Neutral Citation Number: [2009] IEHC 432

THE HIGH COURT

JUDICIAL REVIEW

2006 1231 JR

BETWEEN

A. Z. N.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL (BEN GARVEY) AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 7th day of October, 2009.

1. This is an application for judicial review of the decision of the Refugee Appeals Tribunal (RAT), dated the 25th August, 2006, 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.

2. Leave was granted by Birmingham J. on the 31st July, 2008, on the following ground:-

"The decision of the First Named Respondent does not accurately reflect the conduct and content of the appeal hearing and the evidence and information provided by the Applicant in the course of his appeal and contains factual inaccuracies of a material nature. The Tribunal Member has acted in breach of the Applicant's right to fair procedures and natural and constitutional justice and has acted ultra vires the Refugee Act (Appeals) Regulations 2003 S.I. 424".

3. The substantive application was heard at the Kings Inns, Court No. 1, on the 3rd and 4th March, 2009. Mr. John R. Finlay S.C. and Ms. Sarah Walsh B.L. appeared for the applicant and Mr. Anthony Moore B.L. appeared for the respondents.

Factual Background

4. The applicant claimed to be a national of Sudan and a member of the minority Beni Amer who are a sub-division of the Beja tribe which occupies the area of Eastern Sudan in the Red Sea region. The applicant claimed that before coming to Ireland, he lived in a Beja village of about 30 houses called El Hassnab in Tokar province in eastern Sudan. He received all his education at El Hassnab apart from four years at the Red Sea University at Port Sudan where he studied Arabic and was also employed as port worker. His account of the events preceding his departure from Sudan is as follows: since the year 2000 when he was a student in Port Sudan he was a member of the Al Beja Congress which is an opposition political party. The Congress seeks vindication of the rights of the Beni Amer

people and is made up of a militant wing called the *Free Lions* and a non violent wing called *National Movement of Eastern Sudan*. The Free Lions are engaged in armed conflict with the Sudanese government while the National Movement aims to improve the employment opportunities of the Beja people by peaceful means. The applicant claims that he supported the National Movement because the Beja are not recognised as Sudanese, being considered Eritrean, and as such they are marginalised on the jobs market. They are offered unskilled jobs while all the other situations are filled by Sudanese. As an example, he described the situation at the port authority in Port Sudan where well qualified Beja are offered jobs as porters or loaders.

5. The applicant says that his problems initially arose from his presence in early 2005 at two demonstrations organised by the Al Beja Congress in Port Sudan. On the 26th January, 2005, the Congress wrote a letter to the Governor of the Red Sea province of Sudan protesting the treatment of the Beni Amer people and seeking the resignation of the President of the Marine Harbour. The applicant and some students and other people were present the following day (the 27th) at a peaceful demonstration when this letter was handed over. The letter gave the Governor 72 hours to respond. When no action was taken in response to the letter a second demonstration occurred on the 29th January, 2005. The applicant said that he and his future wife were walking together with the other demonstrators from the market place heading towards the Port and Marine Administration Building when security forces and police attacked the demonstration resulting in the deaths of approximately 35 people.

6. Both the applicant and his betrothed were arrested. He himself was arrested by the police while his wife was arrested by the security forces. The applicant claims that he was detained for roughly three months in Port Sudan prison, during which time he was tortured, beaten and threatened with execution. He was released on 10th April, 2005, after signing an undertaking that he would cease his activities with the Congress.

7. He says that on his release he returned home to El Hassnab where, despite having signed the undertaking, he and his wife (who he married on the 5th May, 2005) continued their activities with the Congress because he "*would not let the government get away with stealing their resources and mistreating their people.*" After he had returned home he went to visit his brother who was a member of the *Free Lions* in Tasanay on the border of Sudan with Eritrea where the Beni Amer are found, divided between the two countries. He claims that during his visit, people from Tasanay attacked government army forces who were camped close to El Hassnab. The applicant says that he returned to El Hassnab on the 9th July, 2005. The government forces thought that because he had gone to Tasanay, he had some role in the attack on the military camp. The following day, government forces attacked his village of El Hassnab from the air and with ground forces, as a result of which his father and brother and many others were killed.

8. His wife, who survived the attack on El Hassnab, went to stay with a relative while the applicant was arrested as an informer and once again detained and tortured. This time he was detained in Kassala prison where he was accused of being an Eritrean and questioned, beaten, burned, deprived of food and held in solitary confinement. He was struck on the head with a gun and lost consciousness and he woke up in hospital. Two days later, supporters of the Al Beja Congress helped him to escape by providing him with women's clothes which were hidden in the lavatory in the hospital. He escaped the hospital disguised as a woman on the 5th August, 2005. He was sheltered by Al Beja Congress members who advised him to leave Sudan as his life was in danger. Those people

arranged for him and his wife to be reunited and they then both fled Sudan in fear of their lives. They paid for the journey by using his wife's gold and money he had hidden in the house in El Hassnab and they took a boat and arrived in this State on the 5th September, 2005.

