Neutral Citation Number: [2009] IEHC 330

THE HIGH COURT

2007 1492 JR

BETWEEN/

M. A. W.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered on the 8th day of July, 2009

1. The applicant is an unmarried man of 28 years of age who comes from Ethiopia. He arrived in the State in May of 2006 and claimed asylum. He had three interviews with an officer of the Refugee Applications Commissioner and in a report of 21st November, 2006, his claim for refugee status was recommended for rejection by the Minister.

2. His claim to a fear of persecution if returned to Ethiopia was based on his political activities as a student at the University in Addis Ababa where he had, in March 2005, joined the political party "Rainbow Ethiopia Movement for Democracy and Social Justice – Kestedamena". This party was one of four opposition parties which had come together to form a coalition called the "Coalition for Unity and Democracy", otherwise "CUD."

3. As a result of his activities in the party during the preparations for elections in 2005, he had been assaulted and attacked by political opponents. Police were sent to the University after the elections to disperse student demonstrations and the army later came to arrest those taking part. The applicant escaped, but two days later, soldiers arrested him at home and detained him for 15 days when he was beaten and tortured. On release, he either wrote or contributed to an article by way of interview, (the event is one of the controversies in the case) which alleged university staff members had obtained their positions based on political affiliations rather than by academic qualification or performance. After further beatings by police in August, and difficulties with the university authorities over his possession of certain leaflets, he left Addis Ababa to evade further searches for him and stayed with relatives before making an escape, arranged by an uncle, to Ireland via Nairobi and the Netherlands. He says that if returned, he would be at risk because the authorities hate him for his anti-government campaigning and blame him for a fire which had taken place in his local area.

4. The Section 13 Report of the Refugee Applications Commissioner based its negative recommendation essentially on a lack of credibility in the account given of the applicant's political activities: - his involvement in the CUD and in particular his apparent lack of knowledge of basic facts about the CUD and its component parties and their leaders.

5. The report was appealed to the Tribunal and amongst a number of specific grounds advanced it was submitted that the authorising officer of the Commissioner had made fundamental errors of fact in parts of the evidence identified as undermining the applicant's credibility. In particular, proof was offered on the appeal that the date the applicant had given for the foundation of the CUD was right when adjustment was made from the Ethiopian calendar to the Gregorian calendar, and that he had correctly named three of the four leaders of the CUD parties and got half of the fourth name right. It was also pointed out that the authorised officer had made a mistake as to the date which the applicant had given for leaving home in 1998 (Ethiopian calendar), and had thus drawn a wrong and speculative conclusion on the basis of that error.

6. The decision of the Tribunal, which is now sought to be quashed, also found the applicant's claim lacking in credibility and, indeed, it goes so far as to express the view that he had "reconstructed his evidence" since the production of the Section 13 report, with the obvious implication that the applicant thereby sought to adjust his story to mend some of the gaps or contradictions that had been identified in it.

7. In the Contested Decision, the Tribunal member makes a number of findings on which the conclusion as to lack of credibility is then based. They are set out at section 6 of the decision under the heading "Analysis of the Applicant's Claim" and can be summarised as follows:

A. The applicant claimed to have written the article critical of university officials in August of 2005, following which he was beaten on six occasions. When questioned on this he became furtive and evasive, and when pressed further, he changed his evidence and said that he was mentioned in it. He had been interviewed by the journalist and his views had been quoted. The Tribunal member then says, "I am satisfied he did not write the article."

B. His answers to questions as to why one party leader, Lidetu Ayelow, had resigned after the elections were vague and incorrect; and when the actual reasons given by the politician were put to him, the applicant said he had heard about those reasons but had forgotten them.

C. At interview, he had said he did not have a CUD membership card but afterwards claimed a purported membership card had been sent to him by his mother. This is described by the Tribunal member as "subsidiary evidence" and he says, "I will therefore weigh such evidence in line with my general evaluation of the applicant's credibility."

D. His fear of arrest on return for campaigning was discounted, given his brief membership and low ranking role in a CUD party.

E. The Tribunal member finally, having regard to section 11 B(b) of the 1996 Act, expressed dissatisfaction with the applicant's account of his travel to Ireland without claiming asylum in the first safe country he reached. This is said to be inconsistent with an intention to flee from one's pursuers and "to seek a safe haven wherever one can."

8. The applicant now seeks leave in accordance with s. 5 of the Illegal Immigrants (Trafficking) Act 2000, to apply for an order of *certiorari* to quash the Contested Decision. The application is essentially based on a claim that the negative conclusion as to credibility is legally flawed. The statement of grounds, as lodged, proposes to advance a total of 24 grounds (28 if the sub-grounds are included), but in opening the case, counsel for the applicant indicated that the *gravamen* of the complaint could be taken as encapsulated at section E of the statement in grounds 5, 6A) to E), 7, 8, 9 and 16.

