Neutral Citation Number: [2009] IEHC 323

THE HIGH COURT

2007 91 JR

BETWEEN

S. I. M.

PLAINTIFF

AND

REFUGEE APPEALS TRIBUNAL, MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND HUMAN RIGHTS COMMISSION

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered on the 3rd day of July, 2009

1. The applicant arrived in the State on 24th February, 2006, and applied for asylum. He claimed to be a member of the Al Berti tribe from the village of Tiwal in south Darfur, Sudan. He said that he was forced to flee conflict in that area after attacks by the Janjaweed and by government and other militias on his village in which members of his family and other villagers were killed.

2. The applicant says his livelihood was that of a herdsman and that his formal education was limited to some religious instruction in a Muslim school. He speaks Arabic only.

3. A report of the Refugee Applications Commissioner of 3rd May, 2006, recommended that he be not declared a refugee. In effect, the Commissioner's authorised officer found that the applicant's account of his personal and family history in the Darfur region lacked credibility. The report laid particular emphasis on the applicant's demeanour, discomfort, and evasiveness at interview when questioned on aspects of his life in the area and his lack of knowledge of matters that might have been expected to be known by him if he had genuinely lived where he claimed.

4. The applicant appealed to the Refugee Appeals Tribunal and it is the manner in which this appeal procedure was conducted that gives rise to the single ground upon which leave was granted to bring the present application.

5. The hearing before the Tribunal took place on two days some three months apart, 25th July and 26th October, 2006, and the decision which is now contested was given on 8th December, 2006, ("the Contested Decision"). It appears that the hearing on 25th July, 2006, was effectively abandoned because of difficulties in the interpretation of the applicant's testimony and some tension and even acrimony in the exchanges between the applicant's legal representative and the Tribunal member.

6. In a judgment of 5th February, 2009, leave was granted for the present application upon one ground but a second ground directed at the alleged

unlawfulness of the decision by reason of the delay between the first hearing and the giving of the decision on 8th December, 2006, was rejected. The ground allowed as set out in the court order of 5th February, 2009, was as follows:

That there was an infringement of the entitlement to fair procedures in that the conduct and outcome of the first hearing on 25th July, 2006, was so unsatisfactory that no use or regard should have been made or had to the testimony on that occasion as the basis for finding that the applicant's testimony was contradictory on specific points so as to ground the finding of lack of credibility which lies at the heart of the Contested Decision.

7. The issue before the court in this application, therefore, concerns the degree, if any, to which the essential finding of the Contested Decision might be said to be dependent upon material drawn exclusively from the abortive hearing of 25th July, 2006, and which can be shown to be sufficiently tainted by the unsatisfactory character of that hearing to render the decision so flawed as to be unlawful.

8. The hearing on 25th July commenced apparently at 10:40 in the morning and concluded some two hours later at about 12:50. A solicitor of the Refugee Legal Services took what appears to be a reasonably comprehensive and detailed note of that proceeding. It emerges from the note that at various points the applicant disagreed with the interpreter about some of his translations of the applicant's answers and there appears to have been difficulties, at least in the applicant's mind, about the interpreter's comprehension of the applicant's dialect.

9. It is also clear from the note that a number of tense exchanges occurred between the applicant's counsel and the Tribunal member although it is always unreliable to attempt to assess the true tenor of such exchanges from a handwritten note. What appears abrupt and aggressive on paper may well have been no more than robust advocacy at the time. Nevertheless, it is undisputed that the hearing was brought to a conclusion before its business had ended because of the difficulties over interpretation.

10. The note records counsel towards the end expressing unhappiness with the interpretation and the Tribunal member responding "Well, I am adjourning the hearing because you are [or perhaps 'we are', the handwriting is not clear] just playing ducks and drakes". The Tribunal member says that he would start again where the questioning left off if the matter is adjourned. Although the note is by no means explicit it seems clear that there was some discussion about the possibility of a resumed hearing before a different Tribunal member and the Tribunal member asks whether he was being accused of bias. Counsel is recorded as replying "I am not saying that. I think the interpretation may have put a slant on the story".

11. Counsel for the applicant at that hearing says in an affidavit in the present proceeding that when the hearing was abandoned she understood the new hearing was to be a de novo hearing of this appeal. The resumed hearing was first fixed to start on 5th October, 2006, and was due to take place that morning before the same Tribunal member but had to be adjourned as no room was available. Significantly, however, no objection was raised at this point as to the basis of the resumed hearing or the fact that no new Tribunal member had been nominated. The resumed hearing before the same Tribunal member then took place on 26th October, 2006, and again no objection was raised.

