Neutral Citation [2013] IEHC 282

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 215 J.R.]

BETWEEN

S. N.

APPLICANT

AND

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

JUDGMENT of Mr. Justice Mac Eochaidh delivered on 6th day of June, 2013

Background

1. The applicant is a Kenyan man, born in 1971, who sought asylum in Dublin Airport on 22nd August, 2005. The determination of his claim by the Office of the Refugee Applications Commissioner is dated in late 2005. That decision (and the accompanying 'section 13 report') records that the applicant joined the Mungiki tribe in July 2002 and left in October 2004 as it had been outlawed by the Kenyan Government. The basis of his claim for refugee status, according to the report, is that he fears retribution from the tribe. Country of origin information describes the tribe as a criminal gang with a record of brutality. The applicant was introduced to the tribe by his cousin and her boyfriend and he says that they were murdered in April 2004. The s. 13 report raised questions as to the credibility of the applicant because of his lack of knowledge of the circumstances of the murder of his cousin, *inter alia*. A negative assessment was made of the applicant's claim and a notice of appeal was received by the RAT on 26th January, 2006. Some twelve typed pages of grounds were submitted by the applicant's lawyers. No specific complaint was made in the

Appeal in respect of the credibility finding relating to the circumstances of his cousin's murder.

2. The RAT conducted an oral hearing on 29th April, 2008, and delivered its decision on 24th October, 2008.

3. By letter of 10th February, 2009, the Ministerial Decisions Unit in the Irish Naturalisation and Immigration Service wrote to the applicant's solicitors to give them a copy of a decision letter also dated the 10th February, 2009, informing the applicant that the Minister had decided to refuse to grant refugee status. The letter says:-

> "We regret to inform you that the Minister for Justice, Equality and Law Reform has decided to refuse to give you refugee status. The reasons for this decision are set out in the recommendation made by the Refugee Appeals Tribunal, which you have already been given."

4. Proceedings challenging only the decision of the Minister and not the decision of the RAT issued on 25th February, 2009.

5. At the hearing of this action, counsel for the applicant restricted the grounds of challenge to a complaint concerning the rendition by the Tribunal Member of the Mungiki tribe as the 'Kumgiki' tribe throughout his decision; a complaint that the Minister failed to have regard to the applicant's evidence about the murder of his cousin; and a complaint that the Minister failed to assess country of origin information as to whether the applicant would be safe in Mombasa.

6. I expressed concern that the proceedings did not embrace a challenge to the decision of the RAT and eventually counsel for the applicant sought leave to amend the proceedings to include such a claim. The relevance of this point is that the applicant might be out of time if he is required to challenge the decision of the RAT and not just the decision of the Minister accepting the RAT's recommendation. In passing I note that a challenge to the Minister's decision unaccompanied by a challenge to the RAT, if successful, would not necessarily disturb a negative RAT recommendation, even if the basis for success was a flaw in the RAT decision adopted by the Minister. I cannot see why the Minister could not, having been defeated, revisit his decision and accept the negative recommendation of the RAT but for reasons shorn of the flaw identified in the successful proceedings. In other words I see little merit and great peril in pursuing the Minister only and not the RAT in asylum judicial review. Further, in a case such as this where the Minister's decision involves the adoption of the entirety of the RAT recommendation (and the reasoning therein), a challenge to the Minister's decision is almost certainly a collateral attack on the decision of the RAT but is one not instituted within the 14 day period required by law..

The Decision of the Tribunal Member

7. The Tribunal Member opened his assessment of the applicant's claim with a summary of his conclusions, in the following terms:-

> "The applicant's story was non-specific and in my view having heard it, it did not seem to be the evidence of a person who had been involved in the incidents the applicant had claimed he had been involved in. It lacked the type of detail that one would expect and as a consequence I found it neither plausible nor credible."

This statement indicates the Tribunal Member's findings are based, at least in part, on the demeanour of the applicant.

