Neutral Citation Number: [2010] IEHC 344

THE HIGH COURT

JUDICIAL REVIEW

2007 1645 JR

A.

Applicant

AND

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

Respondents

Judgment of Mr. Justice McCarthy delivered on the 4th day of October, 2010

1. This is an application for leave to apply for judicial review of the decision of the Refugee Appeals Tribunal (RAT), dated 10 September 2007 to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner (ORAC) that the applicant should not be granted a declaration of refugee status. The hearing took place on 28 July 2009. Ms. Agnes McKenzie B.L. appeared for the applicant and Mr. Daniel Donnelly B.L. appeared for the respondent.

2. The applicant claims to be a Somali national seeking refugee status on the basis of a stated fear of persecution by reasons of his race. He arrived in the State in November 2005. He made a previous asylum application in the UK which was rejected in 2005 and again on appeal in 2006. ORAC issued a negative recommendation in July 2006 and made s.13(6) findings due to this prior UK application. Accordingly, his appeal to the RAT was confined to a non-oral appeal.

Factual Background

3. The applicant claims that he was born on 11 September 1989 and lived in Somalia. He says that his father was a farmer and member of the Jareer/Bantu clan. When civil war started in Somalia, life became very dangerous for the Bantu as they did not belong to any dominant clan. He alleges that in 1992, the Hawaadle militia came to his house and shot his father and brother. His present version of events is that in 2001, his home was attacked again and he was held for ransom in a camp for 47 days. During this time, a ransom note was sent to his mother demanding that she surrender her land. In captivity, the applicant claims to have been tortured and made to watch the beheading and shooting of other prisoners whose families did not pay ransoms. He escaped with the assistance of a friend and was driven to Addis Ababa in Ethiopia first, before settling in Sudan for three years.

4. Following the outbreak of war in Sudan, the applicant made his way to Tripoli, Libya and was arrested there in 2004, but subsequently released. In 2005, he boarded a small boat with approximately 26 other Somalis heading in the direction of Europe. The boat ran out of fuel and drifted for about 10 days before being rescued by a Danish vessel which landed at a U.K. port in June of that year. He applied for asylum in the U.K.

5. The account the applicant gave in the U.K. contained a number of inconsistencies with the account he offered in this jurisdiction. In the U.K., these inconsistencies included the fact that he gave his date of birth as being the 11 April 1986, not 11 September 1989. He claimed that he was advised by other Somalis to say that he was older or he would be separated from them and that if the U.K. authorities knew he was a minor he would be sent to a camp or fostered to a family.

6. The applicant explains that further inconsistencies in his U.K. asylum application arose because he gave the U.K. authorities an altered version of events on the advice of fellow Somali refugees. He claims that he was confused and traumatised by the ordeal and was interviewed by the U.K. authorities before disembarking from the rescue ship. He suffered headaches due to injuries received from blows to the head by a rifle-end when in captivity in Somalia. He persisted in this account through to appeal stage as he was afraid he would not be believed if he told the truth.

The ORAC Recommendation

7. On 25 July 2006, ORAC recommended that the applicant should not be declared a refugee following two interviews with the applicant. ORAC referred to the discrepancies in the accounts he presented in the U.K. and Ireland, noting that as the applicant had been accepted as a minor, it was not unreasonable to believe he might be persuaded by his fellow countrymen to follow a certain line in his claim in the U.K. However, the Commissioner took the view that the fact that he had legal representation made it difficult to believe that he would maintain an incorrect version throughout the appeal process. The Commissioner further noted that it was illogical that a band of armed men would hold a boy from an impoverished background to ransom as his mother eked out a living washing clothes and working for neighbours for food. The authorised officer stated "[h]ad one of the dominant clans wanted his family's home, then, presumably, all they had to do was take it." The application for refugee status was therefore rejected and s.13 (6)(d) finding was made, namely that the applicant had a lodged a prior application for asylum in another state party to the Geneva Convention.

The R.A.T. Decision

8. On 10 September 2007, the RAT upheld the recommendation of the Commissioner. In addressing the applicant's nationality, the Tribunal Member noted the difficulties in establishing that the applicant is in a fact a Somali national and that "the Tribunal has had to rely on general information questions to attempt to establish the Applicant's nationality."

