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Neutral Citation Number: [2009] IEHC 353

THE HIGH COURT

2007 648 JR

BETWEEN/

I. R.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND

THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 24th day of July, 2009.

1. In most forms of adversarial dispute the assessment of the credibility of oral testimony is one of the most difficult challenges faced by the decision-maker. The difficulty is particularly acute in asylum cases because, almost by definition, a

genuine refugee will be someone who has fled home in circumstances of stress, urgency and even terror and will have arrived in a place which is wholly strange to them; whose language they do not speak and whose culture may be incomprehensible. Inevitably, many will have fled without belongings or documentation from areas in a state of anarchy or from the regimes responsible for their persecution so that obtaining any administrative evidence of their status and even identity may be impractical, if not impossible.

2. In such cases the decision-makers at first instance have the unenviable task of deciding if an applicant can be believed by recourse to little more than an appraisal of the account given, the way in which it was given and the reaction of the applicant to sceptical questions, to the highlighting of possible discrepancies or to contradictory evidence from other sources. Recourse will also be had in appropriate cases to what is called "country of origin information" but in most cases this will be of use only in ascertaining whether the social, political and other conditions in the country of origin are such that the events recounted or the mistreatment claimed to have been suffered, may or may not have taken place.

3. It is because in such cases the judgment of the primary decision-maker must frequently depend on the personal appraisal of an applicant, that it is not the function of the High Court in judicial review to reassess credibility and to substitute its own view for that of the decision-maker. Its role is confined when a finding of lack of credibility is attacked, to ensuring that the process by which that conclusion has been reached is legally sound and not vitiated by any material error of law.

4. While the problems inherent in the lawful assessment of testimony and other evidence going to credibility arise in a variety of forms of litigation and in other areas of judicial review, the guiding principles of the law have received particular attention in the case law relating to asylum in this jurisdiction and elsewhere in recent years and are possibly so well known to practitioners in the field as to have little need of resumé by this Court at this stage.

5. The background to that case law and the starting point for the decision-makers is, of course, the statutory provisions and guidelines relating to the process which they are required to follow in assessing claims to refugee status and to subsidiary protection. Both the Commissioner and the Tribunal in this jurisdiction are required by s. 11B of the Refugee Act 1996 to have regard to the thirteen particular matters listed at paras. (a) to (m) of that section when assessing credibility. For the most part these are factors or indicators which any experienced adjudicator will have in mind as a matter of common sense such as the truth of the explanation given as to how an applicant travelled to the State; why asylum was not sought in safe countries traversed en route and the use of forged documents for the making of false representations.

6. That mandatory check list is supplemented by the more pedagogic requirements of regulation 5 of the European Communities (Eligibility for Protection) Regulations 2006 which both prescribe matters to be taken into account in assessing facts and circumstances and, in subs. (2) and (3) give guidance as to the evaluation of persecution or serious harm already suffered and as to the circumstances in which aspects of statements unsupported by documentary or other evidence will not require confirmation.

7. Furthermore, authoritative guidance as to the approach to be taken in evaluating claims, in handling the burden of proof and according the benefit of doubt to an applicant is given in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1992) (see in particular the section

"Establishing the Facts" at paras. 195-205).

8. The present case is one in which the decision of the Refugee Appeals Tribunal of 17th April, 2007 now sought to be quashed, turns entirely upon the credibility of the applicant's account of his personal history and raises a number of the broad issues which are frequently encountered:

> (i) how is this decision-maker to strike a correct balance when required to weigh evidence in different forms and of different quality:
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> (ii) if the decision-maker doubts the plausibility of an account given in personal testimony what duty, if any, is there to consider and assess the probative value and effect of documentary evidence or other secondary information which appears to be supportive of the doubted testimony: and
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> (iii) where the decision-maker rejects as incredible the personal testimony of an applicant what is the extent of the obligation, if any, to state the reasons for the rejection or discounting of other inconsistent documentary evidence or secondary information?

