

THE HIGH COURT

Record Number : 2006 No. 199 JR

BETWEEN

H.Y.

APPLICANT

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

RESPONDENTS

Judgment of Mr Justice Michael Peart delivered on the 31st day of July 2007

1. The applicant is a Palestinian from Gaza who arrived here on the 25th May 2004 and applied for asylum. His application form states that he left his country of origin on the 3rd March 2004, and that he made his way to this country via Jordan, and Holland.

2. The Refugee Applications Commissioner in due course recommended that he should not be declared to be a refugee. From that recommendation the application appealed to the Refugee Appeals Tribunal. The Decision by that body, affirming the recommendation of the RAC is dated 26th January 2006, the appeal hearing itself having been heard on the 29th June 2005.

3. The Tribunal Member found aspects of the applicant's story to be implausible and not credible. It is clear that the Tribunal member was satisfied that circumstances existed in Palestine whereby conditions were, as stated therein "difficult for the people of Palestine", but for a well-founded fear of persecution to be found to exist for the applicant, it was necessary for the Tribunal Member to find the personal story of the applicant to be credible. Without that personal credibility, the Tribunal Member could not find that the applicant had a well-founded fear, even though the story if true fitted into available country of origin information and could otherwise amount to a well-founded fear of persecution.

4. The applicant submits that the process by which the Tribunal Member reached an adverse credibility finding is unsatisfactory.

5. To understand the issue more fully, it is necessary to set out what the applicant states is the basis of his well-founded fear, and then set out the various matters which the Tribunal Member found to be implausible or not credible, and thereafter to examine whether from those matters it was correct for the Tribunal member to decide that the lack of credibility in relation to these particular matters was sufficient to conclude that the story overall was not credible and that accordingly there was not established to be a well-founded fear of persecution.

Background facts

6. He was born in 1973 and lived in Gaza until his arrival in this country. His mother as well as his younger sister and brother remain living in Gaza. In the Questionnaire which he completed for his application he stated that he claimed asylum on political grounds. He stated also that he was a member of 'Fatah' and that he is wanted by Israeli occupation forces, and that his name is in fact on a list of persons wanted by Israel and whom the Palestinian authorities have agreed to hand over. I will come to that in more detail in due course. He goes on to say that in the past he has been imprisoned and tortured, and that at the relevant time the Palestinian authority and the Israel government were co-operating at the highest level so that he would have been handed over if he had not escaped, and he fears now that if returned he will still be detained by the Palestinian authorities so that he can be handed over, and by the Israeli government when handed over to those forces, since his name is still on the list referred to.

7. He stated in his application form that he was tortured by the Israelis from 1998 until 2000 while he was detained in an Israeli detention unit in Beersheba. He stated that at that time his brother was still detained by them. At his interview he stated that he himself was released in 2000, and that following his release he resumed his political activities with 'Fatah'. This activity involved meetings and throwing stones at the Israeli in order to defend his country. He states at interview also that the Israelis had arrived at his home and expelled his family from their house and knocked it down. He stated also that his father had been killed by the Israelis in 1997.

8. At his first interview on the 15th November 2004 he stated that in 2004 Israel asked 'Fatah' to expel from Gaza a list of people, and that as a result those on the list received orders from 'Fatah' to leave Gaza since Israel was intent on arresting/killing them. He says that they accordingly left Gaza and moved to Nablus and thereafter entered Jordan using false permits. As stated already he left Gaza on the 3rd March 2004.

9. He and the others with him stayed in Jordan for two months and 22 days while they tried to find someone who would smuggle them out of Jordan and into Europe. He appears to have found such a person, and he states at interview that this person asked him if he would like to travel to Ireland, and that when he found out that Ireland was in Europe he indicated that he did so wish. He stated at interview that this smuggler came to Ireland with him and that on arrival here he took \$5000 from him and told him that he was in Ireland, and told him to apply for asylum. That was on the 25th May 2004. He then stated that he found two Sudanese nationals at the airport who told him to take a bus to the city centre and that someone would tell him where to go. He stated then that he found three people who were speaking Arabic and that they showed him the building and that he then made his application for asylum. The smuggler, according to his story, kept the false passport on which he had travelled and also his flight ticket.

