

THE HIGH COURT

JUDICIAL REVIEW

2007 1104 JR

BETWEEN

G. A.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL (MICHELLE O'GORMAN), THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT OF MS. JUSTICE CLARK, delivered on the 31st day of March, 2009.

1. This is an application for leave to apply for judicial review of the decision of the Refugee Appeals Tribunal to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner that the applicant should not be granted a declaration of refugee status. Mr. James Healy B.L. appeared for the applicant and Ms. Fiona O'Sullivan B.L. appeared for the respondents. The hearing took place at the King's Inns, Court No. 1, on the 25th March, 2009.

The ASY-1 form and Questionnaire

2. The applicant claims to be a national of Ethiopia and a member of the Orthodox Church. He says he lived in Addis Ababa and his first language is Amharic. He gave three different dates of birth: 12th July, 1988 on his ASY-1 form, 5th July, 1980 on his questionnaire and 5th July, 1979 at interview. He claims to have arrived in the State on the 5th January, 2007 and he applied for asylum four days later. He was open about having made a previous application for asylum in Malta in 2005 but he said that application was not properly processed. His asylum application was accepted and processed by the Office of the Refugee Applications Commissioner (ORAC) and it appears no attempt was made to transfer him back to Malta. On his ASY-1 form it was recorded that at his preliminary s. 8 interview, the applicant said his date of birth was 1988, that he did not have any problems in Ethiopia and he did not fear for his life in Ethiopia.

3. The applicant completed a questionnaire in Amharic which was then translated into English. He said he had nine years of education between 1988 and 1996. He gave no work history. When asked why he left his country of origin he said *"If a person leaves his country because of hardship and asks for asylum in another country"*. He said he was a member of "the Amharic Organization of Kenejit". At the question "have you ever moved to a different town or village to avoid the persecution" he answered he was *"faced with a lot of suffering and hardship. Running from city to city and from country to country; I have gone through great suffering. I became a refugee, leaving Ethiopia in 1997. Before that I have suffered a great deal in my country. Because of the grave suffering bestowed on [me], my body was physically damaged."* In response to the question whether he had been arrested, detained or imprisoned, he said yes and explained *"The reason I do not know, I was imprisoned by Armed forces for 1 year and suffered without any crime."* He said his mother and father were captured and did not return and he said his body had been injured "all over" and "every part" of him was injured. He said he was issued with a passport in Addis Ababa but had lost it. When asked what travel arrangements he had made he said *"Even though I wished to save myself from dying, my life was faced with great hardship."* He said he left Ethiopia in 1997 (presumably on the Ethiopian calendar) and travelled through Sudan, Libya and Malta by car, boat and plane. He stayed in Sudan for one month, Libya for five months and Malta for one year and three months. He said he applied for asylum in Malta in August, 2005 (which must be on the European calendar) and his application was rejected but he was not given any reasons for the rejection.

The s. 11 Interview and s. 13 Report

4. At his s. 11 interview, which took place on the 14th March, 2007 and was conducted through Amharic, the applicant explained that the current date in the Ethiopian calendar was the seventh month of the year 1999. He submitted a medical certificate from Zauditu Hospital in Addis Ababa where all entries were written both in Amharic and English, as was a registration card from the hospital. Both documents were dated the 23rd July, 2004 (which must be on the European calendar). He also submitted the envelope in which he said the documents were posted to him. He did not submit any identity documents and said his birth certificate was at his parents' address. (His parents were both described as deceased).