Procedural Background

9. The applicant and his wife applied for asylum in this State in the normal way. The husband completed a questionnaire and attended for a s. 11 interview which took place over two days. His wife was separately interviewed and their accounts were compared. By letter dated the 7th April, 2005, the applicant was notified that ORAC was recommending that he should not be granted a declaration of refugee status. One of the reasons for the recommendation was his inability to speak either the Bedawiye language of the Beja people or Tigre, the alternative tribal language. Although country of origin information ("COI") states that the Beja are Bedawiye speaking with Arabic as a second language, the applicant explained that in his village, his people spoke mainly Arabic. The s. 13 report outlined discrepancies between his account of the demonstration in Port Sudan and that of his wife. His inability to describe events in the Al Beja Congress were said to undermine his claim. He was described as not forthcoming in the details relating to descriptions of the demonstration. The village of El Hassnab could not be located on an electronic mapping system and Tokar, which he had described as a province, was found to be a town. Many other details impugning his credibility were outlined and it was also found that no COI supported the holding of a demonstration on the 27th January, 2005.

10. The ORAC officer's recommendation relating to the applicant's wife was also available to the court. The same credibility issues arose in relation to the inability to locate any village called El Hassnab in Tokar province and there was doubt as to the existence of such a village. The village is not mentioned in any COI relating to documented aerial bombardment which occurred in the Eastern area of Sudan in June/July 2005. The wife similarly was unable to speak the Bedawiye language even though she claimed to be an activist in health and education in the remote villages of Eastern Sudan where Bedawiye is the common language. She too was unable to speak Tigre which is the other language of the Beja. Her knowledge of the Al Beja Congress was found to have been confined to the demonstration in Port Sudan. Her evidence of the demonstrations and her arrest and detention were found to be implausible and it was found that she was using real events in Sudan to support her claim. Her lack of any documentation was also the subject of negative comment.

11. Both the applicant and his wife appealed against the ORAC recommendations and sought to have their appeals heard together. A Form 1 Notice of Appeal was forwarded to the RAT with a vast amount of information on the political and human rights situation in Sudan. The court has considered this information almost all of which relates to Darfur and the separate conflict in the south of Sudan and those portions are therefore not relevant. Of some relevance among the documentation furnished to the RAT is a Sudan Country Report of April, 2006 prepared by the U.K. Home Office which contains a short extract devoted to the Beja and which indicates that the Beja have their own language and customs. Of further significance are several reports which deal with the demonstrations in Port Sudan which state that a large body of demonstrators were involved in two demonstrations which took place on the 26th and 29th in Port Sudan and not the 27th January asserted by the applicant. The information describes the events of the 29th January as involving several thousands of demonstrators.

12. Reports from Amnesty International also furnished to the RAT by the appellants listed the names of persons known to be held in Sudanese prisons including the names of members of the Al Beja Congress who were arrested following the demonstrations on the 29th January and who were still in custody three months later. The applicant's name does not appear. The appeal papers also included a translation of a letter stated to be from the Al Beja Congress. That letter named the applicants and said they were from the "*Hasnab area of Toukar Province are activists in Kawadir Organising Beja. He* [i.e. the applicant] *endured many disturbances and was arrested in the protests which started on the 19th of January 2005 in Burstsudan city for challenging the regime. He was tortured and beaten by the security forces of the dictatorship regime. His wife Mrs Taysir works in the management of the summer caravans for Health awareness in the village and she is an active member in organising the Beja Congress. For that, we pledge you to facilitate their roles as Beja Congress is worried about their lives and what they could be facing of arrest and torture in the circumstance of returning home to Sudan.*"

13. The oral appeal hearing took place on the 13th July, 2006. The wife's appeal hearing was held first. The husband's appeal which followed was not successful and a negative decision issued from the RAT on the 25th August, 2006, confirming the ORAC recommendation. The RAT decision relating to the husband is the subject of the present challenge. The court was not made aware of the outcome of the wife's appeal nor was the Tribunal decision relating to her appeal opened to the court. The attendance note taken by an RLS caseworker at the applicant's hearing is before this Court. The attendance note played a crucial part in this judicial review and in the leave application hearing. It was relied upon by the applicant to demonstrate that certain questions were not put to the applicant as stated in the Tribunal Member's decision. The court was informed that the attendance note was not originally produced to Birmingham J. at the leave application until he asked that efforts be made to determine whether any record of the hearing could be produced and an adjournment was granted to conduct inquiries when it was then produced.

14. As is reflected by the ground on which leave was granted at para. 2 above, the applicant's challenge to the RAT decision centres on asserted discrepancies between what the applicant avers to in his affidavit of what occurred at his appeal hearing and the findings made in the Tribunal Member's decision.

The Impugned Decision

15. The RAT decision follows the now familiar format of first setting out the applicant's claim with the evidence and submissions made at the oral appeal hearing. It then addresses relevant legal principles and concludes by analysing the claim and setting out the findings under the hearing "decision and reasons".

