Neutral Citation Number: [2009] IEHC 17

THE HIGH COURT

2006 50 JR

BETWEEN

A. S.

APPLICANT

AND

MICHELLE O'GORMAN, ACTING AS THE REFUGEE APPEALS TRIBUNAL

RESPONDENT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT OF MR. JUSTICE HEDIGAN, delivered on the 20th day of January, 2009.

1. The applicant is seeking judicial review of the decision of the Refugee Appeals Tribunal ("RAT"), dated 5th September, 2005, to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner ("ORAC") that the applicant should not be granted a declaration of refugee status. Leave to apply for judicial review was granted by Hanna J. on 9th March, 2007. At the beginning of the post-leave hearing, Senior Counsel on behalf of the applicant indicated to the Court that he had taken the view that the case should be withdrawn, but was unable to contact the applicant so as to take instructions. Counsel on behalf of the respondent urged that the case go on as there had already been a period of substantial delay. This was the second occasion on which the case came forward; it had first come forward some twelve months earlier. I agreed that the case should go on and, having indicated that I had already read the parties' written submissions, asked Senior Counsel on behalf of the applicant if he had anything to add to those submissions. He indicated that he did not; this was not surprising, for very understandable reasons. Counsel for the respondents made oral submissions, largely relating to credibility findings made by the Tribunal Member.

Background

2. The applicant claims to be a national of Somalia, a Muslim, and a member of the minority Asharaf clan. He claims to have been persecuted by the larger Darood and Hawiye clans. His account of the events that preceded his departure from Somalia is as follows. He was born in 1981 and is the eldest of his siblings. In 1992, a year after the fall of the government, his biological father disappeared. In 1994, the applicant was attacked by four members of the Darood clan, one of whom hit him with a bayonet; he sustained serious injuries and was hospitalised. Thereafter, his mother then married a man from the Marehan clan, a sub-clan of the Darood clan. Because he was head of the militia in their village, the family

was thereafter protected for a time. In 1997, however, his brother was abused by militia outside of the family home and in 2003, his sister was kidnapped. In July, 2004, six members of the Darood and Hawiye clans broke into their family home, shot dead his brother and step-father, struck his mother, and kidnapped the applicant and his sister. The applicant was detained in a transport container for six days before he escaped while his captors were arguing. He returned home for one day and was given money by his mother, who told him to go to Nairobi with a neighbouring Asharaf family. He did so, and remained in hiding in Nairobi for six weeks while an agent arranged his journey on to Ireland. He says that his mother, wife and children remain in Somalia. His sister has not been heard of since being kidnapped in July, 2004.

3. Shortly after his arrival in the State on 30th August, 2004, the applicant applied for asylum. He attended for interview with ORAC on 13th April, 2005. ORAC issued a negative recommendation, dated 23rd May, 2005, making a number of adverse credibility findings. The applicant appealed to the RAT by way of a Notice of Appeal dated 27th June, 2005. An RAT oral hearing took place on 20th July, 2005 and the Tribunal Member affirmed the negative ORAC recommendation by decision dated 5th September, 2005.

The RAT Decision

4. In the first section of her decision, the Tribunal Member sets out in some detail the evidence before her. That section is followed by statements of the law, and the burden and standard of proof; no challenge is made to these and it is not, therefore, necessary to set them out. The final part of the decision consists of an assessment of the claim made by the applicant. That assessment centres upon the applicant's credibility. The Tribunal Member expresses doubts about the plausibility of seven elements of the applicant's account of events. Those seven matters relate to:-

(a) The applicant's account of his escape from captivity;

(b) His failure to mention the incidents relating to his siblings in 1997 and 2003 at any stage prior to the RAT oral hearing;

(c) His assertion that his family members remain in Somalia;

(d) His unfamiliarity with a prominent member of the Asharaf clan;

(e) His lack of knowledge about connections with the Rahanweyn clan;

(f) His failure to apply for asylum or seek assistance in Nairobi; and

(g) His inability to name all of the countries through which he travelled; this is a finding under section 11B of the *Refugee Act 1996*, as amended.

5. The Tribunal Member concludes that it has not been established that the applicant comes within the provisions of section 2 of the Act of 1996.