9. Having regard to the fact that much of the relevant case law has been brought to the attention of the Court for consideration in the written submissions and oral argument in this case, it may be useful to attempt, so far as is relevant to the present issues and without being exhaustive, to summarise some of the guidelines which emerge from the case law relating to the process of assessment of credibility in these cases. That case law includes, for example, the following:

10. Memishi v. RAT (Unreported, Peart J., 25/6/03)

Kramarenko v. RAT [2004] 2 I.L.R.M. 450

Traore v. RAT (Unreported, Finlay Geoghegan J., 14/5/04)

Da Silviera v. RAT (Unreported, Peart J., 9/7/04)

Sango v. MJELR [2005] IEHC 395

Imafu v. MJELR [2005] IEHC 182 (pre-leave Clarke J.)

Imafu v. MJELR [2005] IEHC 416 (post-leave Peart J.)

Imoh v. RAT [2007] IEHC 220 (Clarke J.)

Banzuzi v. RAT [2007] IEHC 2 (Feeney J.)

Kikumbi v. MJELR [2007] IEHC 11 (Herbert J.)

E. v. RAT [2008] IEHC 339 (Hedigan J.)

N.K. v. RAT [2004] IEHC 240 (Finlay Geoghegan J.)

V.Z. v. MJELR [2002] 2 I.R.

K. v. MJELR (Unreported, Gilligan J., 19/4/07)

Simo v. RAT (Unreported, Edwards J., 4/7/07)

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Zarandy v. SSHD [2002] EWCA 153

R. v. Immigration Appeals Tribunal ex parte Sardar Ahmed [1999] I.N.L.R. 7

11. So far as relevant to the issues dealt with in this judgment it seems to the Court that the following principles might be said to emerge from that case law as a guide to the manner in which evidence going to credibility ought to be treated and the review of conclusions on credibility to be carried out:-

> 1) The determination as to whether a claim to a well founded fear of persecution is credible falls to be made under the Refugee Act 1996 by the administrative decision-maker and not by the Court. The High Court on judicial review must not succumb to the temptation or fall into the trap of substituting its own view for that of the primary decision-makers.
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> 2) On judicial review the function and jurisdiction of the High Court is confined to ensuring that the process by which the determination is made is legally sound and is not vitiated by any material error of law, infringement of any applicable statutory provision or of any principle of natural or constitutional justice.
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> 3) There are two facets to the issue of credibility, one subjective and the other objective. An applicant must first show that he or she has a genuine fear of persecution for a Convention reason. The second element involves assessing whether that subjective fear is objectively justified or reasonable and thus well founded.
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> 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.
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> 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.
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> 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.
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> 7) A mistake as to one or even more facts will not necessarily vitiate a conclusion as to lack of credibility provided the conclusion is tenably sustained by other correct facts. Nevertheless, an adverse finding based on a single fact will not necessarily justify a denial of credibility generally to the claim.

8) When subjected to judicial review, a decision on credibility must be read as a whole and the Court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in disregard of the cumulative impression made upon the decision-maker especially where the conclusion takes particular account of the demeanour and reaction of an applicant when testifying in person.

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.

10) Nevertheless, there is no general obligation in all cases to refer in a decision on credibility to every item of evidence and to every argument advanced, provided the reasons stated enable the applicant as addressee, and the Court in exercise of its judicial review function, to understand the substantive basis for the conclusion on credibility and the process of analysis or evaluation by which it has been reached.

12. The applicant in the present case is from Belarus. He arrived in the State on 8th March, 2006 with his girlfriend and immediately claimed asylum upon the ground that he feared persecution for his political opinion and political activities as a member of the Belarus Popular Front (BPF), opposition party, if returned to that country. On 12th March, 2006 he completed the asylum application questionnaire. At question 20, he listed a series of documents (referred to in more detail below) as available, or to be made available when received from his parents by post.

13. In the questionnaire and later when interviewed under Section 11 of the Refugee Act 1996 on 24th April 2006, the applicant detailed the events which had led to his flight from Belarus including the following:

a) He had joined the BPF in November, 2001 and had been active in its activities thereafter;

b) He took part in a rally in Minsk on 12th March, 2003 at which he was beaten up by the police and sustained an open fracture to his left leg;

c) He took part in another rally in Bereza on 15th March, 2005 at which he was arrested, detained, charged with offences under the Code of Administrative Offences of having and distributing anti political, unregistered posters and leaflets and he was subsequently convicted, fined, and sentenced to a term of 15 days imprisonment.

d) After another rally in Molodechno in March 2005, he was sentenced to imprisonment for six months;

e) When in prison, he claims he was subjected to severe violence and beatings by prison staff;

f) On release he lived with his girlfriend with whom he attended a rally in Minsk on 16th January, 2006. His girlfriend then wrote a newspaper

article which was published the following day for which he says he took the photos. As a result, her family house was raided and searched a few days later;

g) They both then went into hiding until they left for Ireland.