5. The applicant was initially evasive but when pressed about the problems he experienced in Ethiopia he said he was arrested because he was selling the newspaper of an opposition political party. He said he bought newspapers from a supplier and sold them on at traffic lights. He said he sold four named newspapers only and did not sell government newspapers. He said he was not a member of any political party but was a supporter of the Kinijit party. When asked how he supported that party he said he took part in public protests when they occurred. When asked if his support for Kinijit caused him problems he said the government knew he was a supporter and that he was selling opposition newspapers but when pressed to answer the question he said "no". The applicant was then asked if he had problems in Ethiopia in the past and he said he was arrested on the street in November, 1996 by four unknown men because he was selling opposition newspapers. He was put in a car and brought to a compound. He was beaten by guards two or three times a day and was not fed properly or given proper food. He was sleeping on a filthy floor in a small cell with around eighty other prisoners, sometimes up to 100. He first said he was detained for "about a year" but later said it was "for nine months in total (not a full year)". No charge was brought against him; he saw a lawyer but "nothing happened". He said he escaped in July, 1996 when he was left out of the rooms into the sunshine and when he saw two people escaping through a fence he followed them. After his escape he went to Filwutha area where he stayed for around twenty days. He said the incident documented in the medical certificate occurred after his release from prison in July, 2006 and was

inflicted upon him by soldiers because he escaped from prison and because he sold political newspapers. He was asked in what language medical certificates are normally issued in Ethiopia and what calendar is used in such certificates and he answered that English and the European calendar were used.

6. The applicant was asked to name the parties making up Kinijit. He first said it was a party of many nations but then conceded he did not know. When asked why he did not join Kinijit he said it was because he did not want to attract more danger. The ORAC interviewer said he found it inconsistent that the applicant was prepared to publicly sell opposition papers with the associated inherent dangers but that he was not prepared to actually join Kinijit which appeared relatively less dangerous. The applicant then said he wanted to wait for a suitable time to become a member.

7. At the start of the s. 11 interview, when asked if he completed his questionnaire himself, the applicant said *"No one helped me to fill it in and at that time I was not all right mentally and I was not conscious of what I was talking about and writing at that time."* When asked if what he had written on his questionnaire was true and if the details about his family were true, he answered "yes". He was again asked if all the details recorded on the questionnaire were true and accurate and he said *"I don't know what I have written at that time so I can't tell you for certain but I remember some of the things"*. He was given a copy of the questionnaire and asked to read through it. Having done so, he made one correction relating to the date on which he left Ethiopia, changing it from the 16th to the 17th December, 1997 in the Ethiopian calendar. Later in the interview, when asked why he had not mentioned selling opposition newspapers in his questionnaire, he said he was not employed by the government so he did not say he sold newspapers. When asked why he said in his questionnaire that he said he was a member of Kinijit, he said *"When I was writing the questionnaire I was not stable."* He said this was because he went through many difficulties in his life and was not writing things in a proper manner. When he said he was still undergoing medical treatment he was advised by the ORAC officer that he could not accept a medical explanation for such inconsistencies unless compelling evidence demonstrating that such inconsistencies could be reasonably attributed to a specific medical condition were supplied by the applicant. Later in the interview he said he had no passport and was never issued with one and, when asked why he had said in his questionnaire that he had been issued with a passport, he said he was not in a stable condition when he was completing the questionnaire and that he was talking about his brother's passport.

8. At the end of his interview he said *"I want you to understand my real problems and that I wanted to change and to go and study and wanted to completely change my mental situation."*

9. A s. 13 report was compiled in which a negative recommendation was made. Country of origin information (COI) was consulted. Eight separate negative credibility findings were made and it was noted in particular that the applicant's evidence in his questionnaire was not consistent with the evidence he gave at his s. 11 interview. It was noted that the applicant had previously applied for asylum in Malta and a finding was made under s. 13(6)(d) of the Refugee Act 1996, as amended.

The Appeal Stage

10. A Form 2 Notice of Appeal was submitted on behalf of the applicant by the Refugee Legal Service (RLS) in which nine detailed grounds of appeal were set out. No documents were furnished and no COI was appended. As a result of the s. 13(6) finding, the applicant was not entitled to an oral appeal hearing.