16. The Tribunal Member recounted the applicant's evidence in some detail. He said that the applicant presents as a highly educated and articulate person and said that to the extent that his evidence was that a demonstration occurred on the 29th January, 2005 and that the authorities interfered with that demonstration by killing and arresting people, the applicant's evidence was in conformity with country of origin information. However when he analysed the applicant's evidence in full he found that there were "a number of problematic inconsistencies" which "serve to undermine his claim and questions the legitimacy of his claim". The Tribunal Member made comments on some of the questions put and the answers given at the oral hearing and he identified a considerable number of issues which ultimately were crystallised to nine negative credibility findings, relating to the following:-

1. The applicant states that he took part in a peaceful demonstration on the 27th January to hand in a letter of protest. The events preceding the 29th January are well documented in country of origin information which makes no mention of anything happening on the 27th.

2. It would be expected that the applicant would know in detail certain aspects of the well documented demonstration on the 29th January. He was unable to state how many people were on the demonstration. There were discrepancies between the applicant's evidence to the Commissioner and to the Tribunal in relation to where his wife was at the demonstration. The Tribunal Member stated that he was satisfied that "*it was only when it became apparent that his spouse gave a different version of events that the applicant changed his evidence. I am satisfied that if there were any discrepancies in his Questionnaire and Interview which came about because of any misinterpretation that matter could have been resolved at an earlier stage".* He commented that no grounds were submitted relating to interpretation issues prior to the hearing and found that *"the applicant's attempt at undermining the procedure goes to his credibility."*

3. Amnesty International states that the demonstration relating to the handing in of the documents and demands occurred on the 26th and makes no mention of it occurring on the 27th.

4. The applicant was asked approximately how many partook in the demonstration and he was vague, hesitant and unable to say. This was considered to be unusual considering his background and education.

5. He gave conflicting evidence in relation to where his wife was during the demonstrations.

6. In relation to the bombing of his village the applicant said that he was in the same room as his wife but she gave a different version and when he was asked how they were separated he was vague and said that she went to her aunt's place after the bombing.

7. He told the Tribunal that the bombing of his village was indiscriminate but in his interview he contradicted that.

8. He claims that he was a high profile prisoner and did not have any contact with the outside world. However, his evidence concerning how he escaped lacks credibility. If he was a high profile prisoner who was brought under armed guard to prison it is not plausible that he was simply allowed to go into a toilet and come out dressed as a woman.

9. Late COI submitted by the applicant states that the Beja are a separate ethnic group with their own culture, language and history. The Tribunal Member had difficulty accepting that a person so involved in the Beja Congress could not speak the language and he gave no plausible explanation as to why he could not speak the language of the Beja.

17. Overall the Tribunal Member found that the applicant lacked credibility and he affirmed the ORAC recommendation.

THE ISSUES IN THE CASE

18. The applicant's complaints are contained in the composite ground under

which leave was granted by Birmingham J. on the 31st July, 2008 at para. 2 above.

19. Mr. John Finlay S.C., counsel for the applicant, commenced by pointing out that the facts averred to in the applicant's affidavit had not been controverted and that in those circumstances the court should accept its contents as true and accurate and should also accept the attendance note compiled by the RLS caseworker at the oral appeal hearing as being supportive of the applicant's averments. The applicant's affidavit denied that certain questions referred to in the RAT decision were put to him or that the translation of words and phrases was accurate. The contents of the affidavit and the attendance note of the oral hearing bear a remarkable similarity raising the inference to this Court that the affidavit was prepared on the basis of the contents of the attendance note which was at all time available to the applicant.

20. As the RAT decision comprised a series of findings on what the applicant and his wife said to ORAC and the Tribunal and how their version of events differed from each other and from COI, the hearing before this Court involved an examination of the minutiae of the decision. It seems to the court that this analysis of detail sometimes omitted the all important overall assessment of why the Tribunal Member came to his determination that the applicant's appeal should be not be allowed.

21. At the hearing the leave decision of Birmingham J. was broken down into its various component parts and taken in turn, the first being:

(a) Failure to reflect the conduct and content of the appeal hearing

22. The applicant submitted that the Tribunal decision failed to reflect the conduct and content of the applicant's oral appeal hearing. He relied particularly on the fact that the Tribunal Member found that he and his wife gave differing versions of where they were in their house when the village was being bombed. In his decision, the Tribunal Member stated that it was put to the applicant that his wife had given "*a different version*" of where she and the applicant had been when their village was bombed. In his grounding affidavit the applicant says that that his wife's version was never put to him and further that the question put to him by the interpreter at the oral hearing was whether he was in the same "house" as his wife during the bombing. The attendance note of the hearing records that two separate questions were posed by the Presenting Officer, first as whether the applicant was in the same "house" as his wife and then whether he was in the same "room" as his wife and, again,

Q. "but you were in the same room when the attack occurred – who (sic) did you become separated from her?"

A. "yes, we were in the same room – when I was arrested she went to her aunt's place".

23. The applicant's explanation for this inconsistency was that the translator asked him whether he was in the same "house" as his wife but he did not understand that he was being asked if they were in the same "room".

24. The applicant submitted to the court that if it had been put to him that he and his wife had given inconsistent accounts of their whereabouts when the bombing was occurring, it would have emerged that there was a translation error with respect to the difference between a "room" and a "house". It was argued that as

the attendance note does not record any questions on any divergence between the applicant's account and that of his wife this finding does not merely constitute an error of fact but represents a breach of the fair procedures and natural and constitutional justice and that this error alone should lead to the quashing of the decision.

