Neutral Citation Number: [2011] IEHC 147

THE HIGH COURT

JUDICIAL REVIEW

2008 648 JR

BETWEEN

M. A. M. A.

APPLICANT

AND

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

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Cooke delivered the 8th day of April, 2011

1. The ground for which leave was granted in this case raises an issue which can be put in the form of a question as follows:

> "Where past facts and events which form the basis of an application for refugee status have been rejected in whole or in part as lacking credibility, in what circumstances and on what basis is it still incumbent upon the administrative decision-maker to ask 'what if I am wrong?' and to assess whether there is nevertheless a prospective risk of persecution of the applicant if returned to the country of origin?"

2. The leave ground as defined in the order of the Court of the 19th March, 2010, (Clark J.) was this:-

> "Having found that the applicant's account of past persecution was not credible the Tribunal member erred in law in failing to assess any future risk to the applicant if returned to Sudan."

3. The applicant arrived in the State in March 2006 and claimed to be a national of Sudan and a member of the Berti tribe from northern Darfur. His claim for asylum was based on his being a Muslim and of Berti tribal ethnicity who had faced persecution at the hands of the Janjaweed militia in Darfur and attacks from the Sudanese army. He described how in February 2004, his village had been attacked, his house had been destroyed and two brothers killed. His parents, however, managed to escape. The family later went to Gula where the applicant got work driving a lorry. On the 14th December, 2005, his lorry was attacked by men in "land cruisers". He and three others were arrested by the Sudanese army; he was tied and blindfolded and imprisoned for several weeks during which he was interrogated. He then described how in early February 2006 he was taken with others to be executed but the truck in which they were travelling got

stuck in sand, an argument broke out amongst his captors and the applicant managed to escape although handcuffed. He met a man who helped him out of the hand-cuffs and he then managed to make contact with an uncle who came to his assistance and later arranged for him to leave Sudan and come by ship to Ireland.

4. In the s. 13 report, the Commissioner rejected this story in its entirety for lack of credibility. In a detailed analysis of the account given the Authorised Officer made the following points:-

> - The applicant had no identification documents, no passport and no evidence in relation to his travel to Ireland;
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> - Country of origin information confirmed the attack on the town on the 27th February, 2004, but it was not credible that the applicant's parents were not killed in the bombing raid when the two sons nearby were killed;
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> - He gave conflicting accounts of this attack saying that the land cruisers came first and burned the market, but later that the planes came first;
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> - In spite of finding himself in three life threatening situations in Darfur he was able to escape unharmed on each occasion;
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> - In the description of the attack on the lorry convoy it was not credible that the Sudanese army would shoot some of the convoy but take the rest prisoners;
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> - Neither was it credible that they would blindfold him while driving him to prison, an allegation which relieved him of the need to describe where he was imprisoned;
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> - The description of being driven to execution and of the 30 minute argument between the captors when they got bogged down was implausible as was the claim that he got out of the truck and ran away when he heard shooting.
>
> - The applicant was clearly evasive and vague in his account of his journey to Ireland and could not identify either of the ships on which he travelled.

5. In Part 6 of the appeal decision, the "Analysis of the Applicant's Claim", the Tribunal member too finds many of theses aspects of the claim to be incredible. The analysis records further questions on these issues put to the applicant during the oral hearing and finds that the responses remained unsatisfactory and implausible. In particular, the Tribunal member notes:-

> "The applicant's account of his imprisonment, in particular his claim of being kept in isolation for all of his imprisonment, is not in accord with the known facts of the prison situation that exists in Sudan. Prisons and detention centres are overcrowded, are unsanitary and the applicant's account of his alleged period in detention runs contrary to the known facts of the prisons that exist in Sudan. The applicant's account of his imprisonment and the conditions surrounding the same is seriously suspect."

6. The Tribunal member thus fully rejects as incredible the facts and events given by the applicant as the basis of his claim to have suffered past persecution before having to flee Sudan and the Darfur area from which he claimed to come. That, it is argued, is the full extent of the analysis made by the Tribunal member and the basis upon which the

conclusion is reached that the s. 13 report and its negative recommendation should be affirmed. It is on that basis that the ground for which leave has been granted is directed at the argument that there was an obligation on the Tribunal member in those circumstances to go further and inquire as to whether, nevertheless, the applicant had a prospective risk of such persecution should he be returned to Sudan. It is argued that this is an essential step in the proper examination of an asylum claim and that even where past persecution has not been established, the decision maker must be satisfied that there is no well-founded basis for a fear of future persecution upon repatriation before the claim is rejected.

