

THE HIGH COURT

[2009 No. 872 J.R.]

BETWEEN

D. E., L. E. AND S. E. (A MINOR SUING BY HER FATHER AND NEXT FRIEND, D. E.)

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 25th day of June, 2013

1. In these telescoped judicial review proceedings a complaint is made as to the manner in which the applicant's credibility was assessed. At the outset it is useful to recall the well known passages in *I.R. v. Minister for Justice* [2009] IEHC 353, where Cooke J. summarises the principles governing a review of credibility findings. I refer in particular to the following -

"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.

...

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."

2. It is trite to state that where reasons are required, a mere recitation of reasons will be adequate. Reasons must meet certain minimum standards and these were described in *R.O. v. Minister for Justice & Ors* [2012] IEHC 573 following a review of the relevant case law:

"A survey of this case law reveals principles which may be used to assess the adequacy of reasons for credibility findings in asylum cases:

(i) Reasons must be intelligible in the sense that the reasons should enable the reader to understand why the applicant for protection is disbelieved on a certain point and/or generally ...

(ii) Reasons must be specific, cogent and substantial ...

(iii) Reasons must be drawn from correct facts and must bear a legitimate connection to the adverse credibility findings ...

(iv) Reasons must relate to the substantive basis of the claim and not to minor matters ... "

Background

3. The applicant and his wife left the Ukraine on 26th November, 2006, and arrived in Ireland on 1st December, 2006. The third named applicant was born on 13th December, 2006. These asylum claims rest on the alleged persecution of the first and second named applicant because of the first named applicant's pursuit of corruption allegations against senior military figures. Mr. E. was a platoon commander in the Ukrainian army who served two tours of duty with the International Peacekeeping Force in Kosovo. During his second tour of duty he was asked to collect money from the men in his unit to give to certain officers. He refused this demand but the money was deducted from the soldier's pay. This was the matter that he pursued and which he says brought about his persecution.

4. The first named applicant says that he made numerous complaints about these events when he returned to the Ukraine from Kosovo. He made complaint to the military prosecutor of his garrison. He was advised, he says, by the commander to drop these complaints. He renewed his complaint to the military prosecutor. In a drunken incident, he says that the battalion commander threatened him.

5. The applicant states that he wrote a letter of complaint to a colonel in the Military Prosecutors Office. Some days later he says he was assaulted by a group of unknown people. Consequently, he spent four days in a military hospital and thereafter he was dismissed from the military. He received a letter from the Military Prosecutors Office saying that the complaint had been referred to the prosecutor's office of the Lvov Garrison.

6. On 24th October, 2006, the applicant went to the prosecutor's office in Lvov to pursue the matter and he was informed by a commanding officer that the army were not interested in these events. When he arrived home he discovered that his pregnant wife was missing and it subsequently emerged that she had been abducted, assaulted and kept overnight. His wife made a complaint to the police in respect of this matter. The applicant approached a journalist who took a full record of these events and believed that it was a good story but the story was never published. The journalist later distanced himself from the applicant.

7. The applicant then pursued the matter with the Mayor's office in Lvov who at first appeared sympathetic. At 2.00am on the 25th November, officials from the Anti Corruption Unit (OBOZ) called to the applicant's home and demanded that he make a statement withdrawing the allegations. These men assaulted him and terrified his wife, who was in another room. Civilian police arrived (apparently called by neighbours who heard a commotion) and the OBOZ officials departed. The next day, according to a friend of the applicant, military authorities posted the applicant's photograph on a military wanted list in relation to embezzlement and the illegal sale of arms in Kosovo. It was at this stage that the applicant decided that he had to leave the Ukraine immediately.

8. Documentary evidence was submitted to the Tribunal in support of the claim: photographs showing the applicant in military uniform apparently deployed in Kosovo; military identification documents; medical reports describing injuries sustained by the applicant and his wife in October 2006; employment records of the second named applicant; and translations were supplied of a summons to appear in court.

Decision of the RAT

9. The first named applicant's credibility is rejected for three reasons.

(i) The absence of documentary evidence of the complaints made by the applicant to prosecutors, the police, a journalist and the mayor's office.

(ii) The summons was found to refer to an administrative violation (not criminal) and the fact that it had been sent to his father's home.

(iii) The applicant wore his military uniform at the RAT hearing although he said his apartment had been sealed after his departure leading to a doubt about how the applicant's father was able to access the apartment/uniform.

