH COURT

2010 48 JR

BETWEEN/

O. B.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 20th September, 2011

1. In these judicial review proceedings the applicant seeks to challenge the validity of a decision of the Refugee Appeals Tribunal dated 9th December, 2009, as rejected the applicant's asylum request. The principal ground of challenge is that the Tribunal erred in rejecting the applicant's claims on credibility grounds.

2. The applicant was born in Moldova in 1973 and she later qualified as a midwife. She commenced employment in Chisinau, the capital of Moldova. She says that she spoke and studied in Russian, but that the Moldovan language, history and culture had all been neglected. She then decided to become involved in political activity and got involved in the People's Front Union/Christian Democratic Party. Questions of language, history, school instruction and relations between Moldova, Romania and the Russian Federation both before and after the break-up of the erstwhile Soviet Union were (and, to some extent, at least, still are) highly controversial at the time.

3. She says that in 2001 she became active on behalf of the party with students in schools and colleges. Matters came to a head in November, 2001 when she says that a large demonstration was organised in Chisinau in order to promote the teaching of Moldovan and the re-unification of Moldova with Romania and that she spoke at the demonstration. Ms. B. contends that she was arrested after the demonstration and then brought to the main police station. She says that she was severely raped during the course of her detention and that she felt humiliated and disgusted as a result. She nonetheless says that she managed to speak at a further public demonstration a few days later.

4. After that meeting she met her ex-husband and after they returned to her apartment she says that she was accosted by masked men who assaulted them both and went through their personal documentation. She says that she was hospitalised as a result. She maintained that it was pointless to go to the police to complain, but that when she went instead to the General Prosecutor on 14th December, 2001, with her medical file, she was curtly dismissed and her documentation destroyed. She further contends that shortly after she drove away from the Prosecutor's office her car was hit on a city centre roundabout exit by a minibus belonging to the Moldovan Government. The left-hand side of the car door and a headlamp were damaged. The traffic policeman on duty refused to help her, but she says that she recognised that the car (or minibus) was a Government car because she there was "a government number on the car."

5. The Tribunal found against the applicant on credibility grounds. The applicant now wishes to impugn these findings on the general grounds that the inferences drawn by the Tribunal member are vitiated by material errors of fact and, furthermore, were not reasonably drawn. We can now proceed to examine the analysis of the applicant's claim which the Tribunal conducted.

The demonstration on November 29th, 2001

6. In many ways, the events which are said to have taken place at and following the demonstration in Chisinau on 29th November, 2001, are central to the applicant's claim. After all, the applicant's maintains that in its aftermath she was arrested and subsequently raped by the authorities. I pause here to observe that it is clear from the country of origin information that the human rights record of the Moldovan Government during this period can only be described as deplorable. Regrettably, accounts of arbitrary arrest, the suppression of free speech, the intimidation and arrest of journalists, the absence of an effective prosecutorial and judicial system to deal with complaints against the police and the widespread ill-treatment (and worse) of detainees were all too frequently documented in respect of this period.

7. So far as the credibility of the applicant's claim with regard to the events of 29th November, 2011, is concerned, the Tribunal member concluded:-

> "The applicant was referred to her evidence that there was a demonstration on the 29th of November of about 10,000 people. The Presenting Officer said that it was not credible that there would be no mention of this demonstration in the media. Her reply to that was that the communist press control the media. I find it to be neither plausible nor credible that such a demonstration could have taken place in view of the large number of people the applicant contended had attended such a demonstration."

8. The standard principles to be applied in cases of this kind have, of course, been helpfully set out by Cooke J. in his judgment in R. v. Refugee Appeal Tribunal [2009] IEHC 353. So far as the present case is concerned, it is principles (4) to (8) which are the most relevant:

> "…..(4) The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed. It must not be based on a perceived, correct instinct or gut feeling as to whether the truth is or is not being told.

(5) A finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation and the reasons drawn from such facts must be cogent and bear a legitimate connection to the adverse finding.

(6) The reasons 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.

(7) A mistake as to one or even more facts will not necessarily vitiate a conclusion as to lack of credibility provided the conclusion is tenably sustained by other correct facts. Nevertheless, an adverse finding based on a single fact will not necessarily justify a denial of credibility generally to the claim.

