Neutral Citation Number: [2011] IEHC 151

THE HIGH COURT

JUDICIAL REVIEW

2008 767 JR

BETWEEN

H. R.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 15th day of April 2011

1. At the conclusion of the hearing of this application for judicial review on the 7th April, 2011, the Court indicated that it considered that the first of the two grounds for which leave had been granted had been made out and that the decision of the first named respondent of the 7th May, 2008, (the "Contested Decision",) would be quashed. This is the Court's statement of its reasons for reaching that conclusion.

2. The grounds for which leave was granted in the order of Ryan J. of 8th October, 2010, were:-

> (a) That the decision of the Tribunal was based on a material error of fact that undermined its validity in law; and
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> (b) That the Tribunal erred in law in failing to consider the applicant's case by reference to relevant country of origin material that was submitted on her behalf.

3. The applicant is a national of Belarus who arrived in the State in June 2004, as a student. She entered lawfully with a visa for that purpose. When it expired a renewal was refused but she did not leave and in May 2006, applied for asylum. Shortly after that application was made she gave birth to daughter in the State on the 7th June, 2006.

4. On the 29th May, 2006, the applicant, accompanied by her solicitor attended at the Office of the Refugee Applications Commissioner and completed a form of application for refugee status in accordance with s. 8 of the Refugee Act 1996. On the 30th May, 2006, she completed the ASY1 Form. The interview under s. 11 of the Act took place on the

3rd August, 2006 and on the 25th of that month a report issued under s. 13 of the Act, in which the authorised officers recommended that she should not be declared to be a refugee. This was appealed by a notice dated 15th September, 2006 and the oral hearing before the Tribunal took place on 24th July, 2007. The decision of the first named respondent which is now the subject of this judicial review application did not issue until ten months later on the 28th May, 2008.

5. Although, as mentioned below, the analysis of the claim upon which the Tribunal member bases the decision to affirm the negative recommendation of the s. 13. report, contains an ancillary or alternative finding based on "remoteness", it is fair to say that the substantive basis for the conclusion and the determining factor in the appeal, is the Tribunal member's finding of lack of credibility in the claim made by the applicant. This is based both upon the Tribunal member's observation of the applicant's demeanour during the oral hearing when responding to questions and upon a series of specific points identified by him as being implausible. These are:-

> (1) Noting that the applicant came to Ireland in June 2004 and did not claim asylum until May 2006, he considers that she had not "provided a reasonable explanation to substantiate her claim that this State is the first safe country in which she has arrived since departing her country of origin."
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> He says that she provided "vague and non specific evidence, but it is clear that she has been to Poland, Germany, France and England".
>
> (2) In her claim the applicant had given evidence of one important incident when she was re-entering Belarus from Poland bringing 2000 leaflets on behalf of an opposition political party in which she said her brother was active. She says that she was arrested, searched and detained for several hours and that the leaflets were confiscated. The Tribunal member attaches particular significance to the fact that in the oral hearing she claimed to have been stripped-searched on this occasion, something she had not mentioned during the s. 11 interview. He found the applicant's evidence as to why this particular fact had not been mentioned at any earlier stage being neither plausible not credible and he observes her demeanour in giving her explanation for this she was "vague, non-specific and lacking in the type of detail one would expect from a person who had been subjected to the treatment she alleges" This he finds undermined her credibility.
>
> (3) He then refers to her handing in a envelope at the hearing which she said had been delivered to her in the post empty and which she said showed that post sent to her from Belarus was being tampered with by the authorities. Again the Tribunal member says: "Having heard this portion of the evidence and observed her demeanour I did not find it plausible or credible and found the evidence to have an air of unreality to it. I find that this further undermines the applicant's credibility."

6. It is worth pausing to consider the significance of these three particular findings before addressing the fourth matter which is the subject of the alleged mistake of fact in the first of the two leave grounds.