8. The applicant's evidence as to how he arrived in Ireland is rejected and the view of the Garda National Immigration Bureau ("GNIB") that his identity card is a fake seemed to have been persuasive and the applicant's credibility 1s thereby undermined, according to the Tribunal Member.

9. It is noted in the decision that the applicant faded to resolve an inconsistency as to whether he had seen certain attackers when they approached his home. The Tribunal Member says in relation to this:-

> "Having heard this evidence and observed his demeanour, I reached the conclusion that he had not clarified the inconsistency in his evidence as a consequence I find that it undermines the applicant's credibility."

10. It was also found that the applicant's evidence of going to the police was:

> "less than convincing and neither plausible nor credible and it was vague, non specific and I reached the conclusion that the evidence was intended to be non specific so that there was no possibility of analysing any detail. Having heard the evidence and observed his demeanour I reached the conclusion that his evidence was neither plausible nor credible and find it undermines the applicant's credibility."

11. The decision accepts the suggestion in country of origin information that the state authorities are overcoming the criminality of the Mungiki. The Tribunal Member finds that the applicant had not sought state protection which was reasonably available to him.

12. It was also concluded that the country of origin information suggested that it would be possible for the applicant to relocate to Mombasa in Kenya. The Tribunal Member deals with the issue as follows:-

> "In addition, I am not satisfied that the Applicant made any efforts to consider relocating to avoid persecution which he claimed to suffer. Country of origin information from the United Kingdom Home Office indicates that there is ample protection available for the Applicant to relocate to Mombasa.
>
> With reference to the issue of relocating, I am requiring for us to consider whether the asylum seekers faces a well founded fear of persecution for a Convention reason in at least some part of his country of origin. In this particular case because the applicant has not shown a failure of State protection I have concluded that the well founded fear of persecution aspect of the definition was not complied with. However, even if I had found that there was a well founded fear of persecution for a Convention reason, I am not satisfied that the Applicant could not have access to meaningful internal protection elsewhere in Kenya. The Applicant could have moved away from the area in which the difficulties were and from the place, the source of the Applicant's alleged difficulties.
>
> The proposed site of internal relocation, i.e. Mombasa does not present a distinct risk of even generalised serious harm, and the Applicant did not identify any risk attached to relocating to Mombasa, other than to say that he believed he would be at risk.
>
> I believe that Mombasa, for example, would not only provide the Applicant with the protection against the risk of persecution he claims...."

Error of Fact

13. On at least thirteen (and possibly more) occasions the Tribunal Member uses the word "Kumgiki" instead of the word "Mungiki" to describe the vicious tribe/gang being the source of the applicant's problems. This is advanced as an error on the face of the record and/or an error of fact sufficient to vitiate the decision.

14. The applicant relies on a number of authorities in support of the proposition that an error of this nature is sufficient to quash an administrative decision. In *E. v. Secretary of State for Home Department* [2004] Q.B. 1044, the Court of Appeal in England and Wales addressed the theme of errors of fact in public law challenges because new evidence was claimed to show that the basis of the inferior immigration tribunal's decision was mistaken. The Court of Appeal referred to decisions in the House of Lords by Lord Slynn in *R. v. Criminal Injuries Compensation Board Ex P. A.* [1999] 2 A.C. 330, where he said, as to mistakes of fact:-

> "...decisions based upon wrong facts are a cause of injustice which the courts should be able to remedy."

and to his decision in *R. (Alconbury Developments Limited) v. Secretary of State for the Environment, Transport and the Region* [2003] 2 A.C. 295, 321 at para. 53 where Lord Slynn referred to the jurisdiction to quash for "misunderstanding or ignorance of *an established* and relevant fact" [emphasis added], as part of his reason for holding that the judicial review jurisdiction met requirements of the European Convention on Human Rights. Having reviewed the English authorities and the textbooks on the issue, the Court of Appeal concluded as follows:-

> "In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in cooperating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise, the ordinary requirements for a funding of unfairness are apparent from the above analysis of the *Criminal Injuries Compensation Board* case. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