12. This resumed hearing started apparently at 10:30 in the morning and concluded at around 2 o'clock in the afternoon. So far as can be judged again from the note taken, the hearing proceeded in a calmer atmosphere, free of disputes about interpretation and any acrimony between the counsel and the Tribunal member. It appears also to have commenced on the basis of a hearing de novo in that the applicant was again led in direct examination through his evidence as to his personal history and the events which provoked his flight from Sudan. Nevertheless, it is also clear that at a number of points either the Tribunal member or the Commissioner's presenting officer queried the accuracy of the applicant's evidence by reference not only to alleged discrepancies between the evidence then given and the replies to questions in the asylum questionnaire or at the Section 11 interview but also by reference to answers given on 25th July, 2006. It is this aspect of the hearing which is the focus of the ground now advanced against the Contested Decision.

13. The decision of the Tribunal member is, as I described it in the judgment granting leave on 5th February, 2009, characterised by its lengthy and comprehensive summary of the evidence given, of the submissions made and by the detail of the analysis of the applicant's claim as set out in section 6 of the decision extending over four pages. The conclusion as to an absence of credibility is stated in uncompromising terms and relies clearly upon both the content of the evidence at the two hearings and on the impression gained from the applicant's demeanour and attitude including that on 25th July, 2006. This is apparent from the final part of the section 6 analysis where he summarises the effect of the specific matters identified as the basis of doubting the applicant's credibility as follows:

"The applicant's statements are not coherent or plausible and runs counter to the COI submitted to the Tribunal. Having had the opportunity of observing the applicant's demeanour when tendering his evidence I found him to be hesitant, evasive and contradictory in his evidence as to its contents and presentation and I found his story to be implausible and seriously lacking in credibility. I find the applicant's failure to answer questions at first instance and his apportioning blame on the interpreter to be disingenuous and wholly lacking in credibility. I find the applicant has not and will not suffer persecution should he return to Sudan because of his ethnicity or his political opinion and he does not come within the definition of a refugee as set out in s. 3 of the Act."

14. This is, therefore, an application to quash a decision of the Refugee Appeals Tribunal which turns entirely and in forthright terms on disbelief of the personal history given by the asylum applicant. In the light of the quoted conclusion to the decision it is therefore no harm to cite once again the now well known statement as to the reluctance of the High Court to interfere with such a finding as given by Mr. Justice Peart in *Imafu v. The Minister* [2005] I.E.H.C. 416:

"This court must not fall into the trap of substituting its own view on credibility for that of the Tribunal. The latter, just as a trial judge is at trial rather than the appellate court, is in the best position to assess credibility based on the observation and demeanour when (an applicant) gives evidence. These are essential tools in the assessment of credibility … as the spoken word in a transcript or summary … cannot possibly convey the necessary elements for the assessment of credibility (the High Court is not entitled to interfere) unless the process for assessing credibility is legally flawed."

15. Thus, the issue before the court on this application is whether the process by

which this decision was reached by the Tribunal member was flawed to the extent of being unlawful by virtue of the fact that, notwithstanding the abandonment of the first hearing because of difficulties over the interpretation of the applicant's evidence, extensive use was made and reliance placed in the Contested Decision on alleged discrepancies and contradictions between particular aspects of the account as given at the two hearings. Where the discrepancies identified in the Contested Decision are between the evidence of 26th October and replies in questions or in the Section 11 interview no complaint could or has been raised.

16. There is no doubt, of course, that this Contested Decision describes in some detail the different versions given by the applicant at each hearing on a number of issues. Thus, in the earlier third section of the decision headed "The Applicant's Claim" the evidence as given on the first and second hearing is summarised and contrasted at least on the following points:

1) The ethnicity of the driver, an employee of his friend, Mr Karim, who drove him to Port Sudan;

2) His account of his contacting his brother in Sudan;

3) His explanations for his production or non production of the national identity card;

4) His answers to questions as to where he lived in south Darfur.

17. In the sixth section of the decision under the heading "Analysis of the Applicant's claim" the Tribunal member gives nine specific factors listed as a) – i) as the basis for the conclusion on credibility. Most significant amongst these are the first five at subheadings a) to e) as they form the basis for the finding that the applicant was not from the town or village of Tiwal. That finding is clearly crucial to the rejection of the claim because the persecution feared is based upon the persecution claimed to have been suffered in the attacks on his village and family in May, 2004 and December, 2005. He does not claim to have suffered any other direct persecution or attack and in effect it is these two incidents that are relied upon as to substantiate his claim that he is at risk as a member of the Al Berti tribe.

