Neutral Citation Number: [2008] IEHC 343

THE HIGH COURT

2006 673 JR

BETWEEN

E. A. W.

APPLICANT

AND

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

RESPONDENTS

Judgment of Mr. Justice Hedigan, delivered on the 4th day of November, 2008

1. This is an application for judicial review by way of *certiorari* of the decision of the Refugee Appeals Tribunal ("RAT") to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner ("ORAC") that the applicant should not be declared a refugee. Leave to apply for judicial review was granted on 25th April, 2008 by Birmingham J.

Factual Background

2. The applicant is a national of Sudan and a member of the Tanjar tribe. He is a Muslim and his first language is Arabic. He says that he and his wife lived in a small village in the Darfour region until the first week of September, 2005, when their village was attacked by government-sponsored Janjaweed militia, their home was burned down and many people were killed. The applicant and his wife did not seek help from the authorities nor did they go to a nearby IDP camp. Instead, the applicant's father paid for them to be smuggled out of the country. They journeyed together to Libya but were separated at that point and the applicant travelled on alone, by ship, to Ireland. He has not seen his wife since then.

The ORAC Stage

3. The applicant applied for asylum upon arriving in the State on 21st November, 2005. In his ORAC Questionnaire, he stated that he had escaped Sudan because his house was burned down in an attack carried out by the Janjaweed. He did not give any further details about the incident. At his interview on 13th December, 2005 with an authorised ORAC officer, he specified further details about the attack on his home. He claimed to fear that if returned to Sudan, the Janjaweed will kill him because he is not an Arab and he said that the government wants to take his land.

4. The ORAC officer compiled a report, dated 23rd December, 2005, in compliance with section 13 of the *Refugee Act 1996,* wherein it was recommended that the applicant should not be declared a refugee. The officer drew several negative credibility findings. He canvassed the issue of internal relocation in a tangential manner, citing Professor Hathaway to the effect that "[a] person cannot be said to be at risk if she can access effective protection in some part of her state of origin."

The RAT Stage

5. The applicant appealed to the RAT and an oral hearing was held on 16th March, 2006. At the hearing, a copy of a U.K. Home Office Operational Guidance Note ("OGN") on Sudan, dated 13th December, 2005, was presented to the Tribunal Member via the Presenting Officer. The OGN states that the Janjaweed operate exclusively out of the Darfour region and that non-Arab ethnic Darfurees are not, therefore, at risk of persecution outside the Darfour States and may be expected to relocate to another area within Sudan where they will be safe. The OGN was not available to the ORAC officer when considering the applicant's claim and it was not provided to the applicant in advance of the RAT oral hearing. At the hearing, when the Presenting Officer asked the applicant to comment on the portions of the OGN that relate to internal relocation, he replied that he did not think the report was true.

6. In his decision, dated 9th May, 2006, the Tribunal Member rejected the applicant's personal credibility on a variety of grounds and stated that "the lack of credibility in this case fundamentally infects the subjective element of a well-founded fear of persecution". Having set out the matters that cast doubt on the applicant's credibility, the Tribunal Member briefly remarked as follows:-

> "I have considered the British operational guidance note on Sudan dated the 13th of December 2005, in relation to internal relocation, in light of the forward looking aspect of the Convention."

7. The Tribunal went on to conclude that the applicant had not demonstrated a well-founded fear of persecution, and he affirmed the negative ORAC recommendation.

The Applicant's Submissions

8. No issue is taken in the present proceedings with the credibility findings drawn by the Tribunal Member. Rather, it is the remark made as to internal relocation that is at the centre of the complaints levied against the decision: the applicant complains that the Tribunal Member's remark constitutes:-

> a. A breach of natural and constitutional justice; and
>
> b. A breach of section 16(8) of the *Refugee Act 1996*.

9. The respondent suggests that the decision is based on negative credibility findings and that the statement made as to internal relocation was merely a matter that was in some way comforting to the Tribunal Member. It is said that the consideration of internal relocation in the decision has caused no unfairness to the applicant.

(a) Breach of Natural and Constitutional Justice

10. It is contended on behalf of the applicant that because the OGN was not furnished to him or to his legal advisers in advance of the RAT oral hearing, the applicant was denied fair procedures. It is said he was denied the opportunity to consider, address and rebut the contents of the OGN and was not on notice of the case against him such that he could not place alternative country of origin information before the RAT in support of his appeal. Reliance is placed on the decision in *Olatunji v The Refugee Appeals Tribunal & Others* [2006] IEHC 113. In that case, reliance was placed in the impugned decision upon three pieces of country of origin information that were not disclosed to the applicant and which the applicant and her legal advisors had no opportunity of commenting upon. Finlay Geoghegan J. granted *certiorari*, noting that one of the documents was of particular importance as it was relied on to reject entirely the applicant's personal credibility.

11. The respondents point out that the OGN in question is a document that is commonly used in asylum applications and is readily available online; that the applicant was represented by the Refugee Legal Service; and that the question of internal relocation is a matter that arises in all asylum cases. Moreover, it is pointed out that no application for an adjournment was made at the oral hearing

on behalf of the applicant, nor was an application made seeking time to submit written representations.