15. By 2010, when the Irish High Court was entertaining a judicial review alleging error of fact, the concept did not trouble it in the manner which caused pause for the Court of Appeal in England and Wales a decade earlier. In *V.C.B.L. v. Refugee Appeals Tribunal* [2010] IEHC 362, Cooke J. ruled that a mistaken reference to the Democratic Republic of Congo instead of the Republic of Congo (Brazzaville) did not:-

> "constitute a mistake of fact which is so material to the substantive analysis and consideration in the Contested Decision as to vitiate its validity." (seep. 3)

The learned judge said:-

> "10. More importantly, however, it is clear from the body of the decision that the Tribunal Member made no mistake as regards the details and substance of the case before him. The expose of the factual background of the claim including the recital of the history and events, the description of the locations, ethnic groups and persons referred to by the applicant, are all correctly described. The events are recounted as having occurred in Brazzaville or other locations within the Republic of Congo and not as having taken place in Kinshasa or at locations identifiable as within the DRC. The political party is the UPADS and the elections are those whieh took place in the Republic of Congo in 2002.

> 11. The Court is therefore satisfied that, no1twithstanding the misnaming of the country of origin, there has been no material error of fact which could be argued to raise an implication that there had been an actual misunderstanding or misconception on the part of the Tribunal member which vitiated his assessment of the claim and evidence before him in the appeal."

16. In *Richardson v. Mahon* [2013] IEHC 118, Dunne J. addressed views on this issue and referred to the decision of Kearns J. in *Ryanair v. Flynn* [2000] 3 I.R 240. In *Ryanair*, the court examined whether courts may review decisions where "a mistake of fact" is alleged, particularly when those facts fall within the province of expert bodies. The court emphasised that there were no agreed facts of a straightforward nature involved. The clear suggestion in the case is that where a decision maker decides what the facts are, there having been a real dispute as to those facts, judicial review will not provide a solution, save on of irrationality. Where, contrastingly, a decision maker relies on a mistaken fact which was not in contention and which materially affects the outcome of a decision, judicial review will lie. In my view, it is important to distinguish between the two types of case and one can readily understand judicial reticence to intervene in the first category and yet the importance of intervention in the second .

17. The issue of an 'error of fact' was also examined by Finlay-Geoghegan J. in the granting of certiorari in the decision of *Traore v. Refugee Appeals Tribunal* [2004] 5 JIC 1405 where the Tribunal had misstated facts about the applicant's journey, and the learned judge said "The question of how the applicant travelled between France and Germany was not a factual issue in dispute upon which the Tribunal Member was adjudicating..... The error of fact made is as to what was the story told or evidence given." [emphais added]

18. Having regard to the approach in these three cases some simple propositions are evident: firstly, an error of fact where the facts are not in dispute is susceptible to judicial review; secondly, error of fact in a judgment arising from disputed facts will rarely attract judicial review remedies, save if the error is one that no reasonable decision maker could have made; thirdly, an error of fact whether within or in excess of jurisdiction will not attract a remedy where the error had no material effect on the outcome.

19. I have difficulty in characterising the mistake in this case as a mistake of fact. It is much closer to a typographical error than to an error of fact, much less an error as to a material fact. The parties agree that the Tribunal Member erred in the name of the tribe. The error is susceptible to judicial review as the name of tribe was never in dispute. The issue for the court on such a straightforward matter is whether that simple error had a material effect on the outcome. I am willing to assume that the error is an error of fact, but whatever its nature, the error had no effect on the decision.

20. For those reasons, I dismiss the applicant's complaint that the error as to the name of the tribe vitiated the decision.

