Judgment Title: Imafu -v- Minister for Justice Equality & Law Reform & Ors

Neutral Citation: [2005] IEHC 416

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Judgment by: Peart J.

Status of Judgment: Approved

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THE HIGH COURT

Record Number: 2004 No. 1162 JR

Between:
Mabel Imafu
Applicant And
The Minister for Justice, Equality and Law Reform, Refugee Appeals Tribunal, Ireland and the Attorney General Respondents

Judgment of Mr Justice Michael Peart delivered on the 9th day of December 2005:

The applicant was by order dated the 10th June 2005 granted leave by Clarke J. to apply for an Order of Certiorari quashing the decision of the Refugee Appeals Tribunal ("the Tribunal") dated the 8th November 2004 by which her appeal against the refusal of a declaration of refugee status was rejected.

When applying for leave, the applicant had relied on three grounds; but Clarke J. has allowed leave on two only of the grounds set forth in the Statement of Grounds as originally filed. The ground excluded on the leave application was that in making an adverse credibility finding based

specifically on the applicant's demeanour before the Tribunal, the Tribunal made an unreasonable evaluation of the applicant's credibility, and that it was based on presumptions as to how a witness should tell her story, and that it lacked an understanding of cultural diversity in the manner in which people tell their story. In rejecting that as a ground, to be relied upon the learned judge stated:

"…I have come to the view that while it might be possible to criticise in a limited way

the determination of the RAT there is nonetheless a sufficient basis for the basic determination by the Tribunal as to the applicant's credibility to justify the decision reached.

It was specifically conceded by counsel for the respondents that a reliance upon a mere mannerism such as the repeated statement attributed to the applicant of "I will tell you" would not, of itself, amount to a sufficient basis for a finding of lack of credibility. However, in this case the Tribunal goes on to place significant reliance upon the contention that on a number of occasions when asked a 'difficult' question the applicant proceeded to answer a different question notwithstanding the fact that the applicant encountered no such difficulty in relation to other aspects of her account. There is no evidence before me to suggest that this finding of the Tribunal was not based on a permissible view of the course of the hearing. In a case such as this where there is very little objective evidence to verify the applicant's claims, it seems to me that the Tribunal, in the course of its determination set out on its face a rational and appropriate basis for a finding of lack of credibility. I am further satisfied that there is no evidence before this court to suggest that there was not a basis for the Tribunal coming to the conclusions which provided that rational basis. In all the circumstances I am not, therefore, satisfied that the applicant has established substantive grounds for challenging the determination of the Tribunal on the 'pure credibility' issue."

I have set this out in some detail at the commencement of my judgment because, as was submitted by Counsel for the respondents, this applicant comes before the Court as somebody against who has been found not to be credible.

But the applicant has been permitted to seek relief on two grounds:

1. That the Tribunal Member failed to take into account relevant considerations, and failed to consider the applicant's claims in the context of the background information on the country of origin which was provided;
2. (a) That the Tribunal Member erred in law by considering the credibility

of the applicant in complete isolation from the general picture as to the practice of human trafficking and forced prostitution in Nigeria; (b) That the Tribunal Member erred in law, in that the finding that there was a failure to substantiate her story is not based upon any rational analysis of the substantiation that might reasonably have been expected, the perceived failure of the applicant, the reasons, if any, offered by the applicant for being unable to provide substantiation, and any other material factors.

In relation to 1. above, the respondents submit that there is no error in the manner in which the decision was reached and that there is no requirement in law that the Tribunal must first consider any alleged fear of persecution in an objective context and in the light of country of origin information. The respondents contend that a negative determination on the applicant's credibility negates any further obligation to consider the objective country of origin context in which the applicant places her claim. In other words, if the applicant is not believable, and not believed as to her story (and reference is made again to the fact that since leave was refused in relation to the manner in which she was found not to be personally credible because of the manner in which she dealt with some questions put to her, including hesitancy bin answering), any consideration of the objective element to be gleaned from country of origin information is meaningless, since even if the country of origin information discloses a factual situation into which the applicant's story, if true, could fit, the fact is that the applicant has been found to lack believability or credibility. Therefore it is submitted by the respondent that there is no error of law in not, either considering in the first instance or in not going on to consider objective facts and country of origin information in the case of the applicant who has not been believed as to her story alleging persecution.