7. Counsel for the applicant points out that while the Tribunal member may have wholly discounted the story of a past persecution, there is no finding in the decision nor in the s. 13 Report that the applicant is not of the Berti tribe and not from Darfur and Sudan. The Tribunal member acknowledges at the very outset of the analysis that "the situation in Sudan is indeed dire" and that "the ongoing situation in and around Darfur is a cause of great concern in the international community" because "government forces have been complicit with Janjaweed militia in carrying out a war of attrition on native Africans". This, it is argued, made it imperative that the appeal decision should address the issue as to a forward looking risk of persecution should the applicant be returned to Sudan even if it is to Khartoum rather than Darfur.

8. On behalf of the respondents, on the other hand, it is submitted that the decision is not devoid of consideration of that issue. Counsel points to the concluding paragraph of the analysis where reference is made to the English case of *Secretary of State for the Home Department v A.H. (Sudan) and Others* [2007] U.K.H.L. 49. The Tribunal member notes that the House of Lords in that case ruled that it was permissible to deport Darfuri asylum seekers to Khartoum thereby overturning an earlier judgment in the Court of Appeal to the effect that as rural dwellers, Darfuris would face unduly harsh conditions in refugee camps in the capital. The House of Lords held that the Court of Appeal had not applied the correct test and that it was reasonable to relocate Darfuris to a safe part of Sudan, even if this involved placing them in harsh conditions there.

9. The Court would make one observation on this reference to that particular judgment in the appeal decision. It is, of course, entirely appropriate having regard to the common basis which the asylum laws and procedures of different countries have in the provisions of the Geneva Convention of 1951 that the Courts should have regard to and rely upon relevant judgments given in different jurisdictions. That is particularly the case for the national courts of the Member States of the European Union where both the substantive and procedural provisions for the asylum process are informed by the aims of the Common European Asylum System and circumscribed by the common provisions of the Council Directives 2004/83/EC and 2005/85/EC on minimum standards for qualification and for procedures in refugee matters. In the view of this Court, however, it is prudent that such reliance be confined to questions of interpretation of law. Reports of cases in other jurisdictions are not, in the view of this Court, an acceptable source of information as to factual conditions in a country of origin. For one thing, the facts upon which a decided case which has reached a law report was based will invariably predate the circumstances under consideration in the case in which the decided case is sought to be relied upon. A decision-maker must be alive to the fact that in regions from which refugees may have fled, conditions are likely to be volatile and regimes may change and re-change within relatively short periods of time. Thus, it may be unwise to suppose that because a particular location was regarded in one case as being safe for repatriation in, say, 2004, that it will necessarily have remained safe two years later. The Court does not regard, therefore, the reliance placed upon this judgment of the House of Lords as being an adequate manner in which to address the issue as to the prospective risk to an applicant in a case of this kind. Thus, the issue remains whether, in the particular circumstances of this case there was a further obligation upon the Tribunal member to

address the prospective risk having regard to the basis upon which past persecution had been rejected as incredible.

10. In addressing this issue as to the correct standard and approach to be adopted by a decision-maker in assessing the risk of future persecution when a claim based on past persecution has been rejected as lacking credibility, counsel for the applicant relied upon a number of cases including, notably, the judgment of the House of Lords in the United Kingdom in*Karanakaran v. Secretary of State for the Home Department* [2000] 3 All E.R. 449. The judgment of Brooke L.J. in this case undertakes a wide ranging consideration of the case law on this issue, not only in the United Kingdom Courts, but in the Courts of Australia and Canada.

11. That case concerned an appeal from a decision of the Immigration Tribunal which had dismissed an earlier appeal against removal directions made by the Secretary of State, following a refusal of the applicant's claim for asylum based on his Tamil ethnicity and a fear of persecution at the hands of both Tamil Tiger rebels and government forces if repatriated to Sri Lanka. It is to be noted that the matter before the House of Lords thus related to a later stage of an asylum procedure as compared with the circumstances under consideration in the present case based upon the appeal decision of the Tribunal. In the *Karanakaran* case asylum had been refused and the applicant had been served with a notice refusing leave to enter the United Kingdom together with directions for his removal to Sri Lanka. Although not directly material to the legal issue as to the standard of proof to be applied to the risk of persecution, this distinction is worth noting because, of course, the determination of the appeal by the RAT is not, under the procedures of the Refugee Act 1996, and the Immigration Act 1999 the final occasion upon which the issue as to a prospective risk of persecution on repatriation may fall to be considered. If the claim for asylum is definitively rejected, the applicant will be afforded an opportunity of applying for subsidiary protection and will not in any event be deported until the Minister has considered the possible applicability of the prohibition of*refoulement* under s. 5 of the Act of 1996.