9. In fact, in the light of the way the case was then presented at the hearing and when a certain amount of duplication and alternative formulation is taken into account, the Court considers that the essential grounds advanced as substantial for the purpose of s. 5 of the 2000 Act, could be expressed as follows:

1) The Tribunal member failed to consider the evidence contained in a SPIRASI report of 5th April, 2007, as corroborative of his claim to a history of abuse.

2) The Contested Decision is vitiated by fundamental errors of law and fact in its assessment of evidence in that it:-

- failed to take account of mistakes made in the RAC report but corrected by the applicant;

- failed to give proper consideration to the evidence and explanations offered by the applicant on points identified as lacking credibility or as disclosing contradictions;

- reached an unwarranted conclusion that the applicant had reconstructed or changed his evidence since the adoption of the Section 13 report in relation to an article published in August 2005, when it was the applicant who had volunteered to clarify a mistake which had arisen through wrong interpretation; and

- failed to take account of his explanation for the change in his evidence about having a CUD membership card.

The SPIRASI report

10. The Court is satisfied that no arguable complaint can be raised in respect of the consideration or non-consideration of the SPIRASI report. The applicant had claimed that while detained in Sendafa, he had been tortured. Following the RAC report and the lodging of the appeal, the applicant was examined and assessed at the Centre for Care of Survivors of Torture in Dublin and a report of 3rd April, 2007 was submitted to the Tribunal.

11. On physical examination, the report stated: "Physical examination did not elicit any confirmatory evidence of previous injuries". On medical examination, it stated that he "appeared as a young man with an unkempt appearance but looking well nutritionally… He is not psychotic but appears unsettled. The signs and symptoms noted could be consistent with post-traumatic stress." The conclusion then reads: "Mr W. is a young man who originates from Ethiopia and who came to Ireland by his own account after being detained and subjected to physical abuse by the police and agents of the police on account of his involvement in anti-government protests. Physical examination did not reveal any confirmatory evidence of abuse. The findings on his mental state examination would be consistent with post-traumatic stress which would be in keeping with his history of abuse."

12. The SPIRASI report is mentioned in one section of the Contested Decision, s. 4 under the heading "Submissions", which merely states "The SPIRASI report was put in evidence and this has been considered by the Tribunal." No subsequent reliance is placed on its content and it is argued that this is a failure on the part of the Tribunal member to take into account and to weigh for the purpose of credibility all relevant evidence as the law requires.

13. The Court cannot agree. The decision maker is indeed obliged to consider all the evidence but only where it is of relevance and discloses some probative value in respect of a disputed issue. On its face, this report is devoid of probative value so far as concerns corroboration of the physical torture claimed to have been suffered. Secondly, as support for a broader claim to have suffered abuse, the report merely states that the applicant showed, in effect, some signs of being stressed but the opinion that the finding on his state "could be" or "would be consistent with post-traumatic distress" does not constitute, in the Court's judgment, evidence that his stress, such as it is described, results from the alleged beatings and torture rather than from any of his other experiences as someone fleeing from Ethiopia to a foreign country. The Court considers that the report had such marginal relevance to the issues of credibility in the case that there is no error or defect in the absence of any further mention of it in the report.

Second Ground: Credibility

14. The second ground is directed at the fact that a number of errors were alleged to have been made by the authorised officer in the Section 13 report. These were challenged and it is said were shown to be an incorrect basis for the report's finding of credibility. It is submitted that as the applicant must be taken to have proved his credibility on these points, the Contested Decision is deficient in failing to acknowledge that fact.

15. The errors in the RAC report were as follows:

First, in para. 4.3, the authorised officer claimed the applicant had stated that the CUD had been formed in October 1997 (according to the Ethiopian calendar), and the officer calculated this would equal October 2004, in the Gregorian calendar. The applicant's credibility was doubted because the country of origin information source gave the formation date as October 2003. Evidence lodged on the appeal shows that the October 1997 date translates to October 2003, so that this date as given by the applicant was correct.

Secondly, in para. 4.6 of the report, the Tribunal member doubted the applicant's description of writing the article which led to the attacks on him on 4th August, 1997, (Ethiopian calendar) because he had said he remained at his home in Addis Ababa until 21st November, 1998 (Ethiopian calendar) when he moved to Akaki. The Tribunal member says, "It is felt that surely the applicant would have considered leaving on an earlier date, especially if he was encountering these problems as he alleges." In fact, the applicant had said he left home on the 20th October, 1998, so the conclusion of the Tribunal member is said to be speculative and without any factual basis.