25. Counsel for the respondents argued that there was no obligation for the Tribunal Member to put to the applicant the fact that there was a discrepancy between his evidence and that of his wife but that notwithstanding this argument, the final portion of the attendance note, which briefly summarises the submissions made at the end of the oral evidence, suggests that the discrepancy was in fact put to him and that the discrepancy was a matter that had previously arisen during the hearing. Counsel for the respondent urged the court to bear in mind that attendance notes do not purport to be a verbatim transcript of the hearing and again cautioned against an unqualified acceptance of the contents of either the attendance note or the applicant's affidavit.

26. It was subsequently established that it is not the general practice for legal submissions made to the Tribunal Member at an appeal hearing to be translated or interpreted to the applicant. This may explain why the applicant was unaware that the Presenting Officer had made submissions which the attendance note recorded as:

"PO [The Presenting Officer] submitted that any issues relating to the conduct of the interview should have been addressed by way of judicial review. She submitted that both clients were vague in their evidence and once again contradicted one another – a major one being where they both were on the date of the attack on the village – husband stated that he and his wife were in the same room in the same house at the time and the wife stated that she was in a different room in the same house which was divided in two and the interconnecting door had been locked".

27. In spite of the clarifications on practices at Tribunal hearings, the uncontroverted fact remains that the applicant's legal representatives made no objections or submissions relating to this detailed point at the appeal hearing. This leads this Court to infer that the discrepancy was in fact raised with the applicant at the oral appeal hearing. In reading the RAT decision the court notes that contrary to what was argued, the Tribunal Member did not raise the issue of the discrepancy himself. In the portion of his decision which relates to the evidence given by the applicant the Tribunal Member says:

"He (the appellant) was asked where he and his wife were during the attack and he said "*we were in the same house*". Questioned further, he said both of them were in the same room when the attack occurred. It was put to him that his wife gave different evidence. He was asked what happened to his wife after the arrest and he replied that he didn't see her. It was put to him that he said that he was in the same room so he would know how they were separated."

28. This Court finds that it is more likely than not that the applicant was made aware that his wife's evidence on this issue differed from his. In any event the court finds no substance in the submission that if the matter had not been raised during the hearing, this would constitutes an error of law which vitiates a very detailed series of reasoned negative findings on credibility. The court is singularly unimpressed with the submission relating to the translation of "room" into "house" in the context of the question being raised twice as evidenced by the attendance note of the hearing and the Tribunal Member's record in his decision.

The applicant sought on two occasions to use translation issues, which were not identified in the appeal submissions, to explain away significant inconsistencies. It follows that this ground has not been established.

(b) Failure to reflect evidence and information of the applicant

25. Counsel for the applicant argued that the Tribunal Member's decision fails to reflect the evidence and information provided by the applicant in the course of his appeal and contains factual inaccuracies in that regard. It was submitted that the decision must be quashed and remitted for reconsideration by another Tribunal Member because of the material errors that it contains. Reference was made to the decisions of Finlay Geoghegan J. in *Carciu v. The Minister for Justice, Equality and Law Reform* [2003] I.E.H.C. 31, *Traore v. The Refugee Appeals Tribunal* [2006] I.E.H.C. 606 and *Olatunji v. The Refugee Appeals Tribunal* [2006] I.E.H.C. 113.

26. Each of the factual findings made by the Tribunal Member was the subject of careful scrutiny and extensive submissions were made on each finding. Counsel for the respondents argued that there were no errors and that the RAT decision sets out a rational and substantive basis for each of the nine credibility findings based on evidence before the Tribunal Member which permitting him to make each finding.

27. Before turning to assess the submissions made on each of the findings, the court notes that on several occasions it was obliged to engage in a comparison of two versions of what was recorded as the applicant's evidence with each party laying a different emphasis or nuance on the applicant's words. The court is uneasy with this method of challenge to the decision which involved an extraordinary degree of analysis and minute parsing which was strongly disapproved by Peart J. in *J.B.R. v. The Refugee Appeals Tribunal* [2007] I.E.H.C. 288 (31st July, 2007) as follows:

"In my view the matters identified by the applicant as errors on the part of the Tribunal Member are insubstantial at best. In some cases the alleged error is non-existent. There is no doubt that there were inconsistencies in the story given by the applicant. It is not appropriate to parse and analyse every word and phrase of a decision and isolate a word or phrase here or there and contend that as a result the process is flawed. An error of fact of sufficient significance will of course fatally infect the decision making process. But it must be a clear and significant error of fact."

28. The court recalls that the sole ground on which leave was granted in this case is set out in full at para. 2 above. While this is a composite ground it requires at the very least that the applicant should establish that the appeal hearing was conducted in breach of fair procedures because his evidence was not reflected in the findings. The process engaged on behalf of the applicant involved a deconstructing of the decision line by line. This process has to a great extent determined the format of this judgment with the court being forced to make an individual assessment of the submissions with respect to each of the Tribunal Member's individual findings.