7. There is not doubt, of course, but that the Tribunal member is perfectly entitled to base a finding as to lack of credibility and plausibility upon the manner in which an asylum seeker gives evidence and on his or her demeanour when answering questions in relation to the details of facts and events which form the basis of the claim. Indeed, in

many cases where such facts and events are incapable of any independent corroboration, the personal credibility of claimant may be crucial. At the same time, however, the decision-maker must be careful not to misplace reliance upon demeanour and risk construing as a deliberate lack of candour a demeanour which may be the result of nervousness, of the stress of the occasion and even of the embarrassment of being an asylum seeker. An apparent hesitation and uncertainty may well be attributable to difficulties of language and comprehension. In the judgment of the Court, before a decision maker in the asylum process bases a rejection of a claim upon lack of credibility based mainly on the personal appearance and demeanour of the claimant, the decision-maker ought to be fully confident that the basis of the claim and all relevant facts and circumstances recounted have been fully and correctly understood and that there is no possibility that the decision-maker and claimant have been at cross purposes on any material point.

8. Although the first three findings identified above are the not the subject of the alleged factual error which forms the basis of the first ground, it is appropriate to make some comment upon them in the context of this decision because once it is established that there has been an error of fact on the face of a decision of this kind, the judgment as to whether *certiorari* should issue depends upon the materiality of the mistaken fact and its relationship to other findings in the decision from which it might be severed.

9. So far as concerns the first finding above directed at the delay in claiming asylum, the Court would point out that, taken in isolation, it would appear to ignore an aspect of the circumstances of the claim which was adverted to by the authorised officers in the s. 13 report. They said "it should be noted that as an individual who claims to have left her country of origin and to have come to Ireland in June 2004, in order primarily to study and seemingly do some sightseeing, the applicant's claim to fear persecution in her country of origin appears to be largely based on her contention that she is, in effect a refugee '*sur place*'". That appears to be a correct approach to the claim as it was made, because the applicant did arrive as a student with a visa; she did in fact study and did seek to have her visa extended. It is not immediately clear, therefore, why the Tribunal member considered it significant that the applicant's evidence of having been in Poland, Germany, France and England was "vague and non specific". She does not appear to have claimed that she had been forced to flee Belarus because of a specific event of past persecution. The general thrust of her claim appears to have been directed at the proposition that, having come to the attention of the authorities through the activities on behalf of her brother and the incident with the 2000 leaflets, she faced a future risk of persecution by the authorities for those reasons if now returned.

10. So far as concerns the production of the envelope at the hearing, it is not immediately clear why the Tribunal member considers this to be the basis for an issue of credibility. The passage does not explain what it was about the envelope itself that raised doubts as to the fact that it had been opened and tampered with. The copy shown to the Court bears what appears to be some form of official stamp, but this does not appear to have been translated or explained.

11. The second of the three above findings is of course, more substantial. Its implication in the manner in which it is expressed in that paragraph of the Contested Decision is that the Tribunal member regards the applicant as having embellished the original account of the incident when she was discovered to be carrying the 2000 leaflets, by adding the claim to have been strip-searched. It is not the incident itself which is found to be lacking in credibility but the explanation given by the applicant namely, her embarrassment at the fact of the strip-search, for not having mentioned this particular point in the s. 11 interview.

12. The passage which contains the mistake of fact which is the subject of the first ground follows the above findings and it is necessary to set it out in full:-

> "Further in the course of her evidence the applicant referred to the fact that she had not referred to her brother in the interview, the explanation the applicant gave for this was that she definitely remembered mentioning her brother and she specifically remembers this because at the s. 11 interview the wanted her to write down the name of the person on a piece of paper and she did. The applicant said that this was at the s. 11 interview. I found it neither plausible nor credible that such a fundamental piece of information should be overlooked. The applicant and her legal team had recourse to another course of action if that had occurred and having heard her evidence and observed her demeanour I find that the applicant's evidence in this regard is neither plausible nor credible. The s. 11 interview process involves the written notes being read back to the applicant and signed by the applicant in circumstances where a fundamental piece of information is not written down and the applicant would have ample opportunity to correct it if this had occurred. I find that this undermines the applicant's credibility."

