Neutral Citation Number: [2009] IEHC 527

THE HIGH COURT

JUDICIAL REVIEW

2007 1722 JR

BETWEEN

A.G.E.R.B.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

ATTORNEY GENERAL AND IRELAND

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Ms. Justice Dunne delivered on the 4th day of December, 2009

This is an application for leave to apply for judicial review in respect of the decision of the Refugee Appeals Tribunal (hereinafter referred to as the Tribunal). The relief sought is primarily an order to *certiorari* quashing the decision of the Tribunal made on the 28th November, 2007 affirming the recommendation of the Refugee Applications Commissioner and notified to the applicant on or after the 9th December, 2007. Further ancillary relief is sought. The decision of the Tribunal followed a hearing before the Refugee Applications Commissioner which resulted in a recommendation that the applicant should not be declared to be a refugee. This decision was communicated to the applicant by letter dated the 31st July, 2007. The applicant appealed that decision to the Tribunal and an oral hearing took place before the Tribunal as a result of which the decision was made which the applicant now seeks leave to challenge in these proceedings.

The applicant herein claims to have been born in the village of Kurunji in south Darfur and to have lived there for his entire life save for approximately six months prior to his fleeing Sudan. He was born on the 1st January, 1968. He is married and has three children. He is a member of what was described as a black African tribe, the Bergid. He stated that he and members of his family have suffered persecution as a result of his membership of the Bergid. He claimed that this persecution was carried out by the Janjaweed, a militia organisation which worked closely with the Sudanese government authorities. He stated that on the 13th April, 2006, while he was at a wedding in Baranq, some two hours away from his home village, the village of Kurunji was attacked. In the course of the attack, his mother was killed and a number of the houses in the village were

burned down. A further incident occurred on the 5th May, 2006, in which the village was again attacked. He stated that he was at the mosque when the attack occurred and he ran away. He has not returned to the village of Kurunji since. He does not know what became of his wife and children as they were not with him in the mosque when the attack occurred on the 5th May, 2006, and although he spent a number of weeks looking for them in surrounding villages he has not located them.

After he left Kurunji he went to Yoiyoi and then went to Domai and eventually he went to the village of Kogladi where his father in law resided. While he was there, his brother in law, a member of the Justice and Equality Movement (JEM) was killed. Some people came to the house, forced their way in and the applicant hid and then managed to escape. He then went to Sheiria village where he remained in the care of his uncle for some four months and six days. He stayed indoors in that place as he was afraid that government forces were looking for him. Arrangements were made for the applicant to leave Sudan. He left Sudan by ship on the 14th November, 2006, and arrived in Ireland on the 8th December, 2006. On arrival, he applied for asylum.

It is clear that the decision of the Tribunal was informed by a number of adverse findings of credibility in respect of the applicant herein. In para. 13 of the verifying affidavit of the applicant sworn herein on the 19th December, 2007, he set out his complaint as to the credibility findings by the Tribunal as follows:-

"I say that the adverse credibility finding in relation to the perceived lack of detail in my evidence. I had answered all questions put to me, and it was never stated to me that my evidence lacked detail. No regard was had to the great detail I had given at my interview. The finding that I had not sought my family after the Janjaweed attack on the 5th May, 2006, was inaccurate. It was clearly stated at para. 17 of my notice of appeal that I had searched for my family. The Tribunal made a finding relating to my military service without regard to my explanations and also my letter dated 20th December, 2006. Findings relating to my travel and lack of documents were made without regard to my explanations or without stating any reasons why my explanations were rejected. Findings about my lack of detailed knowledge about the number of UN camps in south Darfur were peripheral to my core claim. I say that the adverse credibility findings were relied upon in a central manner by the Tribunal, despite the fact that the Tribunal made no finding challenging my evidence that I am from Darfur, and indeed determined my appeal on the basis that I am from Darfur. The Tribunal failed to assess my exposure to persecution by reason of my ethnicity. I say that a campaign of genocide has been waged against persons from the Bergid tribe for some time. I further say that I had given evidence that my brother in law had been killed by government or government backed militias when they sought my father in law. My father in law was a member of the political group Justice and Equality Movement (JEM). All persons connected with JEM are killed by the government. I was lucky to escape with my life. I am advised by my legal representatives and believe that the Tribunal also had a duty to assess and determine this aspect of my evidence. No such assessment took place."