16. In the Contested Decision, the Tribunal member acknowledges, at the summary of the submissions in section four, that the presenting officer had acknowledged the mistake in the dates of formation of the CUD in paragraph 4.3 of the Section 13 report, and the decision itself makes no further reference to that issue as a matter going to credibility. Similarly, if there had been a mistake

as to the date of his leaving home in Addis Ababa, no reliance is placed on that point or mention made of it in the decision.

17. In effect, the argument made under this heading is that having, as it were, succeeded in overturning the authorised officer of the Commissioner on these two points, the applicant should have been given credit for it in the Contested Decision. Instead, relying on other factors, the Tribunal member comes to the serious, unbalanced, and, it is said, unwarranted conclusion that the applicant had reconstructed his evidence since the Section 13 report.

18. It has to be borne in mind that the appeal before the Tribunal is a fresh appraisal when credibility is in issue, and especially when there is an oral hearing. The Tribunal member is not bound by the credibility findings of the authorised officer, neither is his reappraisal to be curtailed by mistakes made when corrected. When an appeal decision turns upon the credibility of a claim made to a fear of persecution based on a personal history, the Tribunal member makes a single determination to that effect. That determination may well result from a series of conclusions or findings as to a variety of aspects in the story as told in the light of the way in which it is told by the applicant. It may occasionally turn upon a single serious discrepancy in a story which is otherwise plausible as where, for example, an event is shown to be wholly untrue or a supporting document is shown to be false; but the task of assessing credibility is not amenable to a form of points system in which an applicant is entitled to be treated as having proved the credibility of his claim if he shows that he is credible on more points than the Tribunal member finds to be implausible.

19. Thus, even if the applicant in this case has demonstrated two or more factual mistakes in the Section 13 report, they do not vitiate the legality of the appeal decision if they play no part in it.

20. The remaining grounds can be grouped together and characterised as a general attack upon the reasonableness and rationality of the conclusion that the applicant had reconstructed his evidence.

21. It is submitted that the Tribunal member's approach to the evidence was selective and unbalanced; that it relied on negative aspects without taking account of positive aspects favourable to the applicant; that it concentrated on minor irrelevant matters and ignored major aspects of the claim, and was selective as regards country of origin information. It noted that the decision makes no mention of the fact that at the hearing the applicant had been unhappy with the performance of the interpreter and that he felt compelled to abandon interpretation and to continue his testimony in English. In spite of this, the decision described him as being "articulate, educated, and well able to give his evidence with composure and well able to communicate through his interpreter to make himself clearly understood."

22. Issue is taken by the applicant with two particular pieces of evidence identified as giving rise to doubts on credibility on the part of the Tribunal member in the decision. The first concerns the fact that when the applicant was asked at interview if he had a CUD membership, he had said that he did not. Following the Section 13 report, he claimed that one had been sent to him by his mother. It is complained that the Tribunal member fails to acknowledge and consider the explanation that the applicant had given for not admitting to having one at the outset. He had said he did not admit to having one because it was not in his possession at the time and he was worried he might not be able to get it from Ethiopia.

23. The second piece of evidence concerns the article criticising the university staff in August 1997 (Ethiopian calendar). In the Contested Decision, the Tribunal member refers to this in immediate explanation of the opinion that the applicant had reconstructed his evidence since the Section 13 report. He says, "He initially said that he published an article and when questioned further on that, he said he wrote the article and afterwards he changed his evidence to say he was mentioned in it."

24. This appraisal is pointed to as an instance of the Tribunal member putting the most unfavourable construction on the evidence. It is claimed that the original reference to publishing in the interview was a mistake on the part of the interpreter and it was the applicant who volunteered this clarification at the appeal hearing. Again, it is submitted that the Tribunal member failed to consider this explanation.

25. In making these two complaints in respect of the Tribunal Member's appraisal of his credibility, the applicant is, in effect, urging this Court to decide that the assessment was wrong and that a new assessment ought to be made. As already mentioned, the task of assessing credibility of testimony involves a weighing of the evidence that is given or presented and so to reach an overall conclusion. In this case, the assessment refers to a series of factors in this regard, including, for example:

- the change of the account of the published article, and the applicant's role in it;
- the vague and incorrect answers to the request about the reasons for the sudden resignation of Lidetu Ayelow and his claim to have forgotten the reasons when they were put to him;
- the evidence about the CUD membership card;
- the failure to provide a reasonable explanation for his claim that the State was the first safe country in which he had arrived since leaving Ethiopia and his failure to apply for asylum in the countries through which he travelled.