12. As indicated, the appeal under consideration in the House of Lords raised questions relating to what is variously described in asylum law as being the "internal flight alternative" or "internal relocation" or the "internal protection principle". Brooke L.J. introduces his review of the cases saying: "The issue that has arisen for decision in this case relates to the method of establishing whether it would be unduly harsh to expect an asylum-seeker to live in a different part of his own country". He describes how the English Courts had recognised that different techniques were required in asylum cases when the decision maker has to make judgments about future outcomes. The existing case law had not, he considered, resolved the question "as to the standard of proof a decision maker should apply when considering evidence of past or present facts before he or she goes on to make the necessary assessment of the future". Having referred to a decision of the Immigration Appeal Tribunal in the case *of Kaja v Secretary of State for the Home Department* [1995] Imm AR 1and the questions raised as to the correctness of that decision in the case of *Horvath* [1999] I.N.L.R. 7, Brooke L.J. explains how the appeal in*Karanakaran* was re-listed for further argument with a view to deciding whether *Kaja* had been correctly decided and whether it was possible to maintain a regime in which there was one standard for proof in relation to historic or existing facts for the purposes of the first part of the definition of "refugee" in the Convention and a different standard for proof of facts when considering the issues of protection and internal relocation.

13. Having reviewed a wide range of case law, Brooke L.J. adopts with approval a set of principles defined by Sackville J. in the case of *Rajalingam* [1999] F.C.A. 719 in the Australian Federal Court. He quotes Sackville J. as commenting upon observations made in an earlier Australian case as follows:-

". . . Drummond J's observations are helpful because they identify a second class of case in which, although the decision-maker finds that alleged past events have not occurred, the chance that they might have occurred could provide a rational foundation for finding that the applicant has a well-founded fear of persecution."

14. Brooke L.J. then quotes Sackville J.'s six principles of which those relevant for present purposes are as follows:-

"(1) There may be circumstances in which a decision maker must take into account the possibility that alleged past events occurred even though it finds that these events probably did not occur. The reason for this is that the ultimate question is whether the applicant has a real substantial basis for his fear of future persecution. The decision maker must not foreclose reasonable speculation about the chances of the future hypothetical event occurring.

(2) Although the civil standard of proof is not irrelevant to the fact-finding process, the decision maker cannot simply apply that standard to all fact finding. It frequently has to make its assessment on the basis of fragmented, incomplete and confused information. It has to assess the plausibility of accounts given by people who may be understandably bewildered, frightened and, perhaps, desperate, and who often do not understand either the process or the language spoken by the decision maker/investigator. Even applicants with a genuine fear of persecution may not present as models of consistency or transparent veracity.

(3) . . .

(4) Although the "What if I am wrong?" terminology has gained currency, it is more accurate to see this requirement as simply an aspect of the obligation to apply correctly the principles for determining whether an applicant has a "well founded fear of being persecuted" for a Convention reason.

(5) . . .

(6) If a fair reading of the decision maker's reasons as a whole shows that it "had no real doubt" that claimed events did not occur then there is no warrant for holding that it should have considered the possibility that its findings were wrong."

15. Brooke L.J. thus approves the approach reflected in those principles and finds the approach of the majority of the Immigration Appeal Tribunal in *Kaja* to be the correct approach to be adopted at both stages of the assessment process. He also decides that insofar as the dicta in *Horvath* suggests that the approach favoured in civil proceedings should be adopted in relation to protection issues, that case should not be followed. He then explains that for the decision-maker this approach means: "…that it must not exclude any matters from its consideration when it is assessing the future unless it feels that it can safely discard them because it has no real doubt that they did not in fact occur (or, indeed, that they are not occurring at present)". He adds: "…when considering whether there is a serious possibility of persecution for a Convention reason if an asylum seeker is returned, it would be quite wrong to exclude matters totally from consideration in the balancing process simply because the decision maker believes, on what may sometimes be somewhat fragile evidence, that they probably did not occur. Similarly, even if a decision maker finds that there is no serious possibility of persecution for a Convention reason in the part of the country to which the Secretary of State proposes to send an asylum seeker, it must not exclude relevant matters from its consideration

altogether when determining whether it would be unduly harsh to return the asylum seeker to that part, unless it considers that there is no serious possibility that those facts are as the asylum seeker contends".