Based on the matters set out in the applicant's affidavit the oral and written submissions on behalf of the applicant summarised the adverse credibility findings as follows:-

1. The applicant's lack of knowledge of attacks in Umshagirah around March/April 2006;

2. The fact that the applicant "at no stage returned to his home village to find out about the fate of his family";

3. The applicant believed that the raiding of his in laws' house and which resulted in the killing of his brother in law followed from surveillance of the house. The Tribunal found that "the applicant's subjective belief in this regard is not supported by any objective facts" and also referred to "confusion as regards whether it was the applicant's brother or father in law who was killed";

4. In circumstances where the applicant "was never involved with any anti government movement, it seems unlikely that unknown men would have any motive to pursue the applicant";

5. The applicant's lack of knowledge of Sheiria "where he stayed with his uncle for some four months and sixteen days";

6. The applicant's lack of knowledge of the location of both displaced persons camps and Janjaweed camps, and also his failure to seek the protection of displaced persons camps;

7. The applicant's lack of ID or travel documents.

As can be seen from the above one of the matters referred to was the fact that the Tribunal referred to "confusion as regards whether it was the applicant's brother or father in law who was killed". It is indeed correct to say that there was confusion on that particular point and that this confusion was referred to by the Tribunal Member in the course of the decision of the Tribunal. However, the Tribunal went on almost immediately after that comment to state "the applicant was ultimately able to clarify for the benefit for the Tribunal that in actual fact it was his wife's brother hence his brother in law who was shot by person or persons unknown". So far as it was contended in the course of the hearing before me that there was an adverse credibility finding made against the applicant by reason of confusion as to who was killed, it is clear from the Tribunal's own decision that any confusion on that point was cleared up before the Tribunal and I can see no suggestion anywhere in the decision of the Tribunal that the confusion which undoubtedly existed and which was clarified resulted in any adverse credibility finding.

The decision of the Tribunal has been challenged and is claimed to be unlawful on a number of grounds which were summarised on behalf of the applicant as follows:-

(a) Arriving at adverse credibility findings without regard to the accurate evidence before the Tribunal;

(b) Failing to consider or weigh or make findings on relevant evidence; and

(c) Basing findings on conjecture and "or basing its decision on peripheral matters".

The final complaint made on behalf of the applicant was that the Tribunal had erred in foreclosing on speculation regarding the possibility of the applicant being exposed to future persecutory risk. It was pointed out that had the Tribunal carried out a forward looking test it may have resulted in the Tribunal setting aside the Commissioners decision.

I now propose to look at the issues raised on the behalf of the applicant in some detail. In passing, I note that, as is usual, the applicant herein completed a questionnaire. He was interviewed on two separate occasions in the office of the Refugee Applications Commissioner, the first occasion being the 6th February, 2007, and the second being the 11th June, 2007. Following the recommendation of the Refugee Applications Commissioner, a notice of appeal was lodged and ultimately a hearing took place before the Tribunal. The hearing before the Tribunal was an oral hearing. That hearing took place on the 7th November, 2007, and resulted in the decision of the 28th November, 2007. Included in the papers is a helpful note of the hearing before the Tribunal albeit it is not a complete note. The only other matter to refer to was that reference was made in the course of the hearing to a map of the south Darfur region. Finally there was considerable country of origin information before the Tribunal. In the course of the affidavit sworn by the applicant herein, further country of origin information was provided in the form of a Human Rights Watch Report. As that particular report was not before the Tribunal, I did not consider it appropriate to have regard to that report in the course of the hearing before me.

I now want to examine the issues raised before me, in some detail. The first adverse credibility finding related to the lack of knowledge on the applicant's part of attacks in Umshagirah around March/April 2006. It is contended that insofar as this adverse finding is concerned that it is based on an error of fact, originally made at ORAC and contained in the s. 13 report. The error was replicated in the decision of the Tribunal and is said to concern the fact that the Commissioner in the first place and secondly the Tribunal Member misconstrued the evidence in respect of "attacks in Umshagirah" because of confusion as to the whereabouts of a nearby village of Nyala. It is clear that there are two villages of Nyala. In the course of submissions in relation to this point I was referred to the decision of the High Court in the case of *Da Silveira v. Refugee Appeals Tribunal* (Unreported, High Court, Peart J., 9th July, 2004) in which it was stated by Peart J. at p. 12:-

"Conclusions must be based on correct findings of fact. A factual error of sufficient importance will often have the capacity to at least cast some doubt upon the integrity of the decision making process, and in those circumstances, this court is to intervene, and if necessary on a substantive hearing, to provide redress."