(8) When subjected to judicial review, a decision on credibility must be read as a whole and the Court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in disregard of the cumulative impression made upon the decision-maker especially where the conclusion takes particular account of the demeanour and reaction of an applicant when testifying in person….."

9. Applying these principles, one cannot find fault with the Tribunal member's assessment and I consider that he was entitled to reach this view. If there were to have been a large demonstration of this kind, it seems inherently unlikely that there would not have been some contemporary evidence of this fact appearing in some media outlet of some kind. The fact that none has come to our attention leads ineluctably to the rational inference that such did not take place. Inasmuch as he arrived at this conclusion, it cannot be said that the Tribunal Member engaged in speculation or conjecture. Nor is this some minor matter of detail, since it is implicit in the applicant's general account that, shortly after having spoken at this major public gathering, she was then arrested by the authorities.

The rape claim

10. As we have already seen, it is central to the applicant's claim that she was raped by policemen or by agents of the police on 30th November, 2001 (which was the day after the demonstration) while she was in detention. A medico-legal report was prepared by two physicians in December, 2007 who specialise in treating the survivors of torture from the Centre for the Care for Survivors of Torture ("Ms. B.'s Spirasi report"). That report stated that:-

> "On physical examination, Ms. [B] appears to be generally healthy. However, emotionally she is very unstable and she has marked symptoms of post-traumatic stress, seemingly as a result of her reported experiences in Moldova. Unfortunately, she does not appear to be able to talk to anyone about the rapes that she claims she experienced while being detained. She says that she did try to speak to a psychiatrist about this but that he did not explore it in depth. It is the opinion of the Examining Physician that Ms. [B]'s emotional state is highly consistent with her having experienced the reported rapes and that, as this still remains unresolved after six years, she will need significant psychotherapeutic support at this stage to help her resolve the resulting issues."

11. A consultant psychiatrist, Dr. John O'Mahoney, had also prepared a report in December, 2005 in which he expressed the following views:-

> "It is my impression that this woman is suffering from a major depressive disorder and I have no doubt that her current refugee status, and the attending difficulties therein, are delaying an adequate response to the treatment of this disorder as it remains an ongoing stressor. Notwithstanding her current travails, it is imperative at the moment to try alternative treatment measures as the current ones are certainly not offering her a positive outcome. She is depressed and certainly deportation at this stage would dramatically worsen her condition."

12. It will be seen, however, that Dr. O'Mahoney does not ascribe the depressive condition to any particular incident or life event.

13. It is, of course, otherwise so far as the Spirasi report is concerned. The terminology used in medico-legal reports of this kind dealing with persons who contend that they have been victims of torture is something of a term of art having regard in particular to the internationally accepted guidelines contained at paragraph 187 of the Istanbul Protocol (1999). For my part, however, I would interpret Ms. B.'s Spirasi report as saying that her symptoms are simply highly consistent with her account, i.e., in line with paragraph 187(c) of the Protocol:

> "the lesion could have been caused by the trauma described, and there are few other possible causes."

14. It is, of course, correct to say that it is not the function of such reports to determine whether the underlying account of rape and sexual assault was true or not. This very point was noted by Cooke J. in Pamba v. Refugee Appeals Tribunal, High Court, 19th May, 2009, a case with some similar features to the present one. In that case the applicant had maintained that she had been raped by the Ugandan security forces and for this purpose had relied on a Spirasi report which had concluded that her account "would be consistent with the traumatic experiences that she alleges she sustained in Uganda."

15. Cooke J. stressed that the author of the report was not concerned:-

> "with assessing whether that account was true or not. That was not his function. He was only concerned with making a diagnosis and then assessing whether her mental and physical condition, as presented, were consistent with that history. He does not say and could not have said that because of the symptoms she exhibited, what she said did happen or must have happened. Indeed, he is correctly and deliberately careful in his use of the critical phrase, 'would be consistent with the traumatic experiences that she alleges she sustained in Uganda.'"

16. Turning to the present case, the Tribunal Member concluded:-

> "…it is clear that the medical report and medical records do not address the relative likelihood or the causes in examining it by way of the Istanbul Protocol. Nothing in the report indicates that cause can be attributed to the incidents complained of by the applicant. Having considered the medical report and the medical records, nothing in the medical report or medical records alters my view set out above."