10. He was able to state at his interview that he had been arrested by the Israelis forces on the 17th April 1998 while attending at a meeting in Gaza. He stated that when questioned he was told that it was thought that he and the others were planning suicide attacks in Israel. This was denied and he stated that it was a meeting only to plan putting up posters and distribute leaflets and to arrange demonstrations. He stated that after some questioning had taken place an order was given that he be beaten and that he was beaten with a metal bar, and the butt of a gun and that he was also hit with what he called "a long needle" after which he felt nothing and almost lost consciousness. He then found himself in jail. This detention remained until 2000, and he was unable to say which month in 2000 he was released. At his second interview on the 5th January 2005 he stated that his release had been arranged through the Red Cross.

11. He resumed his political activities after he was released in 2000 as I have already stated. He was not subsequently detained by the Israeli authorities after his release, yet he stated that it was in 2004 that the Israelis had submitted a list of names, including his, whom they wanted the Palestinian authority to hand over. He was asked at interview how he became aware that his name was on this list, and he replied:

"When the list was submitted to the Palestinian authorities, it was passed on to Khalid Al Nabi, assistant to the former

Palestinian leader Yasser Arafat. Khalid Nabi issued an order for all the people on the list to leave Gaza.”

12. He was also asked how he had moved from Gaza to Nablus and he replied that they “were led secretly by a Palestinian ambulance from Gaza to Nablus”.

13. He went on to state that they had been stopped at the checkpoints and “they checked the ambulance and we were checked as well. We had forged documents with us.”

14. He was asked at interview if he read any newspapers when he was in Gaza and he named three such newspapers.

15. He repeated his fear that if returned to Palestine he would be arrested either by the Israelis or by the Palestinian authority who would hand him over to the Israelis. He added that the Israelis have no mercy or humanity and that once a person gets into one of the prisons there “you either come out dead or they release you. But there are people dying in the Israeli prisons and nobody knows about them”.

16. Following that interview the application was considered by the Refugee Appeals Commissioner and a recommendation against refugee status was made. The report under s. 13(1) of the Refugee Act 1996 sets out all the relevant facts disclosed in the Questionnaire and interviews. What are described as “a number of credibility issues” are identified.

17. One such issue related to whether the Oslo accord was still in operation in 1998 when the applicant was arrested, but this Court has been told without contradiction from the respondents that at the appeal this issue fell away following submissions made in that regard and it is not referred to in the Decision of the Tribunal Member.

18. A second matter referred to in this Report in this regard is that it was considered “highly unlikely that the Palestinian authorities would have expelled individuals simply on the basis that they were named on a list by the Israelis, particularly given the extremely poor relations between the Palestinian Authority and Israel at the time.”

19. A third matter referred to is the applicant’s account of his the escape from Gaza to Nablus on the West Bank. The report states that the applicant’s account of leaving Gaza is lacking in credibility, and that a Palestinian ambulance going to Nablus on the West Bank would have had to pass through Israel, and that even with the assistance of forged documents it is not credible that the applicant would have been able to cross “one of the world’s most heavily militarised borders, which is surrounded by a fence. Reference is made also to a U.S. State Department report on Israel and the Occupied Territories for 2004 wherein it is stated: “Even prior to the Intifada it was difficult for Palestinians to obtain permits to visit Israel”.

20. Fourthly doubt was cast upon a Palestinian identity card produced by the applicant since it is said not to be of the standard one would expect of an official identity card and is poorly laminated, and that it would be made in a way that was difficult to forge, whereas that produced by the applicant would be of a type which was very easy to copy and forge. This is said to raise further questions as to credibility.

21. The authorised officer of the Refugee Applications Commissioner who had conducted the interview of the applicant considered all the information in relation to him and expressed himself as satisfied that the applicant had failed to establish a well-founded fear of persecution as defined under Section 2 of the Refugee Act, 1996, as amended. Another member considered the application and under Section 13(1) of that Act and recommended that he should not be declared a refugee.