By contrast I was referred by counsel for the respondent to the decision in *V.P. and S.P. v. Refugee Appeals Tribunal* [2007] I.E.H.C 415, in which it was held by Feeney J. at p. 7 of his judgment that:-

"…that it is a basic rule of administrative law that bodies entrusted with executive tasks are entitled to err within jurisdiction without the High Court acting as a court of appeal and as stated at (p. 256):
'In relation to 'mistake of fact', while generally it is accepted there is no jurisdiction to quash a decision because of an alleged factual error, it is nonetheless the case that where factual errors occur such as to render the decision irrational, then judicial review will lie.'
To intervene the court would be required to be satisfied that there was both a factual error and that error rendered the decision irrational."

(The passage in quotation marks in the judgment of Feeney J. is a quotation from the judgment of Kearns J. in the High Court decision of *Ryanair Limited v. Flynn* [2003] I.R. 240.)

I want to make a number of observations about the contention on behalf of the applicant that there was an error of fact on the part of the Commissioner in the

first place and the Tribunal in the second place. The point made on behalf of the applicant is that the Commissioner looked at the wrong village of Nyala and thereafter misconstrued the evidence in respect of attacks in Umshagira around March/April 2006. The finding of the Commissioner was set out at para. 4.3.1 where he stated:-

"The applicant was asked to name the villages on the way to Sheiria from Kurunji (q. 133, s. 11). He was asked to name the villages from Kurunji to Nyala; to this he stated 'I didn't go there but you could do the same journey to Umshagirah – Sheiria then on to Muhriya, Yassin and then Nyala'. The applicant also stated 'I have been to Sheiria it is only two villages from Nyala' (q. 30 to 33, s. 11). A Darfur field atlas shows that Sheiria and Nyala are in completely opposite directions from Kurunji. When this was put to the applicant he stated 'I didn't go to Nyala' (q. 137, s.11). It is expected that a person from Kurunji would at least know the direction that Nyala was in from their village."

The relevant country of origin information in relation to the attack around Umshagirah was contained in a United Nation Report of the Secretary General on Darfur in which it was stated:-

"Systematic attacks by militia on civilians also continued. Umshagirah village in southern Darfur was attacked by 200 uniformed militia on horseback and on camels, and many cattle and sheep were looted. On the 13th April, at least 15 villagers were killed and 19 wounded when approximately 500 armed militia launched an attack on Kurunji village south west of Sheiria. The attackers dragged men and women from their homes, beat them and looted their houses and stole livestock."

The comments of the Tribunal Member in the analysis of the applicant's claim dealing with this issue were as follows:-

"In the course of his interview the applicant was asked about attacks in Umshagirah around March/April 2006. The applicant in the course of his interview claimed 'I don't know, maybe it did'. The Commissioner was of the view that it would be expected that the applicant would know about these attacks given that Umshagirah is near Sheiria and furthermore the applicant claimed his uncle was from there."

The first point that I would make in relation to this issue is that it is not at all clear from the information I have referred to above that there was in fact any error of fact. It is undoubtedly the case that there are two villages of Nyala, but I find it difficult to reach the conclusion that there was an error of fact. The second point that I would note in that regard is that the applicant's notice of appeal to the Tribunal did not raise this matter as an error of fact in the course of the notice of appeal. An issue was indeed raised as to the villages one would encounter on the way from Kurunji to Nyala and in that regard the issue that was raised was the fact that the applicant did not know the villages one would encounter on that journey as he had never been to Nyala. Finally I should note that the note of the evidence at the Tribunal makes no reference to this issue but I accept that the note is not a complete note. The fundamental point made on behalf of the applicant is that the Commissioner and also the Tribunal looked at the wrong village of Nyala and therefore misconstrued the evidence in respect of attacks in Umshagirah. I cannot see the logic of that argument. Even assuming that the Commissioner or the Tribunal looked at the wrong village of Nyala, I have difficulty in accepting that because of that alleged error that the evidence in respect of "attacks in Umshagirah around March/April 2006" has been

misconstrued. In any event even if one could conclude that the evidence had been misconstrued by reason of an error of fact I accept the statement referred to above in the judgment of Feeney J. in the case of *V.P. and S.P*. to the effect that for the court to intervene it would have to be satisfied that there was both a factual error and that the error rendered the decision irrational. I have to say that I am far from satisfied as to the existence of an error of fact and even if I were satisfied that there was an error of fact as contended for by the applicant, that error does not, in my view, meet the requirement of rendering the decision irrational.