13. It is not disputed that this reference to s. 11 is wrong. It is abundantly clear not only from the content of the s. 13 report of the Commissioner but from the notes of the s.11 interview and even from the summary in Part 3 headed "The Applicant's Claim" in the Contested Decision itself, that the incident involving the alleged failure to mention the applicant's brother relates to the s. 8 interview on the 29th May, 2006 and not to the s. 11 interview. On page 6 of the Contested Decision the Tribunal member records an exchange during the appeal hearing where: "the applicant was asked to refer back to the very first time when her picture was taken when she applied for asylum when she went with her first solicitor Mr. Sherrin". That was the first visit to the office of the Commissioner to make the application under section 8. The Tribunal member continues: "the applicant was criticised for not referring to her brother in that interview. It was said that she did not mention her brother being involved politically and the applicant was asked to clarify this and asked was it correct. The applicant said no, it was not correct. She said she definitely remembers mentioning her brother and she said because they also wanted her to write down the name of this person on a piece of paper and she did so. The applicant was asked who she was and the applicant said the Commissioner who was carrying out the questioning".

14. At the outset of this hearing on the 7th April, 2011, the Court raised the possibility that the references to the s. 11 interview on p. 22 of the decision might be explained as a simple typographical error of substituting s. 11 for s. 8 having regard to the fact that the Tribunal member had correctly recorded the incident at page 6. In the view of the Court the response given by counsel for the applicant to that query is clearly correct. Whether the explanation lies in the lapse of ten months between the oral hearing and the date of the decision or in some other factor which is not immediately apparent, there can be no doubt but that when the Tribunal member came to write the findings upon which the conclusion of the Contested Decision rests, he was under the impression that what he describes as "a fundamental piece of information" had been overlooked and, in effect, withheld during the asylum process up to and including the s. 11 interview. The Tribunal member goes so far as to give two reasons for attaching significance to the finding. First, he points out that if the s. 13 report wrongly recorded what she claims to have said at the interview about mentioning her brother and writing down his name, judicial review could have been taken to challenge the s. 13 report. Given that the few questions that are asked when completing the application for refugee status at the s. 8 interview are confined to establishing the basic facts listed in ss (2), it seems highly improbable that the Tribunal member is suggesting that judicial review could have been invoked at that stage. Secondly, he points out expressly that the s. 11 interview process involved the written notes being read back and makes the point that the applicant would

have had an opportunity to correct the record. Clearly, that has no relevance to the interview under section 8.

15. In the judgment of the Court, accordingly, the passage quoted in para. 12 above from the Contested Decision contains a clear mistake and it is an important mistake because the Tribunal member himself emphasises that the passage relates to a "fundamental piece of information". Counsel for the respondent, however, urges the Court nevertheless not to grant *certiorari* on that basis because, as a mistake of fact, it is not material having regard to the basis for the decision when read as a whole; and secondly it is a mistake of fact made by the Tribunal member within jurisdiction. In the latter regard counsel relied upon the judgment of Kearns J. (as he then was) in *Ryanair v. Flynn* [2000] 3 I.R. 240. He said:-

> "It seems clear that the cases where the court can intervene by way of judicial review to correct errors of fact must be extremely rare. The court can only intervene to quash the decision of an administrative body or tribunal on grounds of unreasonableness or irrationality if it exhibits the characteristics identified by Henchy J. in *Keegan v. Stardust Compensation Tribunal*. There is no body of jurisprudence in this jurisdiction which suggests that it would be desirable for the courts to interfere where errors within jurisdiction are made."

16. Without in any way dissenting from that as a correct statement of law, the Court would express doubt as to whether what has happened in this case is either a mere mistake of fact as such, or a mistake of fact made within jurisdiction.

17. In the first place, the mistake is not the type of error of fact that occurs as when, for example, the decision-maker mistakenly treats some events of past persecution as having taken place on a wrong date or in the wrong place. This mistake is one made as to the course and content of the asylum procedure in which the Tribunal member is exercising jurisdiction. It must be borne in mind that the appeal hearing before the Tribunal is the second stage determination of the application for a declaration of refugee status. When the recommendations of the decision and of the s. 13 report are put before the Minister for his decision under s. 17(1) of the Act of 1996 it is important that there is coherence between them as the two stages of the examination process so that they together constitute a sound basis for the Minister's decision.