*** Date of the first demonstration**

29. There is no escaping from the fact that COI before the Tribunal Member, including a report from Amnesty International, describes the delivery of the letter of demand as having occurred on the 26th January, 2005. This accords logically with the information provided that the Governor of the Red Sea province was

given 72 hours to meet the demands contained in the letter. The large demonstration took place on the 29th January being 72 hours after the 26th January. The evidence of the applicant was that there were three and not two demonstrations; the first on the 26th, a second on the 27th (described as a peaceful demonstration when the letter was handed over) and a third on the 29th which was violently broken up. The Tribunal Member was quite correct to find that the applicant's account is not consistent with COI and I am satisfied that the applicant's evidence does not make sense in view of the time given to the Governor to respond to the demands. The applicant's submission that the Tribunal Member's finding is in error and without foundation fails. However, as a stand alone negative finding it would have seemed unduly harsh to refuse an applicant refugee status on this issue alone.

*** Numbers at the demonstration**

30. Counsel for the applicant objected to the Tribunal Member's characterisation of the applicant's evidence as "vague and hesitant" on the question of the numbers at the demonstrations at which he attended. In his grounding affidavit the applicant says he told the Tribunal Member that he "could not say" what the number was and that there were "a lot of people" there but he could not give an estimate and was unwilling to hazard a guess as estimates for attendances at marches and demonstrations are well known for being inaccurate. Counsel complained that the Tribunal Member did not accurately record this evidence. He argued that the applicant's answers in that regard were perfectly reasonable.

31. Counsel for the respondents argued that the answers recorded in the attendance note indicate that the applicant did not wish to answer the questions asked of him as he was aware that his answers might be contradicted by COI. Counsel argued that the applicant remained deliberately non committal on the size of the crowd because he was not there at all and that it was open to the Tribunal Member to make the negative finding that he did.

32. The court finds that the Tribunal Member was best placed to assess the manner in which the applicant gave his evidence which was also subject to adverse comment by ORAC in the s. 13 report. The applicant's answers to questions put to him at his first interview are quite revealing: when asked if there were more than 20 people at the demonstration he answered "*yes*"; more than 50? "*more*"; more than 100? "*I didn't count them, I don't know*". COI reveals that several thousand took part in the demonstration of the 29th January, which resulted in the deaths of between 20 and 35 people. The applicant's answers at the oral appeal hearing were "*I don't know the exact figure; "I can't say – many*"; "*I can't give you a number because there were a lot of people*" and, when asked if there were 1,000, his counsel objected as he had been asked the question before and said he did not know.

33. It seems to this Court that the Tribunal Member was perfectly entitled to find it unusual that a person of the applicant's asserted education and background as an activist was unable to answer fairly straightforward questions about the size of the demonstration. It is not difficult if one is engaged in a march to give some personal estimate of numbers even if that estimate is qualified. The applicant was without doubt unable to provide any detail of the number of participants at the demonstration. In his affidavit he says he was unwilling to guess but he did not say this at the oral hearing. In the circumstances the court finds no error of fact or law in the finding that the applicant was vague. A judicial review court is unable to determine any dispute involving a finding of hesitancy and must leave such an assessment to the person who hears and sees the testimony being presented although the attendance note of the hearing and the records of the s.

11 interviews provide some evidence to support the finding made by the Tribunal Member. This ground has not been established but again would not in itself be the reason for refusing refugee status.

*** Proximity to his wife at the demonstration**

34. The applicant also challenged the Tribunal Member's finding that there was an inconsistency in his evidence at his s. 11 interview and at the oral hearing with respect to his proximity to his wife at the demonstration. Page 16 of the signed note of his s.11 interview states:

Q. Were you and your wife walking together?

A. We were walking together. She was my wife to be at that time.

Q. She was at your side, not somewhere else in the crowd, is that correct?

A. She was beside me.

35. However at his oral appeal hearing the applicant denied that he ever said that his wife-to-be was beside him, instead saying that she was three metres away. The applicant submitted that there was no real difference between what he said on each occasion. In his affidavit he attempted to explain that the ORAC officer was incorrect in recording that they were walking together at the demonstration as he and his wife to be could not be seen together as an unmarried couple in a Muslim country. This is the first time such an explanation was given and it must be viewed with some scepticism considering that the matter was not raised as an appeal ground.

36. Where the applicant's wife-to-be was in relation to him at the demonstration would normally be of little importance unless the interviewer was comparing the evidence of both parties to establish consistency. The s. 13 report refers to discrepancies between the accounts given by the applicant and his wife in relation to their alleged attendance at the protests in Port Sudan. This goes some way to explaining how this inconsistency in the applicant's narrative took on the importance it did in the RAT decision. As there is undoubtedly a change in what was said on the two occasions and there was an effort at the eleventh hour to blame the interpreter, the court can find no substance in the challenge to the validity of this finding.

*** Nature of the Attack**

37. The applicant also challenged the Tribunal Member's finding that the applicant gave inconsistent evidence at his s. 11 interview and at the oral appeal hearing on the nature of the attack on El Hassnab. At the s. 11 interview the applicant stated that his village was probably attacked because Government forces suspected that he had told the people in Tasanay where the army camp which they attacked was located. He claimed that his village was attacked because the Government wanted to arrest him. When this page of his evidence was read back to him, the applicant sought the insertion that the Government was also engaged in ethnic cleansing. At the appeal hearing his evidence was that the attack was indiscriminate and the village as a whole was targeted as the Government was carrying out ethnic cleansing and that this was what the Government forces did if they themselves were attacked.