22. A Notice of Appeal was lodged against the recommendation in which the applicant submitted that the Refugee Appeals Commissioner had erred in doubting the applicant’s credibility, and, specifically, that the findings on credibility were based on inadequate country of origin information, and that in relation to such reports as were before the authorised officer he had displayed a lack of understanding of the political situation within the Occupied Territories and that he speculated as to how both the Israeli army and the Palestinian Authority would have acted. This Notice of Appeal referred to some legal authorities in relation to the assessment of credibility, and submitted also that the Refugee Appeals Commissioner had erred by not giving the applicant the benefit of the doubt in relation to matters stated by the applicant where conclusive proof was unavailable, given that his account of his detention and treatment was country of origin information. It was submitted also that the Refugee Appeals Commissioner had failed to ask appropriate questions in order to explore the objective foundation of the applicant’s claim. It was contended also that the Refugee Appeals Commissioner had taken into account a number of irrelevant matters such as the applicant’s identity card, in respect of which the authorised officer is not qualified to give a professional opinion as to the quality thereof, and that this finding is based on speculation.

23. The appeal submitted also that the authorised officer had not attempted to establish the subjective element of the applicant’s case. It was submitted that available country of origin reports indicate that Palestinians living within the Occupied Authorities have been subjected to persistent and prolonged contraventions of their basic human rights, and that the account of the beating and mistreatment of the applicant while in detention are consistent with available country of origin reports. Other submissions are made as to burden and standard of proof, and also the failure to carry out adequate country of origin research, since the authorised officer appears not to have a full and detailed knowledge of the situation prevailing in the Occupied Territories and therefore failed to make an informed decision on the applicant’s claim.

The Tribunal’s Decision

24. The Decision of the Tribunal Member sets out the applicant’s story as told on the appeal hearing. It is generally speaking on all fours with what I have set forth above from the Questionnaire and interviews. The applicant appears to have been questioned as to why, if the Palestinian Authority did not believe that he was a terrorist, as he claimed he was considered to be by the Israelis, they ordered him to leave Gaza. The applicant replied that the Fatah wing of the Arafat regime advised him to leave. Earlier in the Decision it appears that the applicant explained that at that point in time Arafat was anxious to show Israel that the Palestinian Authority was co-operating in the hope of building a peace with Israel. At another point of his evidence the applicant stated that he had actually seen his name on the list referred to. He was asked also about the period 2000 after his release by the Israelis and 2004 when he was told to leave Gaza. He stated that even though he had continued his previous activities against the Israelis he had not been detained again during that period, and that he had taken precautions against the possibility of being captured. The Decision does not indicate whether any details of such precautions were given at the appeal hearing or whether he was questioned further in that regard. The applicant was questioned also at the hearing about his passage to Jordan. He confirmed that he was assisted by the Red Crescent, and that his trafficker arranged a Spanish passport for him and tickets, and that he had no difficulties at borders when he showed his passport and was allowed to pass through, even though it was put to him that he had had to pass through three sets of border authorities.

25. The Decision records also that it was put to the applicant that country of origin was showing that there had been an Israeli pull-out from Gaza, and that in response the applicant stated that while that might be true, Gaza would remain surrounded by Israel.

26. The Decision contains an analysis of the applicant's claim by reference to relevant statutory definitions as to the meaning of "a refugee" including Section 2(a) which provides that "a refugee" does not include "a person who is receiving from organs or agencies of the United Nations (other than the High Commissioner) protection or assistance", and relevant to that question was whether or not the applicant was registered or eligible for registration with United Nations Relief and Works Agency (UNWRA) for Palestinians. Registration with that organisation would exclude him from being categorised as a refugee. However the Tribunal Member decided that since no evidence had been put before him that the applicant was so registered so as to exclude him from being considered a refugee under s. 2, the application was assessed by reference to s. 2.

27. The Tribunal member referred to the burden of proof upon the applicant to establish the truth of his allegations and the facts on which his claim is based, acknowledging also the shared burden upon the adjudicator as well to ascertain and evaluate all relevant facts.

28. As to the standard of such proof the Tribunal Member states:

"...in refugee claims the adjudicator needs to decide if based on the evidence provided as well as the veracity of the applicant's statements, it is likely that the claim of the applicant is credible. Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting known facts, and therefore is, on balance, capable of being believed. It may not be possible for a refugee to prove every part of his case and, therefore, it is frequently necessary to give the applicant the benefit of the doubt".

29. The Tribunal Member then referred to the necessity for the applicant to establish a well-founded fear of persecution, and that both the subjective and the objective elements must be evaluated.