16. The *Karanakaran* judgment has, of course, been considered on a number of occasions by the High Court in this jurisdiction and notably by Peart J. in his judgment of the 9th July, 2004, in *Da Silveira v. RAT* [2004] I.E.H.C. 436. In addressing the question as to the standard by which evidence of past persecution and possible future persecution must be judged by the Tribunal, Peart J. said:-

> "The task of the Tribunal is not simply to be satisfied that there is a well-founded fear of persecution arising from the past, but also that, owing to such well-founded fear for a Convention reason (the applicant) is outside the country of nationality, and is unable or owing to such fear is unwilling to avail himself of the protection of that country. In other words, that if returned to that country he would be likely to suffer persecution in the future. It is therefore not sufficient for the adjudicator to be satisfied or not as the case may be about particular facts and details relating to past persecution. A lack of credibility on the part of the applicant in relation to some, but not all, past events, cannot foreclose or obviate the necessity to consider whether, if returned, it is likely that the applicant would suffer Convention persecution."

17. This Court accepts as correct the approach to the standard of proof outlined in this case law. The sole fact that particular facts or events relied upon as evidence of past persecution have been disbelieved will not necessarily relieve the administrative decision-maker of the obligation to consider whether, nevertheless, there is a risk of future persecution of the type alleged in the event of repatriation. In practical terms, however, the precise impact of the finding of lack of credibility in that regard upon the evaluation of the risk of future persecution must necessarily depend upon the nature and extent of the findings which reject the credibility of the first stage. This is because the obligation to consider the risk of future persecution must have a basis in some elements of the applicant's story which can be accepted as possibly being true. The obligation to consider the need for "reasonable speculation" is not an invitation or pretext for gratuitous speculation: it must have some basis in, and connection to, the apparent circumstances of the applicant.

18. It must be borne in mind that in making an asylum claim there is a basic onus of establishing the fundamental elements of a claim which rests with the applicant even if the examination of the claim is strongly investigative in character on the part of the asylum authority and is to be carried out in cooperation with the applicant. Furthermore, one of the crucial elements in the definition of "refugee" as stated in s. 2 of the Act of 1996 based upon Article 1A of the Geneva Convention, is that the asylum seeker "is outside the country of his or her nationality" owing to a well founded fear of persecution for one of the Convention reasons. The assessment of the fear claimed thus involves identifying a country of origin. Accordingly, if the finding on credibility goes so far as to reject a claim that the asylum seeker has a particular nationality or ethnicity or that he or she comes from a particular region or place in which the source of the claimed persecution is said to exist, there may be no obligation upon the decision-maker to engage in "reasonable speculation" as to the risk of repatriation in the case. On the other hand, if the decision-maker concludes that the asylum seeker is opportunistically seeking to place himself in the context of verifiable events in a particular place but decides that while such events did occur, the asylum seeker was not involved in them, the risk of future persecution may still require to be examined if there are elements (the language spoken or obvious familiarity with the locality for example,) which establish a connection with that place. Thus, opportunistic lying about participation in events involving previous persecution will not necessarily foreclose or obviate the need to consider the risk of

future persecution provided there are some elements which furnish a basis for making that assessment.

19. The issue in the present case, accordingly, turns upon a consideration of the extent of the rejection of the applicant's story as incredible in the appeal decision. As already indicated above, there can be no doubt but that both the authorised officer of the Commissioner and the Tribunal member have squarely rejected all of the factual elements relating to the attacks, violence, interrogation and imprisonment claimed to have been suffered by the applicant as well as his version of his escape and travel to this country. Counsel for the applicant argues that there is no express finding however, in the appeal decision that the applicant is not from Sudan and not of the Berti tribe in Darfur. It is pointed out that he had handed in to the Tribunal a letter purporting to have been written by the chairman of the "Darfur Solidarity – Ireland" organisation confirming that the applicant is a native of Darfur and belongs to the Berti tribe. This is adverted to in the Tribunal decision which says that "a letter was handed in to the Tribunal from the Darfur Solidarity Community in Ireland to the effect that the applicant is a member of that organisation and is a native of Darfur, Sudan and that letter was issued upon the applicant's own request". The chairman in question was not apparently invited to give evidence to the Tribunal which might presumably, have substantiated the authenticity of the applicant's knowledge of and background in Darfur.