38. Counsel for the applicant argued that there was no inconsistency here and that in both cases the applicant claimed that the government were engaged in ethnic cleansing of Beja tribespeople. Counsel for the respondents argued that it was clear from the language used at the s. 11 interview that the applicant was saying that there was a causative link between his visit to Tasanay and the attack on El Hassnab. He argued that little weight should be given to the applicant's clarification at interview that the Government was carrying out ethnic cleansing of his people.

40. It seems to this Court that there is no merit to the applicant's challenge to the Tribunal Member's finding on the disconnect between the applicant's evidence on the nature (which the court reads as motive) for the attack of El Hassnab. A perusal of the evidence given at the two s. 11 interviews and in the questionnaire undoubtedly provides ample material on which the Tribunal Member arrived at his finding that the applicant's evidence changed at the appeal. There is little doubt, notwithstanding valiant attempts to put a gloss on the changes that the story of why his village was attacked metamorphosed from being directed against him personally to being an indiscriminate attack. When questioned at the oral hearing, the applicant specifically denied his earlier evidence until it was read out to him, at which stage he reverted to the first version, saying the village was attacked because of his visit to Tasanay. On the basis of this discrepancy it is very difficult to see what exactly the applicant's criticism is and where any of this establishes that the decision did not reflect what occurred at the hearing.

*** Escape**

39. The applicant challenges the Tribunal Member's finding relating to the applicant's account of his escape. The Tribunal Member outlined that it was put to the applicant that it was not credible that if he was a high profile prisoner under armed guard, he could escape by simply walking into a toilet and coming out dressed as a woman. In his grounding affidavit the applicant says that it was not put to him that the account of his escape was implausible and counsel for the applicant submitted that there is nothing in the attendance note of the appeal hearing to suggest that any question of that nature was put to the applicant.

40. Counsel for the respondents once again cautioned that the note of the oral appeal hearing is not a transcript and does not record everything that was said. He also argued that the Tribunal Member was not obliged to specifically put it to the applicant that he found the details of the applicant's escape to be implausible. Reference was made to the decisions of Herbert J. in *D.H. v. The Refugee Applications Commissioner* [2004] I.E.H.C. 95 and McMahon J. in *F.O.S. v. The Refugee Applications Commissioner* [2008] I.E.H.C. 238, where the latter held :-

"It must be acknowledged […] that the obligation on the relevant body is an obligation to give "a reasonable opportunity" to the applicant and that the obligation arises only where the relevant matter is "important to the determination" so that the applicant will have the opportunity to respond. Not every matter, however, must be put to the applicant or to his advisors. It is not incumbent on the Commissioner, after every question is answered, to say to the applicant:-"*I am not sure I believe your answer. It may be when I assess the matter fully and examine the evidence in its totality that I will reject your answer to this question. What do you say to that?"."*

41. Counsel for the respondents also pointed out that there is a discrepancy between what the applicant said at his s. 11 interview (i.e. that a guard told him to go "to the gents" and put on women's clothes) and at his appeal hearing and in his affidavit where his evidence was that there are no separate facilities for men

and women and in Sudan it is the same for everyone. However unusual this averment is for an Islamic country, it was the applicant's evidence at the appeal. The question then posed by the Presenting Officer was "*And the guard just allowed you to go into the toilet and then you changed into the women's clothes.*" In the context of the evidence it seems to this Court that the Presenting Officer's statement/question is loaded with irony indicative of incredulity. The applicant's complaint however is that the Tribunal Member should have made it known that he personally found that evidence lacking in credibility.

42. The court is of the view that it is unreal to expect that a Tribunal Member dealing with an aspect of a claim which has already been the subject of adverse findings by ORAC to say to the applicant "I find certain aspects of your evidence simply not credible". The question the court poses rhetorically is what purpose can be served by such an observation as the questioning of the applicant is conducted by a presenting officer who represents ORAC. The Tribunal Member is not the cross examiner nor is he conducting an investigation. He is determining an appeal where the applicant has the burden of establishing that, contrary to what was recommended by ORAC, he is in fact a refugee. The whole purpose of alerting such a person to matters which are of importance to a decision maker is to ensure fairness and to allow that person to specifically direct his / her mind to addressing those matters before a determination detrimental to the person is made. What purpose could have been served by the Tribunal Member saying "*I find your story of escaping from a hospital where you were under armed guard by changing into women's clothes which were hidden in a toilet not credible"?* No additional COI could have advanced the story and it is highly unlikely that any witness could have been called to corroborate the applicant's story.

43. The applicant was fully aware that his narrative had been rejected by ORAC and he was, with the assistance of counsel, alert to the task before him of filling in details which make the story of his arranged escape more probable. The attendance note of the oral hearing indicates a clear line of cross examination which on the most benign reading is a focused and effective line of questioning challenging the applicant's assertions that he was a high profile prisoner who had no contact with the Al Beja Congress while in prison but that members of the Congress regularly search this hospital as prisoners are known to be brought there; that he was identified by Bashir who was the member of the Al Beja Congress responsible for searching the hospital he was in; that Bashir spoke to him and told him that women's clothes would be hidden in the toilet for him.