30. The Decision of the Tribunal Member runs to just over 13 pages, and it is the final two and a half pages which contain the conclusions. The Member refers to Article 41 of the UNHCR Handbook where it states that where facts are not clear, an assessment of credibility is indispensable. In this case he says that the facts are not clear and then proceeds to consider credibility. The Member has concluded that in circumstances where the applicant was imprisoned from 1998 until 2000 and then released by the Israelis, and where between 2000 and 2004 he had "remained trouble-free", it is not plausible that in 2004 he would suddenly again be the focus of attention, and be urged to leave being one of the names on the list of persons wanted for handing over to the Israelis. Neither was it considered plausible that the Palestinian Authority would expel one of its own citizens simply because his name was on a list unilaterally provided by the Israelis, especially in view of the bad relations which it is stated existed between the Palestinian Authority and the Israelis at that time.

31. Neither was it found to be credible that the applicant could have passed through various checkpoints on false documentation including in Nablus, and a heavily militarised zone.

32. Neither was it found to be credible that the applicant could have passed through various international boundaries and immigration controls through Jordan to Holland and then to Dublin on false documentation, given the heightened security situation prevalent in the Middle East and Europe.

33. Those are the conclusions reached and the Tribunal Member affirmed the recommendation made by the Refugee Appeals Commissioner.

34. Conor Power BL for the applicant before this Court has urged that this Court should view the application under the standard of anxious scrutiny given the nature of the basis for the well-founded fear. While that phrase has achieved wide circulation it eludes precise definition. But in so far as it is being urged that something more than an O'Keeffe test should be applied, I am happy to state that my consideration is one to which great care has been given, and has not been confined to seeing whether there may have been some material on which the Tribunal Member could have reached his decision.

35. Mr Power has highlighted the three matters on which the Tribunal Member has based his adverse credibility finding, and has submitted that in the Decision there has been no consideration of other matters which have been accepted by the Tribunal, and he instances the details given as to the names of Fatah leaders, the name of the Israeli prison where he says he was held, the newspapers he read at the time, and that no weight seems to have been attached to such aspects of the applicant's evidence. He submits that the tribunal has accepted that the applicant was a member of Fatah and of Palestinian nationality. He submits that country of origin information before the Tribunal clearly supports the story of the applicant and the fact that in 1997 the Israeli forces remained in overall control of Gaza. He submits that there was no country of origin information referred to which contradicted the applicant's story, and that in the Decision there has been no consideration of submissions made to the Tribunal on the applicant's behalf. It is submitted that the credibility of the applicant's account of his escape has been decided without any reference to the fact that his evidence had been that he was disguised as a paramedic, and that all credibility findings have been arrived on an intuitive basis rather than by reasoning.

36. Mr Power has referred the Court to a very helpful statement by Clarke J. at leave stage in *Imafu v. Minister for Justice, Equality and Law Reform*, unreported, High Court, 27th May 2005, where he considered the following as principles emerging from a number of recent judgments dealing with the difficult matter of assessing credibility to be as follows:

"While there is not, as yet, a definitive ruling of this court (let alone the Supreme Court) as to the extent to which it is appropriate for this court to review the reasoning of a Tribunal such as the RAT with particular regard to its findings in relation to the credibility of an applicant, there are a number of decisions of this court at the leave stage from which it may be gleaned that the following propositions have been considered by the court to be at least arguable to a sufficient extent to justify a finding of substantial grounds.

(i) The assessment by the RAT of the credibility of an appellant and his/her story forms part of the decision making power conferred by the Refugee Act, 1996 and therefore, in accordance with the principles set out in *East Donegal Cooperative Limited v. The Attorney General* [1970] I.R. 317 such assessment must also be carried out in accordance with the principles of constitutional justice: *Traore v. The Refugee Appeals Tribunal and Anor.* (Unreported, Finlay Geoghegan J., 14th May, 2004).

(ii) Where the assessment of the credibility of an appellant places reliance upon a significant error of fact in a

manner adverse to the applicant such error renders the decision invalid; Traore.

(iii) While the assessment of credibility is a difficult and unenviable task it is not permissible to place reliance "on what one firmly believes is a correct instinct or gut feeling that the truth is not being told". Such a process is an insufficient tool for use by an administrative body such as the Refugee Appeals Tribunal. Conclusions must be based on correct findings of fact.

Da Sliver v. The Refugee Appeals Tribunal and Others (Unreported, High Court, 9th July, 2004, Peart J.)