17. The key point to emerge from the Spirasi report is that the applicant was probably the victim of sexual violence and rape, since her emotional symptoms are "highly consistent" with this experience. But this does not in itself establish that she was raped or abused by Moldovan police or agents of that State which, of course, is the essence of the allegation here.

18. There is, in any event, something of an ambiguity in the way in which the Instanbul Protocol is often applied in practice. Indeed,

this ambiguity is, perhaps, latent in the actual language of the Protocol itself. Take, for example, a case where the claimant maintains that he was physically assaulted while in police custody and where, following his release from custody, he presents some days later to a physician. The physician may well be able to prepare a Spirasi report which effectively confirms that the claimant was physically assaulted (so that the report refers to bruises, lacerations, broken teeth etc.), but this in itself may not be able to show that the assault was caused while the applicant was in custody in the manner alleged.

19. This is, I think, what the Tribunal member had in mind when he said that the Spirasi report did not address "the relative likelihood or the causes in examining it by way of the Istanbul Protocol." As Gilligan J. pointed out in Khazadi v. Minister for Justice, Equality and Law Reform, High Court, 19th April, 2007, it was nonetheless necessary for the Tribunal to have:-

> "considered [and] weighed [the medical evidence] in the balance and a rational explanation given as to why the Tribunal member was making a finding that the applicant was not credible."

20. In the present case, I consider that the Tribunal member satisfied this test. Having weighed the evidence he concluded the Spirasi report did not fundamentally assist the applicant since it did not tend to show that the perpetrators of the rape were police agents. This must also be understood against a background where the Tribunal member had earlier rejected a key and integral factual aspect of her account, namely, that she was apprehended by such agents after speaking at the public demonstration the day before and that the rape took place while in such custody.

The traffic accident

21. The Tribunal member also found against the applicant on credibility grounds with regard to the car accident claim:-

> "Nothing in the applicant's evidence would lead one to conclude that it was anything other than a car accident. Having heard the evidence and observed the demeanour of the applicant while giving this evidence I reach the conclusion that the applicant's evidence that they, meaning the authorities, wish to scare her by having a car crash stretched credibility beyond what is reasonable and I found this evidence to be neither plausible nor credible and I find it undermined her credibility."

22. Here again I find it impossible to fault the assessment conducted by the Tribunal member. While it is perhaps not impossible that a government with such a poor human rights record as Moldova would resort to such odious tactics, the Tribunal member was perfectly entitled to conclude that the account was implausible and unlikely. Even making every allowance in favour of the applicant, it seems unlikely, for example, that a traffic policeman could have known that the offending vehicle had been directed by the authorities to hit her car within minutes of Ms. B. having left the General Prosecutor's office and that it was for this reason that he was unhelpful and hostile.

Failure to Consider Letter

23. The applicant also contends that the tribunal member's assessment is flawed in that he failed to have regard to what purports to be a letter from the Popular Christian Democratic Party concerning the applicant. The original letter was ostensibly written in September 2005. It is written in Moldovan and it gives the address, telephone numbers, fax number and email of the party. As translated it reads as follows:-

> "Confirmation
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> That Bolbocan Olga Ion has distinguished herself as an active participant against the violation of human rights and liquidation of the democratic system, against the illegal actions of the dictatorial communist regime and the attempts of totalitarianism restoration, participant at the demonstrations, meetings and conferences organised by the [Popular Christian Democratic Party] in the period of 2001 – 2002, in particular on the 29th November and 2nd December, when the participant addressed the masses of the country to fight for human rights in a peaceful manner and called the young people to resist the existence of the destroying regime."

24. It is true that this letter was not considered by the Tribunal member. Here, however, principles number 9 and 10 of Cooke J.'s judgment in R. also come into play at this juncture:-

> "(9) Where an adverse finding involves discounting or rejecting documentary evidence or information relied upon in support of a claim and which is prima facie relevant to a fact or event pertinent to a material aspect of the credibility issue, the reasons for that rejection should be stated.
>
> (10) Nevertheless, there is no general obligation in all cases to refer in a decision on credibility to every item of evidence and to every argument advanced, provided the reasons stated enable the applicant as addressee, and the Court in exercise of its judicial review function, to understand the substantive basis for the conclusion on credibility and the process of analysis or evaluation by which it has been reached."