9. The rejection of the application was based on credibility concerns. The Tribunal Member stated that "[w]hile abduction of males is a common factor of life in Somalia the question has to be asked why a young boy from an impoverished background would be held by militia and a ransom demanded from a widow who made her living washing clothes and working for their neighbours." In response to the claim of the applicant that the militia wanted his mother to give over the family home, the Tribunal Member noted that "it is the

normal pattern that dominant clans simply appropriate and take over any house they are interested in, in Somalia." The Tribunal further noted some of the discrepancies that existed in the accounts the applicant gave in his applications in the U.K. and Ireland stating that the two accounts were "completely contradictory" as it was entitled to do within jurisdiction. These discrepancies were not explained by the applicant's assertion that he was advised what to say by fellow Somalis in the U.K. and that he was exhausted when giving his initial U.K. interview. The Tribunal noted that he had had legal representation and he had maintained his story through to the appeal process.

Submissions on behalf of the applicant

10. Counsel for the applicant made a number of submissions, the first of which concerned the Tribunal Member's statement that she had to rely on general questions to attempt to establish the applicant's identity. It was submitted that this statement represented an error due to the fact that there was no oral hearing, thus, the Tribunal Member had no opportunity to put general questions or, indeed, any questions to the applicant. The Commissioner had raised no credibility issues in this regard; therefore it was not open to the respondent to raise any doubt as to the applicant's nationality.

11. The applicant then contended that two major credibility issues arose in the applicant's case, and that in discussing these, the RAT decision and ORAC recommendation are so similar as to suggest that new explanations in the notice of appeal were not considered. These two issues concerned the applicant's account of being abducted and the fact he made a prior application in the U.K. with an inconsistent version of events.

12. As to the abduction issue in addressing the applicant's account both the respondent and the Commissioner referred to the impoverished background of the applicant. The respondent's statement that "it is the normal pattern that dominant clans simply appropriate and take over any house they're interested in" was an unsupported assertion without objective basis and should not have formed the basis for a negative finding of credibility. In this regard, the applicant relied on the judgment of Clarke J. in *I. v. Minster for Justice, Equality and Law Reform* [2005] IEHC 182 where he stated (i) that the court is entitled and obliged to analyse a finding of lack of credibility to ascertain whether determination on its face sets forth a rational and substantive basis for a finding of lack of credibility and (ii) whether on the evidence before the court it appears that there were materials properly before the Tribunal which would have allowed it to come to the conclusions which grounded such rational basis. The applicant contended that the unsupported assertion formed the basis for rejecting the applicant's credibility and thus it was incumbent on the Tribunal Member to substantiate that proposition.

13. The second negative credibility finding related to the inconsistencies between the differences in the accounts the applicant gave in Ireland and the U.K. In the notice of appeal, the Tribunal Member was invited to consider a number of issues, including an explanation for different dates of birth provided in the two jurisdictions and the circumstances in which he gave his account in the U.K. Counsel for the applicant contended that the explanations the applicant gave in the notice of appeal were not addressed and, in fact, the Tribunal Member went no further than the Commissioner in her analysis.

14. Finally, it was asserted that the RAT decision was deficient in the following respects (and I here attempt to summarise), namely:-

- Six redacted decisions were submitted but not referred to in the RAT decision relating to minor applicants from Somalia (*L v. Refugee Appeals Tribunal & Anor* [2009] IEHC 26);
- COI information was not considered nor was the possible future risk to the applicant as a national of Somalia (*M. v. Michelle O'Gorman sitting as the Refugee Appeals Tribunal et ors.* (Unreported, 11th November, 2005);
- Principles that pertain to an application brought by a minor child were not referred to;
- Guidelines and submitted child specific documents were also not referred to;
- The applicant was entitled to a liberal application of the benefit of the doubt;
- The respondent failed to have regard to a submitted medical report which identified multiple small scars on the applicant's body which the applicant claimed were the result of injuries sustained in captivity.

Submissions on behalf of the Respondent

15. The respondent initially referred to Section 11(a)(1)(b) of the Refugee Act 1996 which provides that where an applicant has already applied for asylum in another country which is a party to the Geneva Convention the applicant is presumed not to be a refugee until he shows reasonable grounds for the contention. Furthermore, section 16(16)(a) of the same Act is the effect that the onus is on an applicant who has failed before the commissioner at the appeal stage to establish that he is a refugee.