18. It is a necessary implication of the mistaken passage in this decision, in the view of the Court, that the Tribunal member has not correctly understood (or perhaps remembered,) what had actually happened in the earlier stages of the process. The review jurisdiction which the Tribunal member exercises is based upon a review of the process up to that point and is exercised not only by reference to the oral hearing but by reference to the contents of the ASY1 Form, the s.11 interview and the s. 13 report. Indeed, the Tribunal member so acknowledges in Part 7 of the Decision headed "Conclusion" where he confirms having considered "all relevant documentation in connection with this appeal, including the notice of appeal, country of origin information, the applicant's asylum questionnaire and the replies given in response to questions by or on behalf of the Commissioner on the report made pursuant to s. 13 of the Act". However, in Part 4 of the s. 13 report, headed "Well Founded Fear", the authorised officers correctly record what had happened during the s. 11 interview by reference to the failure "to mention the imprisonment of her brother when she first presented herself to this office".

19. The further significance of this mistake lies in its influence upon the extensive reliance placed by the Tribunal member upon the demeanour of the applicant in giving evidence before him. When the Tribunal member says that "having heard her evidence and observed her demeanour, I find that the applicant's evidence . . . is neither plausible

or credible" he is referring to her maintaining that she had indeed mentioned her brother and written down his name on a piece of paper at the s. 8 interview. His finding is based on the proposition that her demeanour indicated that she was not telling the truth about what happened at the s. 11 interview, evidence which is clearly inconsistent with the notes of the questions recorded on pp. 16 and 17 of the s. 11 interview. Thus the Tribunal member's reliance upon the apparent demeanour of the applicant while telling the truth is clearly unsound. That necessarily calls into question his appreciation of her demeanour when giving evidence on other points elsewhere in the decision including notably, on the "strip-search" explanation described in paragraph 8 (2) above.

20. The position in this regard is somewhat analogous to that considered by Finlay Geoghegan J. in her judgment in *A.M.T. v. Refugee Appeals Tribunal* [2004] 2 I.R. 607. In that case too, the decision of the RAT had contained a mistake on the part of the Tribunal member as to evidence believed to have been given by the applicant. The Tribunal member had referred to the applicant's account of how he had travelled from Cote d'Ivoire to France and from France to Germany by bus and then from Germany to Ireland by plane. The applicant's claim was rejected for lack of credibility. The implausibility of some aspects of his itinerary was part of the basis for that finding. It was conceded however, by the respondents, that the Tribunal member had been mistaken and that the applicant had never given evidence that he travelled by bus from France to Germany. It was argued nevertheless that the error was one of fact and, relying upon the judgments in the *Ryanair* case and in *Aer Rianta cpt v Commissioner for Aviation Regulation*, (Unreported, O'Sullivan J., 16th January 2003), that the error was not one which would invalidate the appeal decision.

21. Finlay Geoghegan J. did not accept that argument. She said;-

> "I have concluded that a different principle arises in relation to the error in this case to that at issue in the above cases. The question of how the applicant travelled between France and Germany was not a factual issue in dispute upon which the Tribunal member was adjudicating. Rather, the Tribunal member was required to adjudicate upon the credibility of the applicant and his story. As part of that adjudication, in accordance with the above principles, she was required to assess the story of the applicant as disclosed in the course of his application, either at interview or in writing or at the oral hearing before the Tribunal member. The error of fact made is as to what was the story told or the evidence given."

22. She then added:-

> "Whether one considers the legal principles applicable to the assessment of credibility in claims for refugee status or the principles of constitutional justice, I have concluded that the obligation of the Tribunal member is to assess the credibility of the applicant in relation to the story as told or evidence given by him/her. This did not happen in this case. In assessing the credibility of the applicant, the Tribunal member has included as part of his story a fact for which she had no relevant material and, further, placed reliance upon such fact in a manner adverse to the applicant in reaching a conclusion against the credibility of his story. Such error renders the decision invalid."