26. It is true that neither of the two explanations in relation to the CUD membership card and the article are explicitly referred to in the text of the Contested Decision, but it is clear that as a matter of law the Tribunal member is not obliged to mention every argument raised or to recite every piece of evidence, provided the reason for concluding a lack of credibility is clear from the decision. The Court notes, however, that in the summary of the evidence given at the appeal hearing, the Tribunal member records that, "Matters arising from the Section 13 report in relation to his credibility was put to him by his counsel and he explained the reasons for his answers in his interview." Both the membership card and the article issues were dealt with in the ORAC report and were gone over again at the hearing. Indeed, it is this feature of the proceeding which clearly influenced the "reconstructed evidence" opinion of the Tribunal member and it is drawn from the contrast between the evidence on those two occasions.

27. In effect, there is a discrepancy between the applicant's claim that it was he who clarified a mistaken impression arising from the wrong interpretation at the interview by volunteering that he had not written but had been quoted in it after being interviewed by the journalist. The Tribunal member, however, states clearly that it was only after "further questioning" and "further probing" that the applicant said he was "mentioned in the article."

28. If this part of the contested decision is an untrue account of the appeal hearing, then it was a matter of such importance to the ground now raised as to require the applicant's account to be corroborated by an affidavit from at least one of the representatives present at the hearing with the applicant. This was not done. Indeed, it is notable that in his evidence, the applicant says, "I judged it necessary to dispense with the interpreter and to give my evidence in English. I say that my difficulty with the interpreter must have been obvious to everyone in the room including the first named respondent." This subjective impression of the applicant is difficult to accept when the difficulty does not appear to have been so obvious to his own legal representatives as to prompt an intervention by them on his behalf.

29. As has frequently been explained, it is because a decision maker such as the Tribunal member has the benefit of hearing such testimony at first hand and of seeing the demeanour of the witness and his reaction to questioning, that this Court will not interfere with an assessment of credibility unless it is clearly demonstrated that the process by which the conclusion has been reached has been vitiated by material error. The Court is satisfied that no substantial ground to that effect is raised in the circumstances of the present case.

30. Finally, so far as the complaint about the failure to mention the abandonment of the interpreter is concerned, if the difficulty with interpretation had been thought to hinder the applicant in obtaining a fair hearing on the appeal, that was something that ought to have been raised at the time. If it was not, and if the applicant successfully proceeded to testify in English, as appears to have been the case, the applicant can hardly quarrel with the Tribunal member's observation that he gave his evidence with composure and made himself clearly understood.

31. In coming to that judgment, the Court does not discount the emphasis laid by the applicant in his affidavit at his unhappiness at the hearing, his difficulty, as he felt it, in getting across what he wanted to say and his impression that the Tribunal member was impatient with him. There is no doubt but that for an asylum claimant who has been translated to this jurisdiction from a remote land and an entirely different culture and society, the experience of such a proceeding may well add considerably to the stress already suffered in leaving home, quite apart from that which may already having undergone in the events that caused the flight. That is why there is an undoubted duty, both upon the Tribunal member and the presenting officer, but above all, on the legal representatives of a claimant to ensure that, so far as possible, the fair presentation of the case at a hearing is not, either deliberately or inadvertently, hampered by problems of interpretation, communication, or other difficulties which place the claimant under unnecessary stress and interfere with the full and fair presentation and investigation of the claim.

31. In the ultimate resort, however, it must be remembered that the High Court, in exercising its function of judicial review, is concerned only to ensure that the decision on appeal has been reached lawfully in compliance with the requirement of the applicable laws and the principles of natural and constitutional justice. Unless an issue as to the improper or unlawful conduct of the appeal hearing has been raised and wrongly rejected at the time, judicial review is not a remedy for subjective dissatisfaction with the hearing or a complaint as to how evidence actually given has been received and perceived by the decision maker.

32. For these reasons the application for leave in this case will be refused.

33. That being so, it is unnecessary to rule on the application for an extension of the 14-day time limit in Section 5 of the 2000 Act. It is, however, appropriate to remark that in this case, the delay involved was not by any means marginal and the explanation to excuse it which is offered is of doubtful adequacy. The Contested Decision was received on 1st August, 2007, by the applicant. The application was not initiated until 12th November, 2007. A very general account is given in a single paragraph on the applicant's affidavit of contacting a solicitor and of what she is advised transpired between that solicitor, counsel and the Judicial Review Unit of the Refugee Legal Service. No dates are given other than the dates of consultations which the applicant had with the solicitor on 21st, 25th September and 3rd October, 2007, such that the Court is unable to assess reliably where and when the delay occurred. Furthermore, no affidavit is offered by anyone acting in those matters on the applicant's behalf to explain what happened and what actually prevented the proceedings being issued, especially in the six weeks from the beginning of October 2007. In those circumstances, it is sufficient to say that had a ruling been necessary on this issue, it is highly improbable the Court would have been in a position to conclude that the statutory requirements for the grant of an extension had been met.