16. The respondent then turned to address the issues raised in the applicant's submissions. In response to the applicant's submission regarding doubt over his nationality, the respondent argued that the tribunal was merely referencing the fact that there are particular difficulties in considering claims by alleged Somali nationals. This was not a determinative part of the decision and the Tribunal did not make a finding as to the applicant's nationality.

17. In response to the applicant's claim that the Tribunal Member engaged in speculation in questioning the motive advanced for the applicant's abduction, the respondent submitted that this was not speculation. On the applicant's own account, individuals were able to seize his farm, and yet were not willing to use those methods to seize his house. The Tribunal Member was entitled to conclude that it appeared to be incongruous that persons who were able to act and to commit murder with impunity, would not forcibly dispossess a widow and instead would take a far more elaborate and complicated method of obtaining the applicant's house by abducting the applicant.

18. The respondent then addressed the inconsistencies in the accounts given in the U.K. and Ireland noting that the two accounts were radically different. In his UK account, his age, family circumstances, account of the alleged raid by major clan members in 2001, the identity of the clan concerned and route of coming to the U.K. differed fundamentally. In his Irish application, he stated his home was attacked, he was beaten and held captive for 47 days, tortured, and saw other prisoners being executed. Thus, the account he gave in Ireland was far more personalised and indicated a more extreme persecution. The Tribunal was aware of explanations for inconsistencies that the applicant put forward, *inter alia*, that he was merely saying what fellow Somalis in the UK had advised him to

say and that he was exhausted when initially interviewed on a ship. However, these explanations were rejected. The applicant had maintained the version given in the U.K. right up to the appeal stage there and with the benefit of legal representation. Although the tribunal did not individually address other explanations such as the fact the applicant claimed he was confused due to injury sustained when in captivity in Somalia, the respondent contends that sufficient reasons existed, and that it is not necessary to refer to every item of evidence or every argument that is made: in support of this, the respondent relied on the judgment of Cooke J. in *P. v. MJELR* (Unreported, 19th May, 2009).

19. The respondent addressed the applicant's six final points as summarised by me at para. 14 above, submitting that neither previous tribunal decisions nor country of origin information could affect the Tribunal's assessment of credibility and the medical report was of no probative value as it did not offer an opinion as to how the applicant's scars were received and did not use the language of the Istanbul Protocol. The respondent also referred to the applicant's young age, submitting that no radically different approach to credibility exists depending on whether one is over 18 or not. Whether or not the Tribunal Member had appropriate regard to the applicant's young age would not affect the outcome.

The Court's Assessment

20. As this is an application for leave, s. 5 of the Illegal Immigrants (Trafficking) Act 2000 applies to the instant case. The applicant therefore, must establish 'substantial grounds' for contending that the decision of the Tribunal Member should be quashed. This is well-established to mean that the grounds must be reasonable, arguable and weighty and not trivial or tenuous (*Re Article 26 of the Constitution and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360).

21. The court has considered fully all of the papers submitted in the course of the present application and has had regard to all of the submissions made by counsel on behalf of the parties.

22. At this early stage, I think that it is necessary to stress the principles expressed in the well-known decision of *T. v. Refugee Appeals Tribunal* (Unreported, 27 July, 2007) and to which I referred in *Z.T. v. MJELR* [2009] IEHC 509. In *Tabb*i, Peart J. stated:

> It is not desirable that a decision be parsed and analysed word for word in order to discern some possible invalidity in the choice of words and phrases…the whole of the decision must be read and considered in order to reach a view as to whether or not, when the decision is read in its entirety and considered as a whole, there is a reasonable basis for the decision maker reaching the conclusion.

This was emphasised in *I. v. Refugee Appeals Tribunal* (Unreported, 9th December, 2005) where Peart J. again noted:

> The court must have regard to the decision in the round, to the real capacity of the alleged error to have affected the correctness of the process by which the decision was reached, and also to the discretionary nature of judicial review. In respect of the latter, it seems to follow that even where the court may be satisfied that there was some error in the process it can refuse relief where it is also satisfied that such errors as did occur did not go to the heart of the decision, such as would render the decision unlawful.