20. More importantly, perhaps, counsel for the applicant points to the extensive familiarity with the geography of North Darfur exhibited by the applicant during the s. 11 interview. The notes of that interview include a page upon which the applicant was apparently requested to draw a rough map of the area in north Darfur from which he came and it is submitted that when compared to an official map, it exhibits a familiarity on his part with the names of various towns and other places and of the approximate geographic relationships between them.

21. On behalf of the respondents however, it is contended that on its face, the appeal decision rejects the applicant's credibility in its entirety including his claims of nationality and ethnicity. Counsel points to the following passage in the decision:

> "The applicant has no evidence of his identity or of his country of origin. The applicant told the Tribunal that all his documentation was destroyed in the attack in 2004. The applicant has no travel documentation and the Tribunal does not know when or how the applicant actually arrived in Ireland. It is the core of the applicant's claim that as a result of his ethnicity he has suffered persecution in Sudan".

22. In the judgment of the Court this passage in the decision is insufficient to remove doubt as to the extent to which the Tribunal member intended to reject the credibility of the applicant's claim. In particular, the fact that the Tribunal member considered it appropriate to refer to the AH case because she was "mindful that every case has to be determined on its own facts" suggests she felt it relevant to seek support in the facts of that case for the proposition that it was safe to return a Darfuri asylum seeker to Khartoum. This implies that she was at least alive to the possibility that the applicant was Sudanese and might well be from Darfur.

23. Having regard to the arguable familiarity of the applicant with the geography of part of that region and the absence of any element suggesting where else the applicant might be from apart from Sudan, the Court is satisfied that this is an instance in which the obligation to consider the possible risk of future persecution on repatriation arose. The ground for which leave was granted must therefore be taken as made out.

24. It is therefore appropriate and necessary to quash the appeal decision but to the extent only that it failed to assess and determine that possibility of prospective risk of

persecution. No flaw is established in any other aspect of the decision or in the way in which the decision was reached. In a judgment delivered by this Court in the case of *U.S.I. v Minister for Justice and another* (Unreported, Cooke J., 7 April 2011,) the Court held that it is not always appropriate or necessary to remit a quashed decision to the Tribunal for full rehearing before a different Tribunal member and that under Order 84 r.26 (4) the court may add to a remittal order directions or recommendations as to how and by whom any remedial consideration of the appeal is to be carried out. As in that case, the decision here falls to be quashed not because of something it contains but for what is missing namely the consideration of the prospective risk.

25. For this reason the Court will order that the matter be remitted to the Tribunal with the Court's recommendation that, subject to her availability, it be further considered by the same member of the Tribunal so that this further aspect of the review of the examination of the asylum application can be completed by a supplementary decision. The only issue that remains to be determined is whether, having regard to the possibility that the applicant may be a member of the Berti ethnic group from northern Darfur, there is any basis in current country of origin information relating to conditions in that country for considering that he may face a real chance of future persecution if repatriated to Khartoum. The Tribunal member should consult such information, if necessary by means of a request to the Commissioner under s.16 (6) of the Act of 1996; furnish it to the applicant for observation, and then determine the issue in the light of the information and those observations and of any further country of origin information the applicant may furnish with his observations. Because the issue turns exclusively upon an assessment of the relevant conditions in Sudan and in Khartoum in particular, and as the applicant has been outside that country for five years, no reopening of the appeal hearing is necessary unless the Tribunal member considers it desirable. For the avoidance of doubt, the Court would add that if the same Tribunal member is no longer in office or otherwise unavailable, it is open to the Chairperson of the Tribunal to withdraw the appeal decision and assign the appeal for rehearing to another member.

26. There will accordingly be an order of the Court in these terms:

> i) The appeal decision of 3rd April 2008 of the first-named respondent is quashed to the extent only that it failed to make and contain a reasoned assessment of the prospective risk of future persecution of the applicant if repatriated to Sudan;
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> ii) The appeal is remitted to the Tribunal with the recommendation of the Court that it be further considered by the same Tribunal member by the adoption of a supplementary decision which remedies the above omission without obligation to reopen the oral hearing.