THE SUBMISSIONS

6. The applicant's complaints in respect of the RAT decision centre upon:-

(i) Errors of fact;

(ii) Flawed treatment of credibility; and

(iii) Breach of s.3, *European Convention on Human Rights Act 2003*.

(i) Errors of Fact

7. It is submitted that the Tribunal Member made errors of fact that were of such significance as to render the RAT decision *ultra vires* and in breach of fair procedures. In particular, the Tribunal Member referred, when outlining the circumstances of the applicant's escape, to the fact that his captors were fighting over "cards" whereas the applicant's evidence was that they were fighting over Khat, a plant similar to hashish, which they had been using at the time. It is contended that this would have a significant bearing on the captors' physical condition and mental alertness. In this regard, reliance is placed on *Bisong v The Minister for Justice, Equality and Law Reform* (unreported, High Court, O'Leary J., 25th April, 2005). The applicant has also complained that while the Tribunal Member states that the applicant had not been shot at when escaping, this was not clarified with the applicant at the oral hearing, nor was it clarified whether or not the armed guards were armed and / or under the influence of drugs at the time.

8. The respondent submits that it is clear from the manner in which the RAT decision is laid out that the reference to cards instead of Khat forms no part of the findings made against the applicant and that it is not a material error influencing the Tribunal Member's findings. Reliance is placed on *A.M.T. v The Refugee Appeals Tribunal* [2005] 2 IR 607 and *D.L. v The Refugee Appeals Tribunal* [2008] IEHC 351.

(ii) Treatment of Credibility

9. The applicant contends that the credibility findings reached are irrational and unreasonable. He submits that the Tribunal Member failed, when assessing his credibility, to have regard to his evidence with respect to the attacks on him in 1994 and upon his family in 2004; it is contended that these are the primary aspects of his claim and it is complained that none of the issues upon which the credibility findings were made relate directly to his fear of persecution. It is further submitted that the Tribunal Member failed to assess his credibility by reference to objective country of origin information (COI). In addition, it is submitted that the Tribunal Member failed to consider the explanations given by the applicant for perceived discrepancies in his evidence. Reliance is placed, among others, on *Simo v The Minister for Justice, Equality and Law Reform* [2007] IEHC 305; *Traore v The Refugee Appeals Tribunal* [2004] IEHC 606; *Camara v The Minister for Justice, Equality and Law Reform* (unreported, High Court, Kelly J., 26th July, 2000); and the judgment of Clarke J. at the leave stage in *Imafu v The Minister for Justice, Equality and Law Reform* [2005] IEHC 182.

10. The respondent submits that the credibility findings made by the Tribunal Member were lawfully drawn on the basis of the evidence that was before her, including the COI. It is contended that the explanations put forward by the applicant at the oral hearing for apparent discrepancies in his evidence were specifically considered and found not to be credible, and that the COI that was before the Tribunal Member was clearly considered and specifically referred to. It is further submitted that the applicant has not put forward any grounds for the proposition that the findings made were unlawful. Reliance is placed *inter alia* on *Banzuzi v The Refugee Appeals Tribunal* [2007] IEHC 2.

(iii) Breach of s.3, European Convention on Human Rights Act 2003

11. The fourth relief sought in the applicant's post-leave Statement of Grounds is:-

> "A Declaration by way of Judicial Review that the Respondent has acted in breach of the European Convention on Human Rights Act, 2003 and/or the constitutional and legal rights of the Applicant."

12. The only ground upon which this relief appears to be sought is (7) "The Respondent […] erred in law in failing to apply the provisions of the European Convention on Human Rights Act, 2003 to the Applicant's claim." This is expanded upon somewhat in the written submissions, wherein the applicant contends that the Tribunal Member acted in breach of her obligations under the Act of 2003 by failing to consider the risk of an interference with the physical and moral integrity of the applicant. It is submitted that the European Court of Human Rights has recognised that such an interference may give rise to an interference with right to respect for private life under Article 8 of the Convention; reliance is placed on *X & Y v The Netherlands* (1986) 8 EHRR 235. It appears therefore that the applicant contends that the Tribunal Member was therefore obliged, under the Act of 2003, to consider the risk of such an interference.