25. One can, I think, readily understand why in present circumstances the Tribunal member evidently found this letter to be of little assistance. If the letter is genuinely authentic, then one would have expected that there would have been some independent corroboration of the facts stated therein at some stage of the proceedings, such as independent media reports attesting to the existence of such demonstrations on 29th November 2001 and 2nd December 2001. The absence of such corroboration speaks volumes, both as regards the authenticity of the letter and the applicant's own credibility.

The applicant's knowledge of Moldovan geography

26. Testing the knowledge of an asylum claimant by reference to basic geography and history of the relevant country of origin is a standard technique whereby administrators and decision-makers seek to determine the basic credibility of a claimant. This technique has its limitations, however, and administrators, decision-makers and, indeed, judges should be sceptical of an approach which effectively amounted to a form of a specialist examination in the geography or history of the region in question. Indeed, I drew attention to this in my own judgment in Om v. Governor of Cloverhill Prison, High Court, 1st August, 2011. In that case, among the questions posed to persons claiming to be Liberian nationals was one which required them to name "at least" seven past Liberian Presidents. It would be unrealistic – and, indeed, inappropriate - to draw any inferences from an applicant's failure to answer a question of that kind at that level of detail.

27. At the same time, it is not unfair to expect claimants from other jurisdictions to have a basic knowledge of the geography, history or contemporary politics of the region from whence they claim to come. If one applied such a test to our own jurisdiction, one might, for example, begin to doubt the credentials of any person claiming to be from Ireland who could not, for example, name some of the

provinces or identify some of the major counties. Yet, on the other hand, even the most passionate Wexford supporter would, I suggest, be prepared to indulge such a person if they could not, for example, pick out the River Slayney or identify towns such as Bunclody or Gorey if a map of Ireland were to be presented to them. (It might well be different, of course, if the person concerned claimed to hail from Wexford.)

28. In the present case the applicant was asked where her parent's house was located vis-à-vis Chisinau, the approximate distance from Chisinau and to identify other towns in the region. Provided that such questioning does not descend into something approaching a form of specialist cross-examination on the details of local geography, it may well be fair to draw appropriate inferences from a failure to give a satisfactory answer to such questions.

29. On this point the Tribunal member concluded:-

> "If the applicant contended that she was from that area I am of the view that she would have a knowledge of the area and would, in my view, be able to indicate whether the location was north, south, east or west. I am of the view that she would be familiar with towns in the region, which she did not appear to be. Having heard her evidence and observed her demeanour whilst she gave this evidence I reach the conclusion that the applicant was not sufficiently familiar with the area to lead on to the conclusion that she was from that area as she had contended. I find that this undermines her credibility."

30. Here again I cannot fault the inferences drawn by the Tribunal member in these circumstances. Indeed, it is only fair to record that this point was not pressed before me at the hearing.

The Tribunal's observations regarding the applicant
31. Towards the end of his decision the Tribunal member observed that, by reference to her own evidence, the applicant was fleeing criminal prosecution in Moldova. This observation is, perhaps, a somewhat puzzling one. It appears to be an oblique reference to the fact that the applicant may have violated Moldovan laws governing public demonstrations. Judged by the applicant's own account, however, all that she did was to speak at two public demonstrations to order to call for a variety of political and other reforms.

32. Absent something in the nature of an incitement to actual violence, such conduct could not possibly amount to a criminal offence. Even if it did so under the laws of Moldova, given the commitment to free speech and free assembly contained in Article 40.6.1 of the Constitution, we could not possibly recognise or give effect to legislation of that kind which would not remotely assort with our own constitutional standards. If one likewise measured such legislation by reference to Article 10 ECHR one would arrive at exactly the same conclusion.

33. The Tribunal member accordingly erred insofar as he made these observations. If those comments were integral to the decision, I think it inevitable that the decision under review would have to be quashed. Since, however, I consider that these comments were more in the way of passing remarks which were not critical to the decision-making process, one must conclude that they cannot in themselves affect the conclusions which the Tribunal member independently - and validly - arrived at and which rejected the applicant's account on credibility grounds.

Conclusions
34. In these circumstances, I am driven to the conclusion that the applicant has not established the existence of substantial grounds such as would justify me granting the applicant leave to apply for the purposes of s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000.