23. One must also remember the principle stated by Hardiman J. in *G.K. v. Minister for Justice Equality and Law Reform* [2002] 2 I.R. 418 where he stated that:

> A person claiming that a decision making authority has, contrary to its expressed statement ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case.

Having regard to the direct attack on the Tribunal's conclusions of fact, one must also emphasise that this is not an appeal and that I am concerned only with whether or not they are irrational, out of all reason, or incapable of being reached.

(a) Nationality of the applicant

24. It is quite apparent that the Tribunal Member expressed some doubt as to the nationality of the applicant. This was expressed, in particular, when the tribunal referred to the fact that it had to rely on general information questions in attempting to establish the applicant's nationality. No actual final determination was made as to the applicant's nationality and the case did not hinge on that issue.

(b) Credibility: abduction and prior U.K. asylum application

25. The applicant referred to the two major credibility issues arising in this case, the first concerned the account of the applicant's alleged abduction. It is submitted that the Tribunal Member made an unsupported assertion that militia would simply appropriate any property they wanted and would not engage in an elaborate method of obtaining the property by abducting the applicant. It seems to me however, that having considered the applicant's account the Tribunal Member was merely expressing a legitimate commonsensical view as part of his analysis. This relates directly to whether the Tribunal Member accepts what the applicant has asserted and is solely within the domain of considering the applicant's credibility. This is an issue for the decision-maker to consider and, as is well established, the Court cannot substitute its own view for that of the decision-maker.

26. The applicant has submitted that the respondent acted in breach of fair procedures in not accepting as reasonable and/or rational the applicant's explanation for the inconsistencies between the account he gave to the U.K. authorities and the account given in interviews with the Commissioner. However, the extent of the discrepancies in the two accounts is quite extraordinary. This is not a case where there is a slight difference in the two applications that could easily be explained. The applicant provided a date of birth differing by a number of years, a different number of siblings, and an opposing account of the alleged raid in 2001 as well as his route of coming to the U.K. The Tribunal Member had regard to two explanations provided in the notice of appeal, namely that the applicant was merely repeating what other Somali applicants had told him to say and that he was exhausted when giving his U.K. interview. Again, their acceptance or rejection of explanations is an example of what a Decision Maker must do and there was no irrationality in his conclusions. Any omission to refer to each and every explanation individually (which is not required as a matter of law) does not overcome the fact the sufficient reasons existed to reject the applicant's account.

27. It is clear that in circumstances where an appeal to the R.A.T. is confined to a non-oral appeal, certain similarities will be evident between the R.A.T. decision and the recommendation from ORAC. The fact that a non-oral appeal occurred was by way of operation of statute. Section 13(6)d of the Refugee Act specifically requires a non-oral appeal where an applicant has lodged a prior application for asylum in another state party to the Geneva Convention, as the applicant had done in the instant case when he applied for

asylum in the U.K. Presumably, the legislature would have been aware that restricting the appeal in this way meant that a Tribunal Member would be heavily reliant on information provided by the authorised officer in ORAC. However, in circumstances where the Tribunal Member provided cogent reasons as to why she considered the applicant not credible, and in view of the fact she had referenced certain explanations provided in the notice of appeal, it is clear that the decision reached was an independent one based on a rational analysis of the information before her. There is no reason in principle why credibility cannot be considered on an oral appeal.

(c) Previous decisions, COI, future risk, minor applicants, benefit of doubt, medical report

28. Counsel for the applicant submitted, that the six additional flaws aforesaid, also served to undermine its validity. These included the failure on the part of the respondent to consider previous decisions, country of origin information, or the future risk to the applicant, the failure to have due regard to the principles pertaining to an application by a minor child, submitted child specific documents and a submitted medical report.

29. In relation to the failure to refer to the six redacted precisions decisions of the Tribunal, there is authority to the effect that there should be evidence that such decisions were not merely considered but elaborated or distinguished upon with a degree of detail before being rejected on a reasoned basis (*L. v. the Minister for Justice* (Unreported, High Court, Clark J., 21st January, 2009). However *L.* was distinguished in *I. v. Refugee Appeals Tribunal & Ors* [2009] IEHC 94 on grounds that there was no evidence in it that any assessment was made of the previous decisions: the same learned judge said that:

> "The previous RAT decisions were not of sufficient significance to warrant the overturning of the Commissioner's recommendation. The Court is also satisfied that there was no obligation on the Tribunal Member to engage in a detailed assessment of each decision or to explain why his conclusions differed from those reached in each of the previous decisions furnished."

