Neutral Citation Number: [2009] IEHC 510

THE HIGH COURT

JUDICIAL REVIEW

2007 648 JR

BETWEEN/

I. R.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Mr Justice Cooke delivered on the 26th day of November, 2009

1. On 24th July, 2009, the Court gave judgment ("the judgment") on an application for judicial review by the above named applicant in which it quashed by order of *certiorari* a decision of the second named respondent dated 17th April, 2007 ("the Contested Decision") which had rejected the applicant's appeal against a report and negative recommendation of the Refugee Applications Commissioner on his application for a declaration of refugee status. The respondents now apply under s. 5 (3) (a) of the Illegal Immigrants (Trafficking) Act 2000 for a certificate of leave to appeal to the Supreme Court on the basis that the Courts judgment "involves a point of law of exceptional public importance" and that "it is desirable in the public interest" that such an appeal be taken.

2. As the Court pointed out in the judgment, the Contested Decision of the Tribunal turned entirely on the issue of the credibility of the personal history which the applicant had recounted as the basis of his claim to fear persecution if returned to Belarus. In effect, the Tribunal member did not believe his account of having been arrested, detained, charged, convicted and imprisoned for offences of distributing anti-political leaflets and of his having been severely beaten while in prison. In essence, the finding turned upon the Tribunal member's belief that the applicant lacked the knowledge and familiarity with the personnel and history of the Belarus Popular Front political party ("BPF") which the applicant claimed to have supported and in which he said he had been actively involved.

3. The Court quashed the Tribunal decision for one reason namely, that the Tribunal member had erred in failing to consider all of the relevant evidence going to credibility because no mention was made in its decision of and no regard was apparently had to, a number of pieces of documentary evidence which the applicant had produced and which appeared to the Court to be directly pertinent to his credibility. (See para. 24 of the judgment). These included purported police reports and court documents relating to his claimed arrest, trial and

imprisonment. In the passage at para 30 of the judgment which is now the focus of the present application for a certificate, the Court said:

"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 respondent submitted and as is confirmed by the case law summarised at the beginning of this judgment, that the 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."

4. The certificate for leave to appeal is applied for with a view to raising in the Supreme Court the following point of law:

"The High Court erred in holding that the proposition that the Tribunal was not obliged to mention in its decision every argument or piece of evidence advanced by an appellant before it, as long as the basis upon which it considered the application for asylum to be lacking in credibility was ascertained from the reasons given, was valid only when the arguments and evidence so advanced were ancillary to the matters upon which the substantive finding was based and could not by themselves have rendered the conclusion unsound or untenable if shown to be correct or proven."

5. The criteria to be applied by this Court in ruling on an application for a certificate under s. 5 are not in dispute and the Court has been referred to the cases in which those criteria have been considered including:

Raiu v. R.A.T. (Unreported, High Court, Finlay Geoghegan J., 26th February, 2003);

Glancré Teoranta v. An Bord Pleanála & Anor. [2006] I.E.H.C. 250;

Arklow Holidays Ltd. v. An Bord Pleanála (Unreported, High Court, Clarke J., 11th February, 2008).

6. So far as relevant to the present application the principles identified in that case law include, *inter alia*, the following:

• It is not enough that the case raises a point of law: it must be one of exceptional importance;

• The jurisdiction to grant a certificate must be exercised sparingly;

• The area of law involved must be uncertain such that it is in the common good that the uncertainty be resolved for the benefit of future cases;

• The uncertainty as to the point of law must be genuine and not merely a difficulty in predicting the outcome of the proposed appeal or in appraising the strength of the appellant's arguments;

• The point of law must arise out of the court's decision and not merely out of some discussion at the hearing;

• The requirements of exceptional public importance and the desirability of an appeal in the public interest are cumulative requirements.