The applicant has relied upon judgments such as that of Kelly J. in **Camara v. Minister for Justice, Equality and Law Reform, unreported, 26th July 2000** where the learned judge stated in relation to task of assessing credibility referred to Professor Goodwin-Gill's statement in his work "The Refugee and International Law":

"Simply considered, there are just two issues. First, could the applicant's story have happened, or could his/her apprehension come to pass, on their own terms, given what we know from available country of origin information? Secondly, is the applicant personally believable? If the story is consistent with what is known about the country of origin, then the basis for the right inferences has been laid."

The applicant has also relied upon the judgment of Finlay Geoghegan J. in **Traore v. Refugee Appeals Tribunal, High Court, unreported, 14th May 2004** where she considered the question of whether the Tribunal

Member was obliged to assess the applicant's story in the light of country of origin information before coming to a conclusion on credibility, and in that regard referred to the passage from Goodwin-Gill referred to above, and went on:

"…I have concluded that the Tribunal Member in this case was obliged to assess the applicant's story that as an illiterate person he was employed as a driver to Secretaries to top Government officials in the context of what is known of the conditions in the Ivory Coast. Further, that by reason of the importance of this part of the story to the assessment of credibility of the applicant, her [the Tribunal Member] failure to do so renders the decision invalid."

It is worthy highlighting the reference to the "importance of this part of the story to the assessment of credibility". It seems to me that in that case, a question considered important to the question of credibility was whether it could be true that an illiterate person could be a Secretary to a Government official ion the Ivory Coast. I accept that it would not be proper to make a negative credibility finding in relation to the applicant on the basis of a disbelief of that assertion without first checking from country of origin information whether it is permissible or possible for an illiterate person to hold such a position. If it was permissible or possible, that would be an important factor to take into account in assessing whether the applicant was at least believable. In the present case however one is not dealing with something so unusual. One is dealing with a lady who says she was trafficked to Italy for prostitution and that she will be persecuted as such a person should be returned to Nigeria. The Tribunal Member does not need to resort to country of origin information to know that trafficking for prostitution takes place, and if for other reasons (and again it is noteworthy that leave was not allowed in this respect) the applicant is simply not believable as to her tale of being so trafficked and working as a prostitute in Italy, and the threats to her family and so on if returned, then there can be no importance attaching to whether there is or is not country of origin information which says the obvious, namely that women are trafficked from Nigeria to Italy and that on their return to Nigeria they may become the object of attention by the authorities in relation to a possible offence. One could say that that background is "a given", and that is in contrast to the case of an illiterate serving in the Ivory Coast as a Secretary to a Government official, this not being "a given". It is an unusual matter which would have to be checked out before one could assert with any reliability that the applicant was not being truthful. The Tribunal Member in the present case had no such difficulty and could have gained no further assistance in the specific circumstances of this case, from any country of origin information she may have been able to consider.

In this regard, the Court has been referred to a passage from the judgment of Dunne J. in **JX v. Refugee Appeals Tribunal, unreported, 2nd June 2005** where the learned judge expressed herself as follows:

"The assessment of an applicant's claim to have a well-founded fear of persecution does not take place in a vacuum. The passage quoted from Goodwin-Gill to which I have already referred is particularly apposite. There are as pointed out two issues – could the applicant's story have happened, or could his/her apprehension come to pass on their own terms and given what is known from country of origin information? Secondly is the applicant personally believable? There is undoubtedly a difference between a case in which there are some inconsistencies in a person's story and a case such as the present where there has been a clear finding on credibility. The applicant simply was not personally believable."

The same can be said in the present case. I am not satisfied that the Tribunal Member erred in the manner stated under this heading.

Grounds 2(a) relates to the manner in which that adverse credibility finding was itself made by failing to assess credibility (as opposed to the claim itself already referred to) by reference to whether her story might be true given the objective country of origin information. In other words, has the Tribunal, by finding a lack of credibility based solely on the manner of her answering and her demeanour (i.e. hesitancy), and by not at least looking at country of origin information in order to assist in considering whether the applicant's story could possibly be true or believable, excluded from its mind something which was relevant to the consideration of the applicant's credibility? It is submitted on the applicant's behalf that if it has so excluded these matters from consideration, that would be an error in the manner in which credibility was assessed, and that a further assessment of credibility should be undertaken in a proper manner.