Here the Tribunal member says that she considered "all relevant documentation" and this must be taken to include the previous decisions referred to by Ms. McKenzie in her submissions on appeal of the 8th May, 2007.

30. Similarly, in relation to the want of express reference to COI, such omission is not evidence, in and of itself, that they were not considered. In this regard, the judgment of Dunne J. in *S. v. Refugee Appeals Tribunal* [2007] IEHC 276 is particularly relevant as she stated:

> There may be cases in which it could be inferred from the omission of a reference to a significant fact or document in the course of a Tribunal decision that the same had not been properly considered or evaluated. However, there must be some evidence to support such a contention. In the present case, the respondent has expressly stated the various matters that he took into consideration. There is no evidence direct or otherwise to contradict the assertion of the respondent in the course of his decision. In essence, it seems to me that the crux of this case is that the applicant, not surprisingly, does not like the manner in which the Tribunal has considered and evaluated all the evidence before him. Nonetheless there is nothing before me of any kind to show that the consideration and evaluation of the evidence and submissions before the Tribunal member was in any way flawed. As has been pointed out over and over, it is not for the court to weigh and consider and evaluate the evidence before the Tribunal member but rather to consider whether the process by which the Tribunal member dealt with the application before him was flawed procedurally.

31. It is apparent that in circumstances where the applicant failed on credibility concerns were highlighted, neither previous decisions nor country of origin information could on the facts of the present case have an impact on the final determination (*I. v. MJELR* [2005] IEHC 416). I have read the summary of these decisions and they are more in the nature of material from which the state of Somalia can be deduced (the equivalent, so to speak, of country of origin information). The state of the country and the nature of oppression therein was accepted expressly or by implication by the Commissioner and the Tribunal. In light of the judgments therefore, in *N. v. Refugee Appeals Tribunal* [2009] IEHC 434, and *S. v. Refugee Appeals Tribunal* [2007] IEHC 276, in the instant case it is clear that the need to reference the previous decisions and submitted COI is not required in a case where the Tribunal Member has cited serious credibility concerns. They were simply of no assistance on credibility.

32. Turning to the issue of the applicant's age, it is quite clear that it was accepted that the applicant was a minor when he made his application in Ireland. In *N. v. R.A.T* [2005] IEHC 441, O'Leary J. referred to the correct treatment of minors noting that:

> A child of five cannot be expected to reach the same standard of proof (where that proof is based on testimony of the applicant), as and compared with a person approaching his/her eighteenth birthday. The process must surely start at almost no expectation of assistance from evidence of the applicant at 4/5 years to almost the full responsibility at 17 years of age. A person of the applicant's age and capacity to describe her experiences should be expected to bear the normal burden envisaged by section 11 (A) (3) of the Refugee Act, 1996.

33. In the instant case, the Tribunal's decision was dated one day before the applicant's 18th birthday. Thus, although it was accepted that the applicant was a minor, he was of sufficient age to describe his experiences. Accordingly, as a matter of reality, his age does not impact on the final determination of the Tribunal in assessing the applicant's credibility. Even allowing for a liberal application of the benefit of the doubt to be applied in the instant case, could not overcome the significant obstacles that were present in terms of the applicant's credibility.

34. The applicant has advanced an argument that the respondent failed to consider the future risk to the applicant as a national of Somalia. Regulation 5(2) of the European Communities (Eligibility for Protection) Regulations 2006, S.I. No. 518, is clearly not applicable in the instant case as the respondent rejected the occurrence of the alleged past persecution suffered by the applicant as not credible. Thus, the alleged events of the past could not be "a serious indication" of future persecution. It is clear that the Tribunal did not feel the applicant had a credible future fear of persecution.

35. Finally, the submitted medical report was of no real probative value and express reference to its contents. In those circumstances no elaboration is required since it could not have had any impact on the decision. (See *P. v MJELR* (Unreported, 19 May, 2009).

Conclusion

36. In light of the foregoing, I am *not* satisfied that substantial grounds have been shown and accordingly, I am refusing leave.