13. The respondent complains that the applicant's submissions in this regard are vague, non-specific, and of a generalised nature. It is submitted that Article 8 of the Convention is not relevant to the review being carried out by the Court at present, which – the respondent submits – is concerned with the quality and fairness of the RAT decision on applicant's appeal. Consideration of the applicant's Convention rights is, it is contended, a matter for the Minister for Justice, Equality and Law Reform ("the Minister") at a later stage.

THE COURT'S ASSESSMENT

14. With respect to the appropriate standard of review in asylum and immigration cases, this Court has held on numerous occasions that whether or not the term "anxious scrutiny" is employed, this Court will continue to be particularly careful and thorough when reviewing decisions that have the potential to impact upon fundamental human rights (see, among others, *H. O. v The Refugee Appeals Tribunal & Anor* [2007] IEHC 299; *Ol. O. & Ors v The Minister for Justice, Equality and Law Reform* [2008] IEHC 307; *E.A.W. v The Refugee Appeals Tribunal & Anor* [2008] IEHC 343; *D.L. v The Refugee Appeals Tribunal & Anor* [2008] IEHC 351).

(i) Errors of Fact

15. It is clear that the Tribunal Member erred in fact by referring to "cards" where she should have referred to "Khat", i.e. hashish. It falls, therefore, for consideration whether – as this Court outlined in *P. I. E. v The Refugee Appeals Tribunal* [2008] IEHC 339 and *D.L. v The Refugee Appeals Tribunal & Anor* [2008] IEHC 351 – the error renders the RAT decision irrational, unreasonable or in breach of fair procedures. In my view, when the decision is considered as a whole, this question can only be answered in the negative. I have read the decision carefully and it is quite clear that numerous aspects of the applicant's account of events were found to be neither plausible nor believable. I am satisfied that the error made was so insignificant as to be immaterial to the Tribunal Member's assessment of the applicant's credibility; the error could not reasonably be considered to have tipped the balance of the Tribunal Member's analysis against him, and it is not, therefore, fatal to her decision.

(ii) Treatment of Credibility

16. It is essential to recall that the Court is engaged in the exercise of a review

rather than an appellate jurisdiction. In that context, it is well established that this Court must be reluctant to interfere with a credibility finding made by a Tribunal Member unless the process by which the assessment of credibility was made was legally flawed or there was a lack of jurisdiction. This Court must not interfere simply because it would have reached a different conclusion to that reached by the Tribunal Member, who had an opportunity to observe the manner of answering and the demeanour of the applicant at the oral hearing and who is, therefore, in the best position to assess the applicant's credibility (see, among others, the judgment of Peart J. at the post-leave stage in *Imafu v The Refugee Appeals Tribunal* [2005] IEHC 416).

17. Of particular assistance to this Court in considering the process by which the credibility findings were made in this case is the judgment of Clarke J. at the leave stage in *Imafu v The Refugee Appeals Tribunal* [2005] IEHC 182. In that case, the applicant argued *inter alia* that the RAT decision was legally flawed on the basis that the credibility findings made therein did not stand up. Clarke J. reviewed the principles that stem from a series of earlier judgments and found it to be at least arguable that the following is the appropriate level of judicial scrutiny required of credibility findings:-

> "[…] the court is entitled to, and, indeed, obliged to analyse a finding of lack of credibility to ascertain whether:-
> (a) the determination on its face sets forth a rational and substantive basis for a finding of lack of credibility; and
>
> (b) whether on the evidence before the court it appears that there were materials properly before the Tribunal which would have allowed it to come to the conclusions which grounded such rational basis."

18. Applying that test to the facts of the *Imafu* case, Clarke J. refused to grant leave on what he called the "pure credibility" ground, finding that although it might be possible to criticise the RAT decision in a limited way, there was nonetheless a sufficient basis for the credibility findings to justify the decision reached. He noted that the RAT decision "set out a rational and appropriate basis for a finding of lack of credibility" and indicated that he was satisfied that there was no evidence before the Court to suggest that there was not a basis for the Tribunal coming to the conclusions which provided that rational basis.