I now want to deal with the general position in law in relation to the question of credibility. In that regard I was referred in the course of submissions to the decision in the case of *S.S.S. v. Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal* [2009] I.E.H.C. 329, a decision of Cooke J. delivered on the 14th July, 2009, in the course of which, Cooke J. summarised the approach of the court when dealing with credibility. He stated as follows at para. 6 of his judgment:-

"This, therefore, is a challenge to the Tribunal member's treatment of the issue of credibility. The case law in this regard is well known and many of the relevant judgments have been referred to in the written submissions and in oral argument. It is therefore unnecessary to address that case law in detail. Without being exhaustive, it appears to the Court that the guiding principles which emerged from the case law might be usefully summarised as follows:-
(1) The decision on credibility is to be made by the Commissioner at first instance and on appeal by the Tribunal member.

(2) Provided a finding on credibility is based on an objective appraisal of all relevant evidence and information and free from any material infringement of applicable law or the principles of natural or constitutional justice, it will be immune from challenge by judicial review.

(3) This Court is not concerned with the issue of credibility itself and must not fall into the trap identified by Peart J. in the *Imafu* case of substituting its own assessment of credibility for that of the decision makers during the asylum process.

(4) The Court is only concerned with the legality of the process by which these decision makers have reached a negative conclusion on credibility and once the Court finds itself querying whether or not a decision maker has perhaps been too harsh in assessing the answers given to questions put in order to test credibility, where the questions are otherwise logical and appropriate in the testing process, the Court is in danger of substituting its own view.

(5) The Court must also be wary of acceding to an invitation to deconstruct a decision on credibility by isolating individual parts of the appraisal and subjecting particular findings to distinct analysis.

(6) In most instances a decision maker reaches a single overall conclusion on credibility based on a cumulative impression gleaned from the applicant's responses to questions on various parts of the claim and on the personal history as given, including the way in which the story is told, the applicant's demeanour and his or her reactions when doubt is expressed or discrepancies or contradictions are highlighted.

(7) The decision maker must, of course, consider all pertinent evidence and information and must weigh the material objectively and not selectively.

(8) The decision must, therefore, be read as a whole and an error in respect of one or more specific factors identified as undermining credibility will not invalidate the entire decision if the negative conclusion is adequately sustained by the remaining factors relied upon by the decision maker."

That seems to me to be an accurate summary of the way in which this court on an application for leave to apply for judicial review should consider the findings of credibility.

I have already set out above the other adverse credibility findings referred to and relied on by the applicant herein. Applying the principles set out by Cooke J. in the case of S.S.S. it seems to me that the applicant has indeed sought to deconstruct the decision on credibility by isolating individual parts of the appraisal and subjecting the findings to distinct analysis. It is not appropriate for the court to take that approach. The tribunal over a number of pages set out the matters relied on by the applicant and made certain findings in regard to the credibility of the applicant. I cannot see any basis for impugning the findings of the Tribunal in respect of credibility. One of the matters concerned the belief of the applicant that the raid which took place on his in-laws house and which resulted in the killing of his brother in law followed from surveillance of the house. It was found by the Tribunal that the applicant's subjective belief in this regard is not supported by any objective facts. Having regard to the information furnished to the Tribunal on this matter I cannot see any basis for challenging that view. In the course of the decision it was stated by the Tribunal Member as follows:-

"The applicant was asked how he knew that his father in law's house was under surveillance, the applicant told the Tribunal he formed this view because he did not hear about other houses being attacked and presumed as a result that their house was under surveillance."

That is the information before the Tribunal and accordingly I have no hesitation in coming to the conclusion that the Tribunal Member was entitled to come to the view that the applicant's subjective belief in this regard was not supported by any objective facts.

The issues of the applicant's lack of knowledge of Sheiria and his lack of knowledge of the location of displaced persons camps and Janjaweed camps also arose. Again the Tribunal Member set out at length the information furnished by the applicant in this regard.