12. The respondents seek to distinguish *Olatunji* on the basis that the documents relied on by the Tribunal Member in that case were not put to the applicant at all, and no opportunity was given to the applicant to rely on those documents. In addition, it is said that the documents in question in *Olatunji* were of an entirely different nature to the OGN in the present case. In particular, it is noted that the documents in *Olatunji* were not generally available and that one document in particular – relating to the procedures adopted by the GNIB at Dublin airport – was not a public document.

(b) Breach of section 16(8)
13. The applicant says that the failure of the Tribunal to furnish him with the OGN also constitutes a breach of section 16(8) of the *Refugee Act 1996* (as amended by section 11(1)(*k*)(i) of the *Immigration Act 1999*), which provides that:-

> "The Tribunal shall furnish the applicant concerned and his or her solicitor (if known) with copies of any reports, observations, or representations in writing or any other document, furnished to the Tribunal by the Commissioner copies of which have not been previously furnished to the applicant pursuant to *section 11(6)* and an indication in writing of the nature and source of any other information relating to the appeal which has come to the notice of the Tribunal in the course of an appeal under this section." (emphasis added)

14. The respondent contends that the OGN is not one of the documents that fall within the meaning of section 16(8). It is said that the OGN was not previously furnished to the Tribunal Member; rather, it was produced in an *ad hoc* fashion by the Presenting Officer in the course of the appeal.

15. Moreover, it is contended that the "reports, observations, or representations in writing or any other document" referred to in section 16(8) are those produced in compliance with the preceding sections of the *Refugee Act 1996,* which set out the steps that can be taken in the process of investigating a claim for asylum by ORAC (e.g. the interview "report" that must be drawn up under section 11(2); the "representations" that may be made under section 11(3); the "information" that may be sought under section 11(4); the "report" that must be drawn up under section 13(1)). In addition, the respondent contends that when the Act is read holistically, the section 16(8) requirement to furnish an applicant with all information furnished to the Tribunal by the Commissioner does not include an obligation to provide to an applicant all pieces of country of origin information relating to the applicant's case; rather, it relates to "information" procured by the Commissioner in the course of carrying out its duties and sent to the Tribunal.

16. In reply, the applicant contends that section 16(8) must be given its ordinary meaning. It is also said that where the Act of 1996 refers to reports and representations produced under specific provisions, the provision under which the report or representation is prepared is specified; section 16(8), however, uses the terms "any" and "other".

The Court's Assessment
17. As noted in *Ogunniyi v The Minister for Justice, Equality and Law Reform* (unreported, Hedigan J., High Court, 9th October, 2008), until such time as the Supreme Court renders judgment on the appropriate standard of review in asylum and immigration cases (i.e. the traditional standard set out in *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 or the higher standard of "anxious scrutiny"), I will continue to sympathise with the stricter approach in cases involving potentially serious violations of human or constitutional rights, and to be careful and thorough when reviewing decisions that potentially impact upon such rights.

18. As to the contention that there has been a breach of fair procedures, I would note that the OGN that is at the centre of the arguments in this case is widely available online and those dealing with the asylum process – and with applicants from Sudan in particular – are familiar with its contents and implications. The question of internal relocation is a matter that is central to a great majority of asylum applications; with respect to Sudan, in particular, internal location is a live issue. Thus, the applicant, who was legally represented at the RAT oral hearing both by counsel and by a member of the Refugee Legal Service, cannot say that he was taken by surprise because the question of internal relocation was raised at the oral hearing; indeed, there is no indication that anyone was surprised at the oral hearing that the matter was raised. Moreover, the applicant's legal representatives could have applied for an adjournment to consider the OGN, they could have made oral submissions at the hearing on the matter, or they could have requested some time to make written submissions – I am assured that such occurrences are not uncommon at the RAT - but no such request was made. I cannot see that any injustice whatever was caused to the applicant and I do not consider there to have been a breach of fair procedures.

19. Moreover, I am of the view that the Tribunal Member's reference to the OGN did not form a core or central part of the decision; rather, it was in the nature of an additional remark. The Tribunal Member's decision to reject the applicant's appeal was based squarely on his finding that no subjective fear of persecution had been established. That finding was, in turn, grounded in the Tribunal Member's rejection of the applicant's personal credibility. That being the case, there was no need to assess whether or not the option of internal relocation would be available to the applicant. Thus, the Tribunal Member's remark with respect to the OGN does not form part of his final decision and has no impact on the fairness, reasonableness or rationality of the conclusion that was ultimately reached. It has been suggested to me that the Tribunal Member's remark might have been in the nature of some sort of consolation and indeed it seems that there may be merit in that suggestion.

20. Thus, nothing can turn on the Tribunal Member's remarks on internal relocation. Even if I were to find that in this regard there had been a breach of fair procedures, such a finding could not be fatal to the Tribunal Member's assessment of the applicant's claim. In the circumstances, although some interesting arguments were advanced as to the interpretation thereof, I do not propose to examine whether or not there was a breach of section 16(8) of the Act of 1996 as the point is, effectively, moot.

Conclusion
21. I can find no fault with the Tribunal Member's decision and accordingly, I must refuse to grant the reliefs sought.