7. In support of the application for a certificate, counsel for the respondents submits that the passage in para. 30 of the judgment quoted above applies a wrong legal test for the assessment of credibility and that the judgment will therefore create great difficulty for the Tribunal and for other similar administrative bodies called upon to assess the credibility of personal testimony. It is said that the documents relied upon by this applicant were "entirely predicated on the applicant having been a member of the BPF party" and that it was impossible for the Tribunal to verify their authenticity. It is submitted that the onus lay with the applicant to provide evidence of their authenticity when the issue had been identified in the s. 13 report.

8. According to the respondents the traditional view of the court's role in this regard has been that once documentation was put forward whether it was "applicant-specific" or general country of origin information, it was not necessary that it be considered where it was ancillary to a claim which is disbelieved as fundamentally lacking in credibility. There is thus, it is suggested, "a fundamental tension, leading to great uncertainty in the law pertaining to the making of these types of decisions, between the elements of the test propounded by the court… with regard to the assessment of credibility where documentation has been put forward…. and the traditional approach, which advocates assessing credibility 'in the round'". (See the written legal submissions)

9. The Court is satisfied that the arguments thus advanced do not warrant the grant of a certificate in the present case. The Court does not consider that any question of law of public importance let alone once of exceptional importance arises in this case nor that there is any real uncertainty about the law as regards the approach to be adopted in the assessment of credibility where a claim is based partly on oral testimony and partly on supporting documentary evidence. Indeed, the Court does not disagree with the respondent's submission that credibility in such cases must be assessed "in the round". It is, however, the entirety of the proffered evidence that must be assessed in that manner. As the Court sought to indicate in the judgment, this was a case which turned entirely on its special circumstances and the decision was quashed precisely because, in the Court's view, the Tribunal had failed to consider "in the round" the entirety of the available evidence.

10. The Court does not consider that there is any novelty or controversy in the proposition that a tribunal such as the R.A.T. is obliged to consider all of the relevant evidence available to it. The matter was well put by Edwards J. in the case of *Simo v. M.J.E.L.R.* (Unreported, High Court, 30th November, 2007) where he said:

"First of all there is the principle that a judicial or quasi-judicial tribunal must have regard to all the evidence before it and cannot cherry pick the evidence. If it is to act judicially it must consider all of the evidence put before it. If there is a

conflict with respect to the evidence such that the tribunal cannot resolve that conflict, other than by, for good and substantial reasons, preferring one piece of evidence over another …, then it is incumbent on the tribunal or court as the case may be, to state clearly its reasons for doing so …It is perfectly within the province and jurisdiction of the R.A.T. … to prefer some [country of origin] information over other information. What is critical, however, is that they give a reason for doing so. That does not mean that every piece of country of origin information must be alluded to in the judgment, but where there is a major conflict and where the status of one piece of country of origin information versus another …is an issue of very significant importance in a case then the judgment should deal with that and if there is a preferment of one piece of evidence over another, it should be justified so that the tribunal can be seen not to have acted arbitrarily but to have acted reasonably, rationally and impartially."

11. Where the totality of available evidence includes both oral testimony and documentary evidence, it is incorrect, in the Court's judgment, to dismiss the latter as being merely "ancillary to a claim" for the sole reason that the personal testimony is considered to be of greater weight and has been found to be incredible. The probative value of the documents depends upon their nature and their content.

12. In cases where the personal testimony of an asylum applicant is rejected as fundamentally incredible it may well be correct and justifiable to disregard documents offered in support if they consist of general information not directly related to the personal account given. Thus, in the present case, for example, if the documentation had consisted only of country of origin information confirming that political rallies had taken place in Minsk, Bereza and Molodechno on particular dates in 2003-2005 (see para. 17 of the judgment) no inquiry into that information might have been necessary because it would not have served to either prove or disprove the applicant's claim to active involvement in the political party which the Tribunal Member had doubted on the basis of his apparent lack of knowledge of the parties activities.