10. The first complaint made in these proceedings about the decision is that it fails to determine the applicant's core claim. It is a notable feature of this case that the Tribunal Member makes no finding in respect of the truth or otherwise of the applicant's account of being Ukrainian, ex-military, having served in Kosovo, having observed corruption and having made complaints in respect of same. Nor is there any finding made in respect of the persecution alleged to have happened following complaints. Instead the Tribunal Member rejects what is referred to as "the general credibility of the applicant" for the three reasons given above.

11. It is obviously lawful for a protection decision maker to reject credibility by reference to certain parts of an applicant's account of events. Such a basis for rejecting credibility must accord with the principles described by Cooke J. in *I.R.* (supra). Therefore, the first issue for determination in these proceedings is whether the rejection of the applicant's general credibility because of the absence of any documentary evidence relating to the first named applicant's anti-corruption campaign, *inter alia*, is lawful. It must be recalled that the applicant's evidence was that he only received one letter from the various bodies to which he made complaint. He has explained that he left the Ukraine fearing immediate harm, leaving everything behind. It seems to me unfair to criticise the applicant, as the decision implicitly does, for not having kept copies of complaints that were made. Some, if not most of the complaints appear to have been made orally. It is not inherently implausible or peculiar that the applicant has no paper trail of the complaints he pursued. No account was taken of the country of origin information indicating corruption in the military in this regard.

12. In relation to the absence of documentary evidence, no reference is made by the Tribunal Member to Article 5(3) of the EC (Eligibility for Protection) Regulations (S.I. 518 of 2006) which provides as follows:-

"Where aspects of the protection applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met-

(a) the applicant has made a genuine effort to substantiate his or her application;

(b) all relevant elements at the applicant's disposal have been submitted and a satisfactory explanation regarding any lack of other relevant elements has been given;

(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;

(d) the applicant has applied for protection at the earliest possible time, (except where an applicant demonstrates good reason for not having done so); and

(e) the general credibility of the applicant has been established."

13. It is a matter of concern to the court that the rules applicable to the assessment of an asylum claim not based on documentary evidence required by Article 5(3) were not followed in this case. My view is that to discount credibility based on the absence of documents without even mentioning the existence, much less the applicability, of Article 5(3) of the Regulations places a cloud over the relevant finding.

14. It is of note that Regulation 5(3) forgives the absence of documentary evidence in support of an asylum claim where certain conditions are met, including where the general credibility of the applicant is established. This suggests that it is wrong to rely on the absence of documentary evidence to ground a finding as to the general credibility of an applicant. The legislative scheme strongly suggests that general credibility should be determined before the absence of documentary evidence comes to be examined. (My remarks on the impact of Reg. 5(3) are made in passing as the parties did not engage in argument on this point nor did the court invite submissions on the impact of these rules in this case.)

15. Given the explanation in the applicant's account for the absence of documents and the failure of the Tribunal Member to allude to or to apply the provisions of Regulation 5(3), the first reason given for rejecting the first named applicant's general credibility is infirm.

16. The second reason given for rejecting the first named applicant's general credibility related to the facts connected with the

summons submitted by the applicant in evidence. The applicant completed a questionnaire - as all asylum applicants do - for the Office of the Refugee Applications Commissioner, which indicated that he had only lived in his apartment on Kleporivska Street for five months prior to his departure and that his previous address was at Roksolany Street. That is the address of his father. The evidence was that he was registered for administrative purposes at his father's address. In my view, no negative inference should have been drawn from the fact that the summons was served at his father's home. Perhaps more importantly, the Tribunal Member refers to the summons as addressing "an administrative violation not a violation of the serious nature alleged by the Applicant, namely trading in arms". This conclusion is not supported by the evidence. The translated summons is headed: "In the criminal case of an administrative violation/offence" and an article of law is cited (Article 232). In addition, the summons recites the consequences of a defendant's non-appearance in criminal cases as well as the consequences of a non appearance in civil cases. There was no evidence available to the Tribunal Member that the summons related only to "an administrative matter". In addition, it is not possible to discern from the text of the summons, as translated, whether or not it relates to trading in arms. The conclusions made by Tribunal Member are not based on evidence and rely on speculation and conjecture and are consequently irrational. I therefore find that the remarks and conclusions by the Tribunal Member in respect of the summons were unlawful.

17. Paragraph 9 of the decision in *I.R.* requires the Tribunal to give a reason when rejecting documentary evidence. These reasons must be lawful and must accord with the decision in *R.O. v. Minister for Justice* [2012] IEHC 573. The reasons given for rejecting the potentially corroborative effect of the summons are unlawful for the reasons I have stated.