14. In a Section 13 report of 18th March, 2006 the Refugee Applications Commissioner recommended that the applicant be not declared a refugee essentially upon the ground that his account of having suffered persecution in Belarus lacked credibility. That assessment was made on the basis of the applicant's apparent lack of knowledge when questioned about the BPF and its leadership. The report referred to the documents produced by the applicant as listed on the ASY 1 form and in the questionnaire but said "The authenticity of the documents submitted cannot be verified or refuted".

15. An appeal was then taken against the report and recommendation. Included amongst the grounds of appeal were specific submissions as to the Commissioner's failure to consider a medical report put in by the applicant, the newspaper article written by the girlfriend which had been produced, and the impugning of the applicant's credibility by reference to the Belarussian court documents. By letter dated 3rd October, 2006 the applicant submitted to the Tribunal a medico-legal report of 14th September, 2006 on an examination of the applicant by Doctors Good and O'Sullivan at the Centre for the Care for Survivors of Torture in Dublin. The appeal decision of the Tribunal is dated 17th April 2007, ("the Contested Decision").

16. By order of 10th February 2009, Charleton J. granted leave to the applicant to bring the present application for, inter alia, an order of certiorari to quash that decision. He also extended the time to the extent required to enable the application to be entertained. Leave was granted on the basis of a number of grounds which can be summarised as identifying the following errors of law on the part of the Tribunal:

a) A failure to adequately consider the medical reports submitted including the above medical legal report of 14th September 2006:

b) A failure to consider and to make an assessment as regards credibility in respect of a body of specific documentation submitted which supported and corroborated his account of his mistreatment and of the events described in Belarus:

c) The failure to assess the current and future risk to the applicant of persecution on return to Belarus as a failed asylum seeker and a person who had breached the draconian and repressive laws of Belarus.

17. The Contested Decision at section 3 first summarises briefly the applicant's claim by referring to his evidence as to:

i) his part in the protest march in Minsk in March 2003 and his being assaulted by a policeman and subsequent hospitalisation:

ii) His part in the rally in Bereza in April 2004, and the sentence of six months (sic) imprisonment:

iii) His involvement in the rally in Molodechno in March, 2005 and the

sentence to six months imprisonment: and

iv) The publication of the newspaper article by his girlfriend and the subsequent raid on the girlfriend's home.

18. The claim is then analysed at section 6 of the Contested Decision. The Tribunal member first refers to the fact that the applicant claimed to have been a BPF member since 2001 and to have been involved in its rally and pamphlet activities and says, "One would assume that this applicant should have a basic knowledge of the Belarus Popular Front". The decision then quotes at length from paragraphs 195, 196, 203 and 204 of the UNHCR Handbook on the assessment of credibility. At page 15 of the decision the Tribunal member then refers to the applicant's claim to have been in prison for six months for his activities and observes, "One would expect somebody of such political commitment to have fundamental knowledge of the party to which they claim to be a member of". The Tribunal member finds that the applicant lacked a basic knowledge of the BPF and gives three examples of discrepancies in this regard which are said to arise from his answers at interview. First, the Tribunal member cites a passage from an article in "Wikipedia", (which the Court understands to be a form of continually evolving encyclopaedia maintained on an internet site,) describing the role and political history of Zianon Pazniak, a prominent Belarus politician and founder of the BPF party who is described as having fled from Belarus in 1996 to avoid being killed by Alexander Lukashenko, the president of Belarus.

19. The Tribunal member finds that when questioned about Mr. Pazniak the applicant gave wrong or inaccurate answers. Secondly, he was also questioned about elections in Belarus between 2001 and 2006 but in his replies omitted any reference to parliamentary elections held on 17th October, 2004. Thirdly, he was questioned about what the Tribunal member says was a "well publicised split" in the BPF which took place in 1999. The applicant said it took place in 1994.