44. The attendance note indicates that the Tribunal Member asked one question which was "*But how did this person manage to tell you that the clothes were in the toilet if you were under armed guard?"* The response is recorded as "*Because the guard was not aware of what he said to me."* The next question "*You were not allowed visitors in prison – how come you were allowed visitors in the hospital"* was recorded as eliciting no response.

45. The determination of credibility has been the subject of innumerable decisions in asylum matters. There is total consensus on the two principles that where the Tribunal Member makes a specific adverse finding as to the applicant's credibility, this must be based upon reasons which bear a legitimate nexus to the adverse finding and that it is for the decider of fact to determine the weight (if any) to be given to any evidence. The common sense approach expressed by Herbert J. in *Kikumbi v. The Refugee Applications Commission* [2007] I.E.H.C. 11 (7th February, 2007), has much to commend it:

"The probative value (if any), to be given to information or material properly received and considered by the decider of fact may sometimes be ascertained by reference to the cogency of the account itself and the absence of inherent contradictions and errors of substance in that account. Sometimes, it is possible also to compare various elements of the account with extrinsic material which the decider of fact can accept or, which is admitted to be reliable, viz., country of origin information from sources of proven and accepted accuracy and reliability, such as United Nations Reports. Sometimes, however, there is no yardstick by which to determine whether a particular account or part of an account is credible or not, other than by the application of common sense and life experience on the part of the decider of fact in the context of whatever reliable country of origin information is properly before him or her. Also, the decider of fact may have had the advantage of having seen and heard the Applicant for asylum relating his or her story, making all due allowance for the various factors indicated by the UNHCR Handbook as uniquely relevant to such an account giver. The obligation to give reasons, as explained by the Supreme Court in F.P. and A.L. v. The Minister for Justice, Equality and Law Reform ([2001] 1 I.R. 164), does not, in my judgment, require the decider of fact to give reasons why she or he applying such common sense and life experience found that a particular account or aspects of such an account to be not credible." (The Court's emphasis)

46. In applying those principles to the Tribunal Member's evaluation of the account of the applicant's escape from hospital custody, I can identify no error of law or lack of procedural fairness. It was entirely a matter for the Tribunal Member to determine the plausibility of the applicant's description of his alleged escape. The assertions made by the applicant were tested by the Presenting Officer. The applicant was given a reasonable opportunity to explain his position and the Tribunal Member's question *"But how did this person manage to tell you that the clothes were in the toilet if you were under armed guard?"* should have made it perfectly clear that his narrative was met with a degree of incredulity. This should have been sufficient to alert the applicant, if such warning could have been necessary, to address the issue. The court is not satisfied that this criticism amounts to a challenge of substance.

*** Inability to speak the language**

47. The Tribunal Member stated in his decision that it was put to the applicant that COI indicates that the Beja people have their own language and that he was asked if he spoke the language but he said no. The Tribunal Member also stated that it was put to the applicant that if he was a member of the Al Beja Congress for a number of years, he should be able to speak the Beja language. He went on to make an adverse credibility finding on that basis, finding that the applicant had not given a plausible reason for his failure to speak the language.

48. In his grounding affidavit the applicant says that it was not put to him that as a member of the Al Beja Congress he should have been able to speak the language. Counsel for the applicant also complained that the Tribunal Member failed to record and consider the explanation given by the applicant at the oral hearing, which was that he said he was unable to speak the language because Arabic was the common language used in the schools and universities and is spoken by the younger people who do not generally speak the Tigré tribal language, which is spoken by older people. Counsel argued that COI supports the applicant's claim in this regard and he opened to the Court several passages of the material that was before the Tribunal Member. Counsel contended that the Tribunal Member was obliged as a matter of fair procedures to record and to consider the explanation given by the applicant and he submitted that it was not sufficient to state that the applicant gave no plausible explanation for not

speaking the language. Counsel further argued that although the Tribunal Member appears to have attributed less weight to the absence of a plausible explanation in this regard than to other negative credibility findings, there was nonetheless a breach of fair procedures.

49. Counsel for the respondents supported the validity of the finding that it was not credible that the applicant did not speak the language in the light of the claim that he was involved with the Al Beja Congress for five years and where COI indicates that the Beni Amer people speak Arabic as a second language but have retained Beja as their primary language. Counsel further argued that there was no obligation on the Tribunal Member to set out the explanation given by the applicant for not speaking the Beja language. Reliance was placed on *Ndinda v. The Refugee Appeals Tribunal* [2006] I.E.H.C. 368, where Herbert J. held:-

"As a matter of general principle, while the Member of the Refugee Appeals Tribunal must comply with the ruling of the Supreme Court, (*F.P. & Ors. v. Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164 at 172 per Hardiman J.), as to the provision of reasons for the decision of the Refugee Appeals Tribunal, I agree with the submission of Counsel for the Respondents that the Member of the Refugee Appeals Tribunal is not obliged, in his decision, to note or to refer to every aspect of the evidence considered in reaching that decision."