Ground 2(b) results from the fact that the Tribunal member stated in her decision as follows:

"…In circumstances where it is difficult to verify the appellant's claim, the Tribunal may be entitled to give the appellant the benefit of the doubt. However, this may only arise in cases where the appellant has made every effort to substantiate her story, and is found to be credible. I consider that in this case, in order to conclude that the appellant suffers from a well-founded fear of persecution for a Convention reason, I would first have to apply the benefit of the doubt. <u>However I do not feel in this case that the appellant has made every effort to substantiate her story,</u> nor do I consider the appellant to have been truthful in providing her account. In coming to this conclusion

I have purposefully set aside or excluded the evidence provided by the appellant prior to the hearing. Even having done this I am still unable to conclude that the appellant's account is credible, and in the circumstances cannot give her the benefit of the doubt." (my emphasis)

The applicant refers to the judgment of Finlay Geoghegan J. in **Kramarenko v. Minister for Justice, Equality and Law Reform, unreported, 2nd April 2004**, in which she approved the decision of Mr David Pannick QC. (sitting as a deputy judge of the High Court) in R. v. Immigration Appeal Tribunal, ex parte **Ahmed** [1999] INLR 473. As noted by Clarke J. in his judgment allowing leave herein, both of these cases adopted the finding of His Honour Judge Pearl in **Horvath v. Secretary of State for the Home Department [1999] INLR 7** to the following effect:

"It is our view that credibility findings can only really be made on the basis of a complete understanding of the entire picture. It is our view that one cannot assess a claim without placing that claim into the context of the background information of the country of origin information. In other words, the probative value of the evidence must be evaluated in the light of what is known about the conditions in the claimant's country of origin."

I have no doubt that this is a correct and appropriate statement of principle. But one cannot at the same time that it is applicable or appropriate as an absolute standard in all cases, without exception, Cases differ, as do reasons for a finding of lack of credibility. For example, a fear of persecution may be grounded upon persecution resulting from an alleged involvement in political activity, and certain things may be alleged to have taken place at a political rally and so forth. Many details may be given by the appellant relating to political involvement. Personages may be named or questions may have been asked about the location in which meetings are alleged to have taken place. The applicant will no doubt have given details of particular forms of harassment and perhaps injury/harm amounting to persecution. The Tribunal Member deciding an appeal on facts of that kind would certainly not be in a position to correctly make an adverse credibility finding, on the basis solely of the hesitant manner in which the appellant told his/her story, or the difficulty which the appellant appeared to have in answering certain questions, and not others. The Tribunal Member, and in accordance with Horvath principles, would undoubtedly be faulted for not making any reference to relevant country of origin information concerning the political situation complained of, so that some verification of the specific events referred to by the appellant could at the least be sought and considered as part of the assessment of whether the appellant was somebody who is credible. If for example the Tribunal Member found country of origin information, or if the appellant himself/herself provided such information, he/she may be satisfied that things which the appellant has said happened

did in fact happen, and that even though the appellant appeared hesitant in answering and so forth, the story could nevertheless be true and therefore this might assist the appellant in passing the personal credibility threshold (referred to by Clarke J in his judgment at leave stage in these proceedings as " the pure credibility issue"). But a case such as the present case is different in a significant way in my view. It is relevant to recall a passage from that judgment of Clarke J. where he states as follows:

"It should be emphasised, of course, that the mere fact that that an applicant gives an account which is consistent with country of origin information does not of itself lead only to the conclusion that the applicant's account is correct, any more than a Tribunal would be absolved from further enquiry into an account which did not seem to be consistent with country of origin information so as to ascertain whether the facts might nonetheless be true if somewhat unusual."

It is necessary to divert for a moment and set out some detail of the background to the Appellant's claim. She is a Nigerian national who arrived in this country and made an application for refugee status at first based on a fear of persecution at the hands of the Muslim father of her first child, born out of wedlock, she being a Christian, as well as persecution at the hands of her own parents who did not want her to marry a Muslim. She stated that these fears were not reported to the authorities. These facts were disclosed at an interview with a male interviewer, and thereafter the Tribunal received a letter from solicitors on behalf of the applicant stating seeking a second interview before a female interviewer on the basis that it has come to light subsequently and that at interview she had been too intimidated and inhibited to give her story in full to the male interviewer. A second interview was arranged for the 12th August 2004. That interview commenced but after a short time it was adjourned for one week as she had her young child with her and it was felt that it was not possible to continue while the child was present at the interview. At the adjourned hearing she gave an account of a childhood in a poor home during which she was assaulted by her father at the age of twelve. She stated also that at age twenty a woman came to her and promised to take her to Europe. According to the Tribunal Member's decision the encounter with this woman was described differently at the interview on the 12th August 2004 and the interview on the 19th August 2004. At the former, she apparently stated that this woman came to her house, whereas on the 19th August interview she stated that she met this woman while she was at work in a shop sweeping floors. At any rate she stated that this woman promised to take her to Europe; and that she was then taken to a burial ground and she was made to take an oath to pay a sum of 6000 Nira. This woman then apparently took her to Italy by air, where she was taken to another woman's house. The first lady returned to Nigeria at this point. She then stated that the woman in Italy initially stated that she