18. The third reason given by the Tribunal Member for rejecting the applicant's credibility related to the circumstances in which his father was able to obtain the applicant's military uniform, given that his apartment was under seal. The finding by the Tribunal Member here is noteworthy. She says:

"He claims that he had the military uniform sent on to him afterwards by his father, however I query how he was in a position to access this if the Applicant's apartment was sealed after he left, as he claimed."

19. Section 3 of the Tribunal Member's decision is a detailed account of the oral hearing and of questions put to the applicant by the Tribunal Member and by the Presenting Officer. On this account, the Tribunal Member never put this matter to the applicant, and if she queried how the applicant's father obtained the military uniform, it was a query she addressed only to herself. The matter is, in my view, peripheral, but where it is one of only three matters on which a finding as to general credibility is based, it ought to have been put to the applicant to give him an opportunity to answer it.

20. On the evidence before the Tribunal, the applicant had only lived in his own apartment for five months and at all times he remained registered at his father's address. On those facts, which were available to the Tribunal Member, there is a perfectly plausible explanation as to how his father had his son's military uniform. This finding offends the fifth paragraph from *I.R.* above which requires that credibility findings must be based on correct facts, untainted by conjecture or speculation. There is no finding or evidence in relation to the uniform that it was at all times locked in the sealed apartment. The Tribunal Member has engaged in unfair conjecture as to how the applicant's father obtained the uniform. The relevant facts ought to have been ascertained, one way or the other, by the Tribunal Member before rejecting the applicant's credibility.

21. The Tribunal Member found that there was "a discrepancy" between the evidence of the first named applicant and the evidence of his wife, the second named applicant. The discrepancy between them apparently relates to the events which happened at 2.00am when persons came to visit their home. The first named applicant's account is as follows:

"On 25/11/2006 at approximately 2.00am, someone rang at the door. I approached the door and asked who was there. They replied: 'the OBOZ' * [translator's note: the Anti Organised Crime Department]. They showed me an I.D. card though the inspection hole. They said that I contacted the Mayor's Office recently and they came in relation to my case."

A discrepancy between different accounts of the same event refers to a surprising lack of similarity between the various accounts. There is a difference between the accounts given by the husband and the wife about the OBOZ nocturnal visit.

23. The second named applicant was not present when the policemen introduced themselves and presented their Identification Cards. She was in the bedroom when this happened. It is not surprising that the second named applicant claims that her husband told her that the men who came to visit late at night were from the Mayor's office. That he might have told her this is entirely consistent with his evidence which recounts the visitors as saying they are aware that he had been to the Mayor's office to make a complaint.

24. In effect, Tribunal Member unfairly compares the first named applicant's first hand account of his encounter with the officials with the second named applicant's account of what her husband told her had happened. Into this mix is also added the second named applicant's later expressed view as to the true identity of these visitors that they came from OBOZ. There is nothing surprising or unsettling about any of these differences given that the parties were not present simultaneously when the events took place, that there was confusion as to who these people were and that this confusion appears subsequently to have been clarified.

25. In my view, the differences between the accounts are minor, irrelevant and wholly understandable, having regard to the different perspectives the parties had on the events that night. It is unfair to characterise the differences as discrepancies. More importantly, it seems fundamentally wrong to base a credibility finding against the second named applicant on these irrelevant and minor matters.

26. This finding appears to offend the language in paragraph 6 of the decision of Cooke J. in *I.R.* where he said:

"The reasons [for rejecting credibility] 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."

At paragraph 7, the judge said:

"... an adverse finding based on a single fact will not necessarily justify a denial of credibility generally to the claim."

In my view, the unfairly described discrepancy could not justify a general finding of lack of credibility in this case.

27. A further credibility finding was made in respect of the second named applicant and that related to her employment booklet. The Tribunal Member notes that her last place of employment is not mentioned in her employment booklet and that this was a cause for concern. Asked why it was not recorded in the booklet, the second named applicant said that it was because it was less than six months. This appeared to contradict data in the employment record showing that certain employment which was for a period of slightly less than six months was recorded. As counsel for the second named applicant noted, the shortfall in the six-month period

was a matter of days only. My view is that this was an irrelevant or a peripheral matter and had nothing to do with the essence of the claim advanced on behalf of these applicants. A general rejection of credibility could not be built on such an observation.

28. My conclusion is that the credibility findings in this case are unlawful. I accept the complaint advanced that there was a failure on the part of the Tribunal Member to assess the core claim made by these applicants. Rather than examining the full narrative provided by the applicants, the Tribunal Member rejected general credibility based on mistaken facts, conjecture and speculation and on peripheral matters.

29. I formally grant the applicants leave to seek judicial review and further grant an order of *certiorari* in the case and remit the matter to the Tribunal for reconsideration.