50. The court finds that the complaint made on the language does not relate to the substance of the finding but is rather that the Tribunal Member failed to specifically say to the applicant that that his explanations were not found credible. The court approaches the matter in the following way: COI is uniform in stating that the Beja speak their own language and that a large number of them also speak Tigrinian or Tigre. While many young Beja are stated to also speak Arabic, it is nowhere stated in the several sources opened to the Court and which were before the Tribunal Member that they no longer speak Beja.

51. The Tribunal Member had been told that the applicant came from a small village of thirty houses and that his wife worked with the caravan Beja. They both claimed membership of a Beja people's movement. The applicant's brother was stated to be a Beja militant living close to the Eritrean border. Notwithstanding this Beja background the applicant was unable to speak even basic Beja or Tigre and explained to the ORAC officer at interview that young Beja no longer speak the language and speak Arabic instead. While the language issue does not seem to have been raised as a topic during the oral hearing, it was dealt with in the bundle of documents which the Tribunal Member is obliged to consider. Ground 12 of the applicant's Grounds of Appeal appended to his Notice of Appeal read:-

"The Authorised Officers erred in law in concluding that the Appellant was unable to speak tribal languages entailed that his evidence was not consistent or credible […]. The Appellant in fact has a very limited knowledge of Tigre language. Arabic is in fact the primary language of one half of the population (see *infra* Submissions) and as a University educated Sudanese student, the Appellant would have been accustomed to speaking Arabic only, that was not acknowledged as relevant by the Authorised Officer at all."

52. It was a matter for the Tribunal Member to evaluate this evidence and as has been stated so often there is no obligation on any assessor of fact to put every single aspect of an applicant's evidence to him or to record all the answers. I adopt the reasoning on this aspect of the case of the judgment of Costello J. in *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593, which has been followed as a

general principle including recently by Hedigan J. in *O. O. (a minor) & Ors v. The Minister for Justice, Equality and Law Reform* [2008] I.E.H.C. 307. In contrast to ORAC, the Tribunal Member did not consider the applicant's inability to speak the language necessarily fatal to the applicant's claim even though he found the explanations which were included in the appeal documents implausible. The finding was logical, reasonable and based on evidence and the applicant's challenge to that finding fails.

Cumulative Effect / Severability

53. The court has not identified any error or breach of fair procedures which individually or cumulatively raises a breach of fair procedures or which undermines the integrity of the decision generally.

DECISION

54. The applicant told his story as to why he was fleeing persecution over two days before ORAC. His wife told a similar story. Neither party was found credible before ORAC or on appeal. The Tribunal Member outlined his reasons in his lengthy decision. The applicant argues that these reasons contained inaccuracies, errors and instances of constitutional unfairness. However, looking at the decision either as a whole or taking each finding individually and setting that finding against the applicant's evidence it is found that there is little substance in his complaints.

55. Independent COI supports the negative findings made by the Tribunal Member on key issues and alleged discrepancies between what the Tribunal Member found on minor issues (e.g. whether the wife's version of events was specifically put to the applicant) are not capable, in the absence of a transcript, of resolution. The main reasons why the applicant was found not to be credible were not seriously in dispute but multiple individual findings were asserted to have been in error and to have failed to reflect the actual evidence. The court examined each of those findings in turn. First, the dates of the demonstrations provided by the applicant do not accord with COI. If this was the only discrepancy identified in the applicant's evidence it would seem harsh to find that he was not a refugee on this matter alone. It is also unlikely that he would have failed because of minor discrepancies as to where his wife was in relation to him at the demonstrations in Port Sudan or where they both were in the village of El Hassnab when the air and ground bombardment occurred. However when these conflicts are set against other findings which bear on want of credibility such as the paucity of detail in the applicant's evidence relating to the size of the demonstration at which 35 demonstrators were killed, his seamless escape from hospital while under guard as a high profile prisoner who had been rendered unconscious during torture, his inability to speak his tribal language, the discrepancies on the nature and motive of the attack on his village among other aspects of the evidence, then it becomes inescapable that the decision maker's determinations were soundly based. The Tribunal Member was entitled to assess the evidence that the applicant was, while in hospital under guard, visited by members of the very political party he was associated with and which had been the cause of his detention and alleged torture and find that aspect of his evidence not to be credible. The Tribunal Member was equally entitled to find that it was not credible that a prisoner under guard in a hospital should be able to communicate with members of the Al Beja Congress who could inform him that women's clothes were being left for him in a toilet and to inform him of the password to use for his arranged escape in a taxi. These last two reasons alone were sufficient to find the applicant not credible. It seems to the court that on a question of practicality, even if the issues over which so much time was taken at

this hearing such as the dates of the demonstrations, the position of the applicant's betrothed / wife in the house and at the demonstrations, their inability to speak the language of the Beja tribe, the motive for the attack on El Hassnab were all severed from the decision and the story told by the applicant was reduced to its basic components, the Tribunal Member would still be acting reasonably and within jurisdiction when affirming the recommendation of the ORAC officer.

Conclusion

56. In the light of the foregoing, I am satisfied that the Tribunal Member did ***not*** act in breach of fair procedures and natural and constitutional justice and accordingly, I ***refuse*** the reliefs sought.