would have to pay US$50,000 – this news apparently caused the applicant to faint. She stated that she was made go out onto the street, wear a mini-skirt, and engage in prostitution in order to pay back the money which she owed. She stated that she was beaten and threatened, but that since she did not speak Italian she did not go to the police. She was nine years in Italy before coming to this country. It appears from the resumé of facts recited in the decision of the Tribunal Member that the applicant applied for a work permit in Italy in 1996 and received one in 1998. She apparently explained that at that time there was a general amnesty in Italy and that was how she came to get a permit. She stated also that she ran away to Novara to look for a job, but that she never felt safe there, because the "Madam" for whom she was working in Naples was well-connected. However it appears also according to the applicant that some time later the "Madam" in question released her papers to her. She stated that the "Madam" had been able to locate her because she was staying in a location where she had to register with the police. She claims also that the "Madam" was friendly with the Italian Mafia. Other details are set forth about her experiences in Italy, but it is worth noting that of course the applicant never applied for asylum because of what was happening to her in Italy. Her fear of persecution fear is based on the fact that she was afraid that she would be deported back to Nigeria from Italy and that she would be killed by the Madam because she had not repaid the money already referred to, and that in the event of her deportation to Nigeria her mother would also be killed by the Madam for the same reason. She stated that the Madam would be able to trace her in Nigeria because she was part of the "Ogboni Fraternity" and that "all the members of the trafficking network were part of the Ogboni Fraternity also."

I have set out some of the factual detail because of the nature of the ground relied upon, namely that in her assessment of credibility of the applicant the Tribunal Member did not have, and ought to have had regard to country of origin information relating to the fact that it is well documented that there is trafficking of women from Nigeria to Italy and that by not having regard to country of origin information the Member failed to place what was said by the applicant in the context of this information, and that this is required to be done in accordance with what is stated in Horvath by reference to the decision of David Pannick QC to which I have referred.

In my view, while accepting as a general proposition that the Horvath principle is a good one and in many if not most cases might be appropriate, it does not mean that there cannot be an exceptional type of case where the Tribunal Member can quite adequately and completely assess and reach a conclusion on the personal credibility of the applicant, such that there would be no possible benefit to be derived from seeing whether the applicant's story fits into a factual context in her country of origin. It is particularly relevant in my view to the present case. It would be no mystery or surprise

to the Tribunal to know that women are trafficked from Nigeria to Italy for the purposes of prostitution. One must ask what would have been added to the sum of knowledge of the Tribunal Member by referring to such information as may be available on the subject of trafficking of women from that country to Italy, and what might happen to them if returned to Nigeria by way of prosecution. The reality, and reality must enter into these matters at this stage, is that the Tribunal Member while disbelieving the applicant completely as to her own particular story, would have seen that something like what the applicant has said about her life, if true, could potentially happen, because what she says happened is documented in a general way. To that extent any lingering doubt the Member may have had could be corroborated by the country of origin information, and could assist the assessment of credibility. But in the present case the applicant was not believed as to her personal tale, and it is reasonable to conclude therefore that no matter how much evidence or material may have been available as to the state of things in Nigeria from an objective viewpoint, this could not have persuaded the Member to believe the personal story. In this way the case is different from many other cases where the country of origin information may have the capacity to corroborate the actual story of the applicant.

While I respectfully agree with Clarke J. that the applicant had raised a ground in this respect was a substantial ground, there must be a meaningful distinction between the hearing before him at leave stage, and the case before me at the substantive hearing. That distinction in my view can be related to the extent to which this Court as opposed to that at leave stage can look to the reality of the relevance of the country of origin information to the assessment of credibility in the case of this applicant. The Court can go further than at leave stage in examining to what extent the country of origin information has or has not the capacity to have influenced the decision made as to credibility in this particular case. Such an examination would not be as appropriate at leave stage, because there would be a danger that in so doing, the Court would be in effect deciding the substantive issue at leave stage, rather than at the substantive hearing after leave was granted.