23. Finlay Geoghegan nevertheless recognised that the Court's entitlement to intervene to correct errors was limited:

> "…I do not wish to suggest that every error made by a tribunal member as to the evidence given will necessarily render the decision invalid. It will, obviously depend on the materiality of the error to the decision reached. The decision-maker is in breach of the obligation to consider the evidence given in accordance with the principles of constitutional justice."

24. In the judgment of the Court, similar considerations apply here. For the reasons given in paragraphs 17 to 19 above, the error which has occurred is material to the conclusion reached and it goes to the soundness of the basis upon which the review jurisdiction of the Tribunal has been exercised. Because of the importance attached by the Tribunal member to what he believed to have been the withholding of a significant element in the claim at the s. 11 interview and having regard to the importance of the interview in question as the source of information going to credibility, this error is clearly material to the basis upon which the conclusion as to the credibility of the claim was reached. It does not appear to be necessary to characterise this approach as based upon principles of constitutional justice: it is an application of the basic principles of judicial review to the extent of the duty of the decision-maker in assessing credibility in an asylum hearing.

25. As already mentioned above, counsel for the respondent urged that even if the Court found the first ground to be established on the basis of a material mistake of fact having been made, the alternative finding of "remoteness" constituted a reason for not quashing the decision having regard to the fact that Ryan J. refused to grant leave in respect of a distinct ground in that regard.

26. What Ryan J. said in the leave decision of the 8th October, 2010 at paragraph 21 was as follows:

> "A further failed ground relates to the question of remoteness. The Tribunal member expressed the view that, even if the applicant had been credible, her problems were largely the making of her brother and her connection was too remote. This was an alternative finding. The Tribunal's affirmation of the negative recommendation was essentially based on his finding that the applicant was not credible. The alternative finding on remoteness, even if flawed, could be severed from the decision without consequences as to its validity."

27. Although Ryan J. refers to this as being a "failed ground" the Court does not construe his judgment as refusing leave because the ground was unfounded in law so much as being capable of being severed from the remainder of the decision if it should be established that the finding in question was unlawful.

28. In the judgment of this Court it would be highly unsatisfactory to refuse to quash this decision for the sole reason that it could be said to be saved by the finding embodied in the passage quoted in paragraph 21 above. For one thing, it is by no means clear which particular aspect of the applicant's claim is referred to in that passage as being "too remote". It is possibly true that insofar as it was the applicant's brother who was the political activist, her involvement as a mere carrier of leaflets might possibly be described as being "too remote" or tenuous to form a basis for a well-founded serious risk of persecution on grounds of political opinion. However, it seems readily apparent that one of the central incidents relied upon by the applicant is that in which she was arrested and found to be in possession of 2000 leaflets she was herself importing to Belarus. It is difficult to see how (if believed,) being caught by such authorities in possession of material which, according to country of origin information, would be regarded as contraband to be confiscated, could be described as a merely "remote" risk for the applicant. If her story is to be believed, she was personally apprehended and arrested by the authorities for being in possession of that material and not because she was carrying them on behalf of her brother.

29. Furthermore, although it is unnecessary for this Court to address the second leave ground relating to the assessment of country of origin information because the Contested Decision will be quashed on the basis of the first ground, the Court would draw attention to the fact that there appears to have been extensive documentary

information placed before the decision-maker as to the attitude of the Belarus authorities to opposition activists and their activities including references to legislation which is said to be used as a basis for treating opposition activities undertaken outside Belarus as a form of defamation of that State. Rather than attempt to interpret this finding of "remoteness" in order to determine whether the decision might be saved on that basis, the Court considers it preferable to leave all of these matters to the reconsideration of the appeal before a different member of the Tribunal.

30. The Court accordingly finds that the first ground has been sustained. *Certiorari* will therefore issue on that basis to quash the Contested Decision and it is unnecessary to consider the second ground.