19. Applying these principles to the facts of the present case, it is clear to me that there was a sufficient basis for the credibility findings made by the Tribunal Member, and that a rational and appropriate basis for each finding is set out. Equally, there is nothing before this Court to suggest that there was no basis for the Tribunal Member coming to the conclusions that she did. Indeed, it is clear that the applicant has not taken particular issue with the basis on which any of the specific credibility findings were reached; his complaints with respect to the treatment of credibility are of a general nature.

20. As was the case in *Banzuzi v The Refugee Appeals Tribunal* [2007] IEHC 2, in circumstances that mirror the present, the applicant in this case was fully heard at an oral hearing and where the credibility findings made do not run counter to generally known facts and are not inconsistent with the COI. It cannot be said that the credibility findings are irrational or inconsistent with a proper or any consideration of COI; rather, they are reasonable and rational, based on the evidence that was before the Tribunal Member, and set out with sufficient clarity. Nor were the findings, in my view, of a generalised nature; instead, it seems to me that the Tribunal Member carried out a fair, detailed and reasonable

assessment of central aspects of the applicant's claim, including his knowledge of the Asharaf clan, the incidents involving his siblings, the circumstances of his escape, and his account of his journey to Ireland. For these reasons, I find – as did Clarke J. in *Imafu* and Feeney J. in *Banzuzi* – that the credibility findings were made within jurisdiction and by a process which was not legally flawed.

(iii) Breach of European Convention on Human Rights Act 2003

21. Every organ of the State is obliged, pursuant to s. 3 of the *European Convention on Human Rights Act 2003*, to perform its functions in a manner compatible with the State's obligations under the provisions of the European Convention on Human Rights. This obligation extends to Members of the RAT by virtue of s. 1(1) of the Act of 2003, which defines an "organ of the State" so as to include the following:-

> "a tribunal or any other body […] which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised".

22. It does not follow, however, that RAT Members are obliged to consider the risk of an interference with an applicant's rights under Article 8 of the Convention when determining an appeal against a negative ORAC recommendation. The applicant has not suggested – nor is it easy to envisage – that the RAT decision could, of itself, impact on the applicant's Article 8 rights (if any). It appears that the suggestion is, rather, that the RAT decision might set in motion a series of events that have the potential to ultimately give rise to an interference with such rights. The potential impact of a negative RAT decision must be viewed in the context of the various stages of the asylum and immigration system as a whole. The Minister is not obliged to accept a negative RAT decision; he has a discretion to grant a declaration of refugee status even in the event of a negative ORAC recommendation and a negative RAT decision. That notwithstanding, if the Minister does accept the negative RAT decision, which is of course the case in the great majority of cases, this does not inevitably lead to the applicant's deportation. The applicant may apply for and be granted subsidiary protection or leave to remain temporarily in the State, for example.

23. It is only when the Minister proposes to deport an applicant that the obligation to consider Article 8 rights arises. The Minister is obliged to give consideration at that stage, prior to making a deportation order, not only to the matters set out in section 3(6) of the *Immigration Act 1999* and section 5 of the *Refugee Act 1996* but also to assess whether the making of a deportation order would be in breach of any other legal obligation (see e.g. *Kouaype v The Minister for Justice, Equality and Law Reform* [2005] IEHC 380; *Kozhukarov v The Minister for Justice, Equality and Law Reform* [2005] IEHC 424, at para. 2.6; N.*H. and T.D. v The Minister for Justice, Equality and Law Reform* [2007] IEHC 277). Such "other" legal obligations include the State's obligations under the *European Convention on Human Rights Act 2003* and the *Criminal Justice (United Nations Convention Against Torture) Act 2000*. Thus, the applicant's Article 8 rights arise for consideration at the pre-deportation order stage; they do not arise for consideration at the RAT stage. The sole matter that arises for consideration at the RAT stage is the appeal against the negative ORAC recommendation. The applicant's submissions in this regard are, consequently, without foundation.

Conclusion

24. In the light of the foregoing, I am satisfied that the Tribunal Member acted in compliance with fair procedures and in accordance with natural and constitutional

justice and I am satisfied that she did not act in breach of her obligations under s.3 of the Act of 2003. Accordingly, I refuse the reliefs sought.