20. Thus, it is on the Tribunal member's appraisal of the applicant's lack of basic knowledge of the history, leadership, and activities of the party in which he claims to have been a member and for which he went to jail, that the negative finding on credibility is reached.

21. If, as in other cases, the applicant's claim turned entirely on his personal testimony, it would be difficult to persuade the Court to interfere with that assessment. The applicant has been interviewed by the Commissioner and had an oral hearing before the Tribunal member. Both decision-makers have seen and heard him and concluded that he lacks credibility. The observations made by the Tribunal member are based on questions put to him which arise directly and logically out of the applicant's own account. On that basis, it could not be said that it was perverse or irrational for the Tribunal member to consider that a better knowledge of the BPF could be expected from someone with the applicant's level of education who claims to have had the involvement in that party which he described.

22. So far as credibility is concerned, counsel for the respondent also points out that there was a change in the applicant's evidence as to his level of involvement when confronted with this lack of knowledge. He then said he was only active in it at weekends. But even if it could be argued that the Tribunal member was demanding too much in that regard from somebody with the applicant's level of involvement, that is a matter of judgment for the Tribunal member and to say the decision should be quashed for that reason is not to point to any necessary error of law but to invite the Court to substitute a different view.

23. However, the Court considers that there is a significant and material problem with the Contested Decision because this is not a case in which the applicant relied entirely upon his own personal testimony and on its credibility. This case is somewhat unusual in that, as already mentioned, the applicant was, from the outset, in a position to produce and submit to the decision-makers for examination, a number of documents which, at least on their face, appear to be directly related to specific facts and events recounted by the applicant and which form the basis of his claim to have suffered particular mistreatment on specific dates in given places.

24. As indicated, at least some of these items were referred to and listed in the original application and at question 2 on pages 3, 3A and 4 of the Section 11 interview. Copies with, in most instances, translations made in Dublin, are exhibited at Exhibit IR3 of the applicant's grounding affidavit in the present application and include the following items:

- The applicant's military service book;
- his birth certificate;
- an extract from his Belarus passport;
- a police report from 26th April 2004;
- a court decision of 5th May 2004;
- a court verdict of 26th March 2005;
- a police summons for 21st March 2005;
- a handwritten letter said to be from the applicant's cell mate in the Belarus prison;
- the newspaper article said to have been written by the applicant's girlfriend with his photographs;
- a sample of a "wanted" poster or leaflet said to have been issued by the Belarus authorities naming the applicant and one other individual.

25. The Court considers that what is crucial about this material so far as concerns the legality of the process by which the conclusion on credibility in the Contested Decision was reached, is that none of it is referred to anywhere in that decision except insofar as it might be said to have been included in the phrase "The Tribunal has considered all the relevant documentation…" which appears in the Conclusion at section 7. In view of the potential significance of that evidence and of the fact that Exhibit IR3 contains only photocopies the Court sought and was given by the parties, confirmation that the documents in question when produced by the applicant were, or at least appeared to be, originals rather than photocopies and that as such they had been given to the Commissioner and then, in accordance with section 16 (5) of the 1996 Act, transferred to the Tribunal. At the Court's request the documentation was brought in to Court so that the Court might see the condition and appearance of the documents as they had been available to the Tribunal member.

26. It is true, of course, as counsel for the respondents submitted, that the mere existence and submission of such documents does not necessarily render untenable

a judgment as to the lack of credibility of the oral testimony of the applicant. Indeed, counsel pointed out that even on a cursory examination of the translations of the court documents there were discrepancies which might put their authenticity in question. Different amounts appear to be given for the same fine and the Bereza court verdict of 15th May, 2004 refers to the applicant having no previous convictions and yet a few lines later it refers to a previous conviction as an aggravating factor in the sentence.

27. Indeed, it might well be that on closer scrutiny, some or all of these documents might be shown to be false and even to have been fabricated for the very purpose of the asylum application. However, the girlfriend's article, for example, looks superficially to be in an original newspaper surrounded by other typical items, advertisements and so on, but it could conceivably be shown perhaps that the names of the author and the photographer in the byline are names the girlfriend and the applicant have adopted in order to claim asylum. Thus, it may all be shown to be an elaborate contrivance and fraud.