11. A negative decision issued from the RAT on the 14th June, 2007. That decision is challenged in these proceedings. In her decision the Tribunal Member stated that the grounds of appeal were as per the Notice of Appeal. She next set out the applicant's claim and then set out various legal provisions and principles before turning to analyse the claim. In the "analysis" section she noted discrepancies in his account of events:

- a. He did not mention in his questionnaire that he sold opposition newspapers and gave no reasonable explanation for this omission - this seriously undermined his credibility considering that he said this was the reason for his arrest and flight from Ethiopia;
- b. He said he was a member of Kinijit in his questionnaire but at interview said he was just a supporter - this raised further credibility concerns as his association with the party goes to the heart of his claim;
- c. He did not know what political parties came together to form Kinijit - this raised credibility concerns as even considering his age it is difficult to accept that a literate person who supported Kinijit and sold opposition newspapers would be unable to name even one of the parties making up the coalition;
- d. The applicant's evidence was inconsistent in that he said he sold opposition papers on the street but was afraid of becoming a Kinijit member as he feared he could be harmed and he was waiting for a suitable time to join the party - this raised further credibility issues;
- e. When he first applied for asylum he said he had no fear for his life in Ethiopia and had no problems there. At interview he said this was because he was unwell and confused at the time. As the applicant previously applied for asylum in Malta it would be expected that he would have given coherent information as to his fear of persecution;
- f. According to a U.S. Department of State report and a U.K. Home Office Operational Guidance Note, the political situation calmed in 2005, there were no political killings in 2006 and it was unlikely that the grant of asylum would be appropriate for persons adducing evidence of mid or low profile activism or association within the CUD alliance. The applicant was not a member of Kinijit and only supported the party and considering that he was not prominent the fear he may hold in relation to returning to Ethiopia is not well-founded;
- g. It was not possible to verify the authenticity of the medical certificate submitted and no photographic identification was submitted - it is not possible to state with certainty whether the applicant was the person named on the document submitted. It was difficult to believe the applicant suffered the wounds in the manner alleged.

12. The Tribunal Member stated that she had considered all relevant documentation including the Notice of Appeal.

THE ISSUE IN THE CASE

13. Mr. Healy B.L., counsel for the applicant, argued that the Tribunal Member failed to mention the grounds of appeal put forward on the applicant's behalf in the Form 2 Notice of Appeal apart from asserting that she had taken account of various materials submitted. He argued that in a paper-based appeal it is particularly important that weight is given to the grounds of appeal.

14. Ms. O'Sullivan B.L., counsel for the respondents, replied by saying that while there is an obligation to consider the grounds of appeal there is no duty on the Tribunal Member to repeat verbatim every argument made by the applicant. The body of the RAT decision makes express reference to "Notice of Appeal, Ground 4" when setting out the applicant's date of birth and at the end of her analysis the Tribunal Member again confirmed she had regard to the Notice of Appeal. Counsel for the respondents also submitted that the Tribunal Member referred to the applicant's explanations given in the Notice of Appeal.

15. Counsel for the respondents further argued that it did not follow from a verbatim recitation of the grounds that regard was not had to them and reliance was placed on *J.A. v. The Refugee Appeals Tribunal* [2008] I.E.H.C. 310 where Hedigan J. held (at para. 18):

"It is of course necessary for a Tribunal Member to take account of all relevant statements and documentation presented by an applicant. This obligation is now set out in Regulation 5(1) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006). It does not follow, however, from the absence of an express reference in a decision to a document that account was not taken of that document. It is for the Tribunal Member to decide whether or not a document merits specific reference, depending on his or her assessment of its probative or corroborative value. In *Muanza v. The Refugee Appeals Tribunal* (Unreported, High Court, Birmingham J., 8th February, 2008), Birmingham J. held that "[i]n his decision a tribunal member is entitled to refer to the facts he identified as relevant and he is not obliged to list every argument which he is rejecting or every fact the significance of which he is discounting." Likewise, in *Banzuzi v. The Minister for Justice, Equality and Law Reform* [2007] IEHC 2, Feeney J. held that "the fact that only certain documents are quoted in the decision does not and cannot lead to a determination that all the documents were not considered." Feeney J. also accepted that it is a correct statement of the law that "there is no obligation on a decision maker to refer to every aspect of evidence or to identify all documents within its written decision."