Failure to consider all of the Applicant's Evidence
The applicant complains that the Tribunal Member failed to have due regard or any regard to the evidence he submitted that his cousin had been killed. The applicant claims that this part of his evidence was critical as it explained his own fears. No criticism was made in the applicant's notice of appeal of the same failure at first instance which is the likley explanation why the evidence did not feature in the decision in suit. Not every piece of evidence adduced by a asylum seeker needs to be addressed. I note the terms in which Cooke J. addressed the need to refer to the evidence submitted by an applicant. At paragraph 30 of *I.R. v. The Refugee Appeals Tribunal*, he noted:

> "It is correct, as counsel for the respondent submitted and as is confirmed by the case law summarised at the beginning of this judgment, that a decision maker is not obliged to mention every argument or deal with every piece of evidence in an appeal decision, at least so long as the basis upon which the lack of credibility has been found can be ascertained from the reasons given."]

21. No one reading the deicison in suit could be left in any doubt but that the applicat's credibility was rejected and I am not persuaded that any mischief attached to the failure of the Tribunal Member to refer to the alleged murder of the applciants relatives.

22. In crticising the tribunals finding on state protection, the applicant referred to the decision of Clarke J. in *V.M. [Kenya] v. The Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2013] IEHC 24. In that case, fear was expressed of exposure to Mungiki activities. The Tribunal Member accepted that asylum seeker's account of events but approached the case on the availability of State protection. The applicant refers, in particular, to the following passage in the decision:

> "23. It now falls to the Court to review the Tribunal Member's conclusion that the Kenyan State is both willing and able to protect this particular applicant from the Mungiki if he were returned to Kenya. The general tenor of the COI which was before the Tribunal Member was that the Kenyan government is doing its best but cannot control the Mungiki who are associated with the largest tribal grouping in Kenya which is a country frequently riven by violent inter-tribal land disputes. The cult finds support with young, disaffected unemployed slum dwellers. Their activities in the Mungiki are often entirely criminal and involve ritual killings, car-jackings, tribal warfare, extortion and general lawlessness. Relevant to this claim is that Mungiki defectors, former members and those who want to leave the cult are targeted and killed in unspeakable circumstances and while witness protection programmes exist and courts are willing to try and convict those accused of Mungiki motivated crimes, the police cannot protect those who have defected or seek to quit the organisation. The difficulty is not that the Tribunal Member disregarded these key documents or that the misunderstood or misrepresented their conclusions but rather that the focus of her analysis was the availability of protection for the general category of 'people who are afraid of the Mungiki sect' and not on the adequacy of protection for the specific category of persons associated with the Mungiki who have defected. What is clear is that while the cult is proscribed by the State and efforts are taken to control their activities, the police are simply unable to protect that category of persons, who are particularly at risk from the Mungiki."

The court quashed the decision because of an irrational finding on the central issue of State protection.

23. I am not persuaded that there is a valid comparison to be made between the treatment of State protection by the Tribunal Member in this case and that which occurred in the *V.M.* decision. In *V.M.*, the Tribunal Member accepted the applicant's credibility and reviewed what appears to have been extensive country of origin information submitted by the applicant for the consideration of the Tribunal. In this case, the applicant's credibility is fundamentally rejected and no country of origin information was submitted. Nonetheless, the Tribunal made its own investigations as to conditions in Kenya, the level of State protection and the possibility of relocation. These matters were fairly put to the applicant at the hearing.

24. I therefore reject the matter pursued in these proceedings expressed as follows in the statement grounding the application:

> "The second named respondent refers to country of origin information indicating that there is protection for the applicant in Mombasa but fails and omits to specify that information; further, he fails and omits to establish that such relocation is reasonable in the applcant's personal circumstances."

I reject the comapliants made about the Minster's deicison which accepted the findings and recommendation of the Tribunal and these being telescoped proceedings I refuse leave to seek judicial review.

I refuse the applicant's application to amend the pleadings to seek relief against the Refugee Appeals Tribunal. Allowing such amendment would serve no purpose as I have decided that the decision of the Tribunal, viewed through the lens of the Minister's acceptance of it, is lawful. Such amendment would, in any event, require an extension of time as the relief was sought for the first time at the hearing of he action well outside the 14-day period permitted by s. 5 of the Illegal Immigrants (Trafficking) Act 2000