I have read all of the papers herein, the interviews with the applicant before ORAC, the notes of his evidence before the Tribunal and the other matters to which I was referred. I can only say having done so that the findings on credibility of the Tribunal Member appeared to me to be based on an objective appraisal of all the relevant evidence and information. I can see no basis for suggesting any infringement of the applicable law or the principles of natural or constitutional justice by the Tribunal Member in relation to the findings in respect of credibility. It should be noted that this is an application for leave to which s. 5 of the Illegal Immigrants (Trafficking) Act 2000, applies and as such the applicant must show substantial grounds for the contention that the decision of the Tribunal should be quashed. Accordingly the applicant must establish grounds that are arguable weighty and reasonable as opposed to trivial or tenuous. So far as the question of findings on credibility is concerned it is my view that the applicant has failed.

I want to deal briefly with a further point that was raised. I mentioned at the outset that complaint was made that the Tribunal had failed to apply a forward looking test. This argument was based on a submission on behalf of the applicant that neither at the ORAC or in the Tribunal was any doubt expressed about the applicant's ethnicity. It was submitted therefore that it was incumbent on the Tribunal to ask the question whether the applicant would be persecuted if returned to Sudan. Counsel on behalf of the respondent submitted that in circumstances where the applicant was found to lack credibility, there was no evidence of past persecution and therefore the Tribunal was not required to apply a forward looking test based on the applicant's account. Reliance was placed on the decision in the case of *J.B.R. v. Refugee Appeals Tribunal* [2007] I.E.H.C. 288, where it was stated at p. 18 of the judgment of Peart J.:-

"Once the Tribunal Member was so satisfied, it was not in my view necessary to go further and consider in any more depth than was done whether the applicant's fear of persecution could be well-founded. The finding of lack of personal credibility meant that the applicant's story as to what had happened to him and members of his family was so unreliable as not to have been sufficient to discharge the onus of proof upon him to show that he is a refugee as required by s. 11A(3) of the Refugee Act.

In the present case the applicant was simply not believed as a result of a number of matters which I am satisfied the Tribunal Member was entitled to have regard to in assessing his credibility. An applicant must be credible in order to have his story believed. If that personal story is not believed, and there is shown to be a rational basis for that disbelief, then it serves no useful purpose to consider whether in the light of country of origin information, the story fits that information – in other words could it have happened. There is no purpose in concluding that the story fits available country of origin information if the story told by the applicant is simply not credible or that the applicant is not reliable, consistent and believable, unless of course the country of origin information which is available helps to show that the applicant is credible. In the present case that information does not assist in demonstrating that substantial grounds have been shown by the applicant."

I want to make two observations about this argument. The first point to make is that I do not accept the contention that neither the Tribunal nor the Commissioner in the s. 13 report expressed any doubt about the applicant's ethnicity. It is the case that the Tribunal has made it clear that the personal story of the plaintiff is not credible. In the course of the decision of the Tribunal it was noted by the Tribunal in a paragraph headed

"The applicant's claim as follows:

Mr. B. told me he is from Kurunji village in southern Darfur, he belongs to the Bergid tribe. As a result of attacks by Janjaweed militia forces, he together with members of his family have suffered persecution."

At a further point in the section of the decision headed "Analysis of the applicant's claim", the Tribunal states:

"It is the applicant's core claim that as a result of his ethnicity he together with members of his family has suffered persecution at the hands of Janjaweed and government forces."

Subsequently in that part of the decision, the applicant was asked about UN

camps in the Darfur area. He was also asked about Janjaweed camps. Country of origin information was referred to by the Tribunal. To quote briefly from that part of the decision it was stated as follows:-

"The applicant claims that there were no Janjaweed camps near Kurunji. Country of origin information shows that there are four camps in south Darfur. The human rights watch report of the 27th August, 2004, indicates that there ware four camps in south Darfur. It is simply not credible that the applicant who claims to be from the area could not but be aware of their existence."

The decision went on to note that the applicant had no evidence of identity or of his country of origin. I think that in those circumstances it is difficult to support the contention that neither the tribunal nor the Commissioner in its report cast any doubt about his ethnicity.

In any event, this is a case in which the applicant was found to lack credibility. Accordingly, there is no evidence of past persecution of the applicant and in those circumstances the Tribunal was not obliged to apply a forward looking test based on the applicant's account.

In the circumstances I must refuse the applicant leave to apply for judicial review.