16. Ms. O'Sullivan argued that the Notice of Appeal contained no explanations or clarifications for two of the findings made in the s. 13 report, relating to the inconsistency between the applicant's claim that he sold opposition newspapers but would not join the Kinijit party and that he had previously stated at his preliminary s. 8 interview that he had no problems in Ethiopia.

THE COURT'S ASSESSMENT

17. This being an application to which section 5(2) of the Illegal Immigrants (Trafficking) Act 2000 applies, the applicant must show substantial grounds for the contention that the decision ought to be quashed. As is now well established, this means that grounds must be shown that are reasonable, arguable and weighty, as opposed to trivial or tenuous.

18. There is a very clear line of decisions from this Court that there is no absolute obligation on a Tribunal Member to expressly consider each and every document or piece of information adduced by or on behalf of an applicant and that the absence of an express reference to a document does not mean that the document was not considered. The degree to which it may be argued that a decision-maker should have had express reference to a document must depend on the nature and quality of the document and the degree to which it is relevant to an applicant's claim and the determination of his or her asylum application and / or appeal. The recital of events by the applicant is the key to any finding of credibility and where there is an obvious lack of coherence, credibility or clarity in the applicant's story then there is undoubtedly less likelihood that all of the facets of that story will be mentioned in the decision. The document to which it is said express regard should have been made in this case was the applicant's Notice of Appeal. That document contained nine detailed grounds of appeal and the applicant complains that the Tribunal Member referred to those grounds only in passing. In the circumstances, I propose to look carefully at each of those grounds in the context of the applicant's claim so as to assess what relevance it had to the appeal.

19. The first ground of appeal was what might be called a generic ground based on the definition of a "refugee" under s. 2 of the Refugee Act 1996 and is therefore not particularly relevant. In any event, the Tribunal Member quoted the definition contained in s. 2 verbatim and also quoted from s. 1 of the Act of 1996. It is difficult to see how it could be argued that she did not consider the applicant's claim in that light.

20. The second ground set out the applicant's history and it was submitted that the applicant was open and honest about his unsuccessful attempt to gain asylum in Malta and that he was afraid to go into detail in his questionnaire about the persecution he had suffered. I cannot see how the Tribunal Member can be faulted for not referring expressly to this submission. The primary difficulty with the applicant's evidence in his questionnaire was that it was thoroughly inconsistent with the evidence that he gave at his s. 11 interview and not that he had failed to provide sufficient details of his experiences in his questionnaire. In addition, in some places the applicant offers as an answer when asked to explain inconsistencies that he was not stable and that he was unwell when completing the questionnaire. In the appeal grounds the solicitor says that he is instructed that the applicant was afraid when filling in the questionnaire. This was not said at the s. 11 interview and is not evidence in a document-based appeal.

21. The third ground related to his claim at interview that he would continue to be involved in protests if returned to Ethiopia and would therefore be at risk based on his previous experiences. This submission could only be relevant if it was believed that the applicant had previously been involved in the sale of opposition newspapers or that he had been imprisoned as a result and is dependent on a credibility finding on this part of his very conflicting record of alleged events.

22. The fourth ground related to the assessment of his credibility: it was submitted that the applicant was then nineteen years old and his date of birth was 12th July, 1988 (Ethiopian calendar), as was recorded on his ASY-1 form. The Tribunal Member expressly referred to that submission and it appears she accepted the explanation provided as she did not mention or make any credibility findings with respect to the different dates of birth provided by the applicant. In fact, she made one of her credibility findings by stating "even considering the applicant's age".