13. However, as the Court pointed out at paragraphs 23 to 25 of the judgment, the documents relied on here were not merely "ancillary" but included court and police items which conceivably proved that the events and treatment described by the applicant did actually take place. They therefore constituted, at least potentially, direct evidence of the events in dispute. Thus, the available evidence could not be said to have been considered "in the round" if no regard whatsoever is given to the potential effect and value of those documents. As the judgment pointed out, no mention was made of the documents in the Contested Decision apart from the general statement "the Tribunal has considered all of the relevant documentation".

14. In the respondent's written submissions for this application, the case is made that the decision of the Court at para. 30 of the judgment prevents bodies like the Tribunal from deciding cases on what is called "the traditional basis" once an applicant puts forward documentation which could conceivably render the conclusion as to the incredibility of the claim unsound or untenable if the documents are shown to be correct and authentic. The Court accepts that the Commissioner or a Tribunal member might well be justified in doubting the veracity of an applicant who claims, for example, to come from a particular country but who is unable to name its capital or answer other basic questions about it. But it can hardly be suggested that the processing of such an application could lawfully disregard and refuse to examine an apparently valid passport from that country produced by the applicant. The applicant may be unusually ignorant

but, if the passport is his own and valid, he is not lying about his nationality. Accordingly, if this submission correctly reflects a practice of the Tribunal to exclude from examination, evidence of potential relevance upon the sole ground that, being documentary evidence, it is merely "secondary" or "ancillary", the Court considers that the practice is wrong in law and does not believe it is guilty of any innovation in so stating.

15. Contrary to the respondent's submission, the issue in this case was not whether the Tribunal had an obligation to authenticate the documents as such. The issue was whether the Tribunal member had an obligation to include consideration of the possible probative value of the documents as part of the entirety of evidence available once it was clear that the documents had possible direct relevance to specific facts and events in the applicant's story. The Court accepts that it may well be difficult and even impossible in many cases for the Tribunal to verify the authenticity of documents of this kind although the Court is aware from other cases in this list of instances where documents have been sent by the Commissioner or the Tribunal for forensic examination in order to ascertain whether they are forgeries or copies. But even if that was not possible in a case such as the present one, it does not, in the Courts view, excuse the Tribunal's failure to make any reference to the documents or give any reason for discounting them. As the Court itself pointed out in para. 26 of the judgment, even a cursory examination of the documents from the Belarus courts suggested discrepancies which might have put their authenticity in question. What was significant from the point of view of the validity of the Contested Decision was that the Tribunal member appeared to have erred in not giving any attention at all to the potential effect of the documents one way or the other.

16. Insofar as it is complained that the Court's judgment makes it difficult for the Tribunal to deal with these cases in the future, the Court acknowledges that the role of the Tribunal can be difficult in this regard as, indeed, the opening passages of the judgment emphasised. However, an inconvenience to an administrative decision maker is not one of the criteria for the application of s. 5 and facilitating short cuts in the appeal process is not a ground for the issue of a certificate.

17. The Court does not, therefore, consider that a case has been made out that a wrong test giving rise to uncertainty in the law is articulated in para. 30 of its judgement. The Court sought to distinguish between, on the one hand, the situation in which documentary evidence of a general kind is offered in support of oral testimony but is not such as to determine its truthfulness; and, on the other, that of documents which, if authentic, must necessarily prove the truth of what is claimed and negate a judgment made as to the inadequacy of knowledge displayed by the claimant. It should be borne in mind that this was not a case in which the applicant had been caught out in telling a lie about some fact or event. He was disbelieved because he did not appear to have what the Tribunal member considered to be an adequate knowledge of matters relating to the BFP Party which had been gleaned from the internet.

18. The Court is accordingly satisfied that no novel proposition of law is contained in the judgment. It merely applies to the special circumstances of this case the general principles derived from the settled case law referred to in the first eleven paragraphs of its judgment.

19. The application for a certificate is accordingly refused.