In my view, the decision in Horvath, and of David Pannick QC in Ahmed could not be extended to mean that in every case no matter how unbelievable the applicant is found to be on the 'pure credibility' issue, the Tribunal Member must indulge in a pointless exercise, namely looking at amounts of country of origin information to the effect that women are trafficked abroad from Nigeria and that if they return they may be prosecuted for an offence. Such information, especially given the finding in respect of which leave was refused as to credibility, could not add anything of <u>real</u> relevance with a capacity to influence the assessment of overall credibility in the present case. That is not to detract for one moment from

the force to be given to Horvath principles generally.

This Court must not fall into the trap of substituting its own view on credibility for that of the Tribunal Member. The latter, just as a trial judge is at trial rather than the appellate court, in the best position to assess credibility based on the observation and demeanour of the applicant when she gives her evidence. These are essential tools in the assessment of credibility, and it is always essential to remember that what appears as the spoken word in a transcript or in a summary of evidence contained in any written decision cannot possibly convey the necessary elements for the assessment of credibility. That is what a Court will be reluctant to interfere in a credibility finding by an inferior tribunal, other than for the reason that the process by which the assessment of credibility has been made is legally flawed.

In my view the Tribunal Member did not err in this respect in the circumstances and facts of this case.

Turning lastly to Ground 2(b), namely that the Tribunal Member erred in law, in that the finding that there was a failure to substantiate her story is not based upon any rational analysis of the substantiation that might reasonably have been expected, the perceived failure of the applicant, the reasons, if any, offered by the applicant for being unable to provide substantiation, and any other material factors.

I can readily accept that in another case, if such a finding were the sole basis on which an adverse credibility finding was arrived at, the decision would be open to question, since there would be no analysis within the finding and it would be impossible to discern the reason for the decision in any meaningful way. Such a decision would be flawed. Even in the present case it would have been preferable if the Tribunal Member had fleshed out what it meant in that regard. While there is obviously an onus on an applicant to substantiate her story in so far as she can, it can in many cases be difficult to do so in any documentary way given the circumstances in which many persons leave their country of origin. The onus in these cases is however one which is shared with the Tribunal, and it follows that simply because the applicant has failed to substantiate her story in the opinion of the Tribunal, she is not necessarily to be disbelieved, since the Tribunal itself would share the task of substantiation to an extent. There would have to be other grounds for disbelieving the applicant, and being satisfied as to lack of credibility.

In the present case there were other grounds, and in respect of one of these, leave was not granted to challenge same. In respect of another I have found already that the Tribunal did not err. While I would be prepared to say that, confined to this head of objection the decision of the Tribunal falls short of

perfection and should have set forth some detail as to the manner in which the Tribunal Member felt that the claim could and should reasonably have been substantiated, I do not in the exercise of my discretion in relation to judicial review, consider that this error, such as it is, undermines the process by which the applicant's claim was rejected. The reference to a lack of substantiation in the decision of the Tribunal Member is very much peripheral to the main finding of lack of credibility. It is in there somewhere but not at the heart of the decision. The Tribunal Member is really saying that perhaps if the applicant had been able to substantiate her story somewhat it might have assisted in relation to credibility so that the benefit of the doubt could be given to her, but that was not the case. But in my view it does not undermine the adverse credibility finding in a way which requires this Court to intervene by quashing the decision. Again, because this is the hearing of the substantive application, it is possible for this Court to take a view that differs from the view of Clarke J. at leave stage. I respectfully suggest that the learned judge was perfectly correct that a substantial ground had been raised at leave stage, but I say again that if there is to be any real distinction between the hearing at leave stage and that which occurs at the substantive hearing, it must include the fact that at the latter, the Court must have regard to the decision in the round, to the real capacity of the alleged error to have affected the correctness of the process by which the decision was reached, and also to the discretionary nature of judicial review. In respect of the latter, it seems to follow that even where the Court may be satisfied that there was some error in the process, it can refuse relief where it is also satisfied that such error as did occur did not go to the heart of the decision, such as would render the decision unlawful. This in my view is such a case.

I therefore refuse the reliefs sought in this application.