23. It was also argued that ORAC failed to assess his knowledge in that light and in the light of the mental distress he

suffered from being in prison. The relevance of this submission must be seen in the light of the absence of any medical report on his medical condition even after he was told at his s. 11 interview that his assertions of being unstable would only be accepted if a medical report demonstrating that such inconsistencies could be reasonably attributed to a specific medical condition were supplied by the applicant. The applicant was therefore expressly put on notice that if he wished to assert that the apparent lack of coherence in his answers was due to psychological difficulties, such as mental distress or anguish, he would have to submit a medical certificate or report to corroborate his claim. Although his appeal was prepared by legal representatives, no appropriate medical report was submitted. It is therefore difficult to see how it can be argued that the Tribunal Member should have had regard to and mentioned this aspect of the fourth ground of appeal.

24. Under the fifth ground it was argued that the applicant had been subjected to persecution or serious harm and this should have been considered as an indication of the risk of serious harm. Like the third ground, I cannot see how this ground could be relevant in circumstances where the applicant's account of events was not found to be credible. If it was not believed that the applicant had suffered serious harm in the past, it is not possible for his account of events to be seen as an indicator of the risk of harm in the future.

25. The sixth ground was a generic ground relating to the standard of proof which was not specifically related to the applicant's claim. The Tribunal Member stated in her decision that in order for a claim to succeed, the applicant must show that there is a reasonable likelihood that he or she will be persecuted for a Convention reason. She also set out the burden of proof, as established by s. 11A (3) of the Act of 1996 and she quoted from s. 16(16) of the Act as to the matters she was required to consider and the s. 16(16A) duty to affirm the ORAC recommendation unless satisfied that the applicant is a refugee. It was not argued at the hearing of this leave application that the Tribunal Member applied the incorrect burden or standard of proof and I cannot see any flaw in her treatment of those principles.

26. The seventh ground related to the obligation to assess whether the applicant would suffer persecution if returned even if there was a lack of credibility on the part of the applicant in relation to some but not all past events. It was not clarified in the grounds of appeal which of the applicant's past events should be found to be credible even if the credibility of other parts was not established. The Tribunal Member appears to have found that none of the past events were considered credible. Again the findings did not require that reference had to be made to this ground.

27. The eighth ground related to the absence of state protection, a matter which did not arise for consideration given that the applicant was found not to have a fear of persecution and the ninth ground was simply generic stating that that the return of the applicant to Ethiopia would breach Article 33 of the Geneva Convention, Article 5 of the European Convention on Human Rights and the provisions of the European Communities (Eligibility for Protection) Regulations 2006. Nothing in terms of specifics were advanced as to how those provisions would be breached.

28. It is axiomatic that in a paper based appeal that the Tribunal Member should assiduously consider all the documents filed. This does not mean that new unsupported assertions made after the ORAC investigations can overturn a decision. The submissions must be addressed to the deficiencies in the applicant's story by providing COI and other objective evidence capable of challenging the Commissioner's earlier findings. When such an exercise is engaged then it is incumbent on the Tribunal Member to address those clarifications and challenges. This does not mean that there is an obligation to specifically recount each document and argument but it does impose an obligation on the Tribunal Member to demonstrate in the body of the decision that all key issues have been addressed.

29. Having carefully assessed the grounds of appeal set out in the applicant's Notice of Appeal I cannot find fault with the Tribunal Member's decision which I consider on the whole, to be carefully considered and well thought out. The evidence given by the applicant in his ASY-1 form and questionnaire and at his s. 11 interview was wholly inconsistent and incoherent and he was quite simply not believed. It is very difficult to see how it could be argued that he was prejudiced in any way by the absence of an express reference to any of the grounds advanced in his Notice of Appeal. I am guided by the judgment of Hardiman J. in *G. K & Others v. The Minister for Justice, Equality and Law Reform & Ors* [2002] 2 I.R. 418, where he stated as follows (at p. 426-427):

"A person claiming that a decision making authority has, contrary to its express 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."

30. In this case the applicant has not produced any evidence of any nature that the Tribunal Member failed to have regard to his Notice of Appeal or grounds of appeal. In the light of the foregoing, I am not satisfied that substantial grounds have been shown and accordingly, I refuse leave.