18. The issues which the Tribunal member identifies as the source of his doubt are as follows:

(a) The applicant's account of the attack in December, 2005 as described earlier in the Contested Decision at paras. 4 and 13 subpara. 3 in which he says 17 inhabitants were killed is contradicted by country of origin information;

(b) he gave inconsistent figures for the number of employees who were with him at the time of the attack;

(c) his evidence as to the number of deaths in the attacks is described as unsure and uncertain but he is said "nonchalantly" to have mentioned a figure of 300. The Tribunal member describes this as disingenuous and wholly lacking in credibility;

(d) he said the population of Tiwal was 400 to 500 people. When told country of origin information gave a figure of 7,000 comprised of four tribes which did not

include the Al Berti tribe, he said he understood the question to mean how many families lived there because population was counted by reference to family units and he said there were 450 families. Again, the Tribunal member found this response disingenuous and wholly lacking in credibility;

(e) here the Tribunal member identifies a discrepancy between the applicant's reference to being from the town or county of Abu Ajura in the July and October hearing while he had said in the Section 11 interview that his village was in the Rhid Albridi region. The Tribunal member then states:

"By reason of the matters set out in paras a) to e) above and because of the contradictory answers I have no doubt that the applicant is not from Tiwal. If he were from Tiwal and was aware of the attack in December 2005 and was present in Tiwal during the attack in May 2004 the incidents should not have led him to giving contradictory answers. I have no doubt that the applicant claims he is from Darfur to enhance his claim of refugee status. Possessing knowledge of an attack in a particular area in Darfur does not automatically mean that a person is from that area. Such information is in the public domain."

19. Having had the opportunity of looking in more detail at the note of the hearing on 26th October in conjunction with the written material furnished by the applicant in the form of his answers to the question in the refugee status questionnaire together with the replies given at the Section 11 interview, the court is now satisfied that the Tribunal member had an ample basis for the findings of lack of credibility in the findings at paragraphs a) – e) at Section 6 independently of any testimony given by the applicant on 25th July, 2006.

20. The note of the second hearing indicated that the applicant's account of the attack on 18th December, 2005, was gone into again in detail on that occasion. He described how he was 15 minutes walking distance from the village when the attack took place at 4:00 am and his staying the night in a forest. He described being with three or four men who worked for him and it was put to him that at question 30 of the Section 11 interview he said that there had been seven men.

21. He was asked about the population of Tiwal and how many tribes lived there. He is recorded as giving the names of four tribes and as saying that the Al Berti tribe were in the majority. It was put to him that the population was 7,000 according to the country of origin information and that there was no mention of his Al Berti tribe living in the village.

22. The country of origin information on the attack on 18th December, 2005, was put to him indicating that six people had been killed and not the 17 he had said. He is then recorded as saying he was unsure how many had been killed. The note also records the questions about the attack in May, 2004 and his saying that he had buried four people personally and attended the burial of a fifth victim.

23. The note further records the applicant being questioned about his failure to produce a national identity card he later said he possessed when he was first asked what documentation he had.

24. The handwritten note, while difficult to read in many places and obviously incomplete, confirms that the summary of the evidence given in response to the questions of the presiding officer at para. 13 of the Contested Decision reflects accurately the exchanges at the second hearing. It is, therefore, clear that the matters relied upon as the basis for the finding which follows paragraph 6 e) are derived in substance from that evidence on 26th October, 2006, and are not dependent on contradictions with any evidence given on 25th July, 2006. It is

true that at para. e) reference is made to his stating in July that he is from the town of Abu Ajura and in October that his town was in the county of Abu Ajura. However, the point being made by the Tribunal member in para. 3 is directed at the divergence between his answers at questions 22 and 23 of the Section 11 interview as against his replies to the presiding officer at the October hearing (see paras. 10 a) and 10 b) of the decision). The fact that impressed the Tribunal member was that, when confronted with this discrepancy, the applicant seeks to attribute his mistake to having been tired and distressed at the interview or to the interpreter (that is, the interpreter at the interview) misinterpreting the question.

25. In these circumstances the court is satisfied that it would be unjustified to interfere with the appraisal made of such testimony by the Tribunal member.

26. Furthermore, the court is equally satisfied that the findings made at paras. g) and h) in relation to the evidence about the national identity card is soundly based on the testimony given at the October hearing as indicated in the handwritten note. Again, the contradiction and the implausibility identified by the Tribunal member has its origins not in the evidence of 25th July but in the contents of the questionnaire and the Section 11 interview.

27. Finally, the court is satisfied that the finding at para. i) in relation to the applicant's assertion that even in Khartoum he would not be safe although his brother lives there and had visited their father in prison, could not be said to be tainted or unsound. The source of the evidence is a reply to the presenting officer at the October hearing (see para. 6 d) of the decision). The point being made by the Tribunal member is that the claim of a general persecution of that tribe was contradicted by country of origin information which indicated that relocation outside Darfur was possible.

28. As already indicated, it is not for this Court to decide credibility. It is concerned only with the lawfulness of the process by which the administrative decision maker reaches a conclusion on that issue. When granting leave in this case the court had some concern that the admittedly unsatisfactory nature of 25th July hearing combined with the number of apparent references to the evidence on that occasion in the Contested Decision could give rise to the possibility of some deficiency in the process in this case. Having now heard the issue argued in detail and having had the opportunity of examining the material findings of the decision in the light of the four different sources of testimony, (the questionnaire, the Section 11 interview, and the two hearings), the court finds the conclusion on credibility by the Tribunal member is sufficiently well founded in evidence independent of the hearing on 25th July, 2006, such that it could not be interfered with.

29. The application will therefore be refused.