28. Nevertheless, unless and until such issues are addressed by the appropriate decision-maker, from the point of view of the validity of the Contested Decision as it now exists, the fundamental point is that this was, at least on its face, original, contemporaneous documentary evidence of potentially significant probative weight in corroborating key facts and events. If it is authentic, it may prove that the applicant has suffered persecution for his political activities. If that is so, then the judgmental assessment that is made of the quality of his answers to the questions about the BPF may possibly assume an entirely different weight when all of the evidence, both testimony and documentary, is objectively weighed in the balance.

29. The Court accepts that there may well be cases in which an applicant relies partly on oral assertions, partly on documents, and partly on country of origin information and in which the decision-maker has sound reason to conclude that the oral testimony is so fundamentally incredible that it is unnecessary to consider whether the documents are authentic and whether the conditions in the country of origin are such that the claim could be plausible. The decision-maker in such a case is finding that what the applicant asserts simply did not happen to him. In the present case, however, the situation is materially different because the adverse finding of credibility is effectively based on the Tribunal member's premise as to the level of knowledge to be expected and the apparent lack of that knowledge, while the documents have the potential to establish that specific events did happen and happened to the applicant. It is this which gives rise to the need for the whole of the evidence to be evaluated and the analysis to be explained.

30. In the Court's judgment, the process employed by the Tribunal member in reaching the negative credibility conclusion as disclosed in the Contested Decision was, therefore, fundamentally flawed because the documentary evidence which had been expressly relied upon before the Commissioner and in the notice of appeal and which was on its face relevant to the events on which credibility depended, was ignored, not considered, and not mentioned in the Contested Decision. It is correct, as counsel for the respondents submitted and as is confirmed by the case law summarised at the beginning of this judgment, that a decision-maker is not obliged to mention every argument or deal with every piece of evidence in an appeal decision at least so long as the basis upon which the lack of credibility has been found can be ascertained from the reasons given. However, in the view of the Court, that proposition is valid only when the other arguments and additional evidence are ancillary to the matters upon which the substantive finding is based and could not by themselves have rendered the conclusion unsound or untenable if shown to be

correct or proven.

31. That cannot be said to be the case here. When the Tribunal member says in the decision, "He claims to have spent six months in prison on account of his political activities," and then finds that the applicant lacks the political knowledge one would expect from someone with that commitment, the Tribunal member is clearly indicating that he believes the applicant was never in prison or, at least, never imprisoned for the political offences he claimed. But if the documents are authentic and are correctly translated, the applicant was indeed in prison and the premise on which the conclusion has been made is therefore no longer tenable. The process is, therefore, flawed and the analysis incomplete.

32. Accordingly, the Court finds that the Contested Decision in this case is sufficiently flawed to warrant its being quashed. The Tribunal member has erred in law in failing to consider all of the relevant evidence on credibility and adequately and objectively to weigh it in the balance in reaching a conclusion on that issue. Where, as here, documentary evidence of manifest relevance and of potential probative force is adduced and relied upon, the Tribunal member is under a duty in law to consider it and if it is discounted or rejected as unauthentic or unreliable or otherwise lacking probative value, there is a duty to state the reason for that finding.

33. As the Contested Decision will therefore be quashed it is unnecessary to go in detail into the other grounds raised but for the sake of completeness, and to avoid any uncertainty in the event of reconsideration of the appeal by the Tribunal, the Court will confirm that the Contested Decision was also vitiated by the failure to consider and rule upon the ground of appeal based on the claim to a fear of persecution as a returned asylum seeker. It may well be found upon examination that this added ground is without merit. It ought, however, to be ruled upon because it is not a ground which falls by reason only of the fact that the personal testimony as to the reasons for flight from Belarus is disbelieved. Provided there is evidence that such a policy of discriminatory mistreatment of returning asylum seekers exists in that country the ground may require consideration independently of the applicant's reason for fleeing Belarus originally. But that, of course, is a matter for the administrative decision- maker.

34. The Court will, therefore, grant the order of certiorari sought to quash the Contested Decision.