(iv) A specific adverse finding as to the appellant's credibility must be based upon reasons which bear a legitimate nexus to the adverse finding. *Kramarenko v. Refugee Appeals Tribunal and Anor.* (Unreported, High Court, 2nd April 2004, Finlay Geoghegan J.) placing reliance on the decision of the United States Court of Appeals for the Ninth Circuit in *Aguilera-Cota v. INS* 914 F. 2d 1375, (9th Cir. 1990).

(v) A finding of lack of credibility must be based on a rational analysis which explains why, in the view of the deciding officer, the truth has not been told. *Zhuchkova v. Minister for Justice, Equality and Law Reform and Anor.* (Unreported, High Court, 26th November 2004, Clarke J.)."

37. Emily Farrell BL has submitted that it is clear that the Tribunal Member has disbelieved the applicant's personal story and that he has indicated in the Decision the reasons why credibility was found to be lacking, and she has referred to what I stated in *Ojelabi v. Minister For Justice, Equality and Law Reform*, unreported, High Court, 28th February 2004 on the application for leave:

"It is quite clear that the applicant was simply not found to be believable to any extent at all, and that even if a large measure of allowance was allowed to him in relation to alleged facts, even then he would not come within the meaning of persecution. But credibility was totally absent. This Court sees no reason to fault the manner in which credibility was assessed. As applications go, this one must come within the category which has disclosed no merit and lacks all credibility. In these circumstances, none of the grounds by which it is sought to impugn the decision can succeed. The reasons for the decision are clearly set out in the s.13 report and the Decision. The lack of credibility fundamentally infects the subjective element of a well-founded fear of persecution. The applicant was simply not believed, as I have said. In such a situation, the objective element of the well-founded fear assessment does not require to be made, since without a credible subjective element, the objective element does not become relevant."

38. Ms. Farrell submits that in the present case the applicant was found not to be generally credible as to his story, and that therefore he is not entitled to the benefit of the doubt. Ms. Farrell has submitted also that the O'Keeffe test is the appropriate test in this country, and that in so far as the test of 'anxious scrutiny' may have gained some currency in the United Kingdom, it has done so only where there is shown to be a risk to the right to life and to bodily integrity, and that these rights are not at issue in the present case.

39. Ms. Farrell has also submitted that it is clear from the Decision that in fact the Tribunal did take into account the fact that the applicant had travelled from Gaza disguised as a paramedic, and in that regard referred to the statement in the Decision that "the applicant stated that he went with the Red Crescent Ambulance as a member of the crew who had a false ID card".

40. She submits that this Court should accept the Tribunal Member's statement in page 12 of the Decision that all matters required to be taken into account under s. 16(16) of the Refugee Act, 1996, and that the applicant has not shown anything to the contrary by the applicant as would be required in order to meet the onus identified by Hardiman J. in *GK v. Minister for Justice, Equality and Law Reform* [2002] 2 IR 418, where he stated at p. 426:

"A person claiming that a decision making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case."

41. Ms. Farrell submits that the Tribunal Member was entitled to rely on his 'gut-feeling' arising from the matters which have been identified as casting doubt on the applicant's story and to conclude as a result that the applicant's ground for seeking asylum was not well-founded, and that the applicant is not entitled to the benefit of any doubt in that regard.

Conclusion

42. Firstly this is an application for leave only, and the onus on the applicant is to demonstrate substantial grounds for arguing for the reliefs which are being sought.

43. The Tribunal Member is of the view that the applicant does not have a well-founded fear of persecution by reason of being on a list of persons required to be handed over to the Israelis by the Palestinian Authority. That decision is based, not on a finding that he is on the list, and that being on that list carries with it the probability that if returned the applicant will be handed over, and further that the applicant would suffer persecution at the hands of the Israelis as a result. Rather the applicant is determined not to have a well-founded fear because the Tribunal Member does not believe/does not find it credible that (a) that his name is on any such list, and (b) that if his name is on the list provided by the Israelis, that the Palestinian Authority would comply and hand over one of its own citizens on the unilateral say so of the Israelis. That is the clear basis of the finding against declaring him a refugee.

44. What has caused the Tribunal Member to reach that conclusion is not any country of origin information as to the non-existence of such a list. It seems to be accepted that there may be such a list of names, since the Tribunal Member has stated that he does not find it plausible that a person who remained trouble-free for a period of four years, as he has stated, and had been released by the Israelis four years previously would suddenly become the focus of attention again in 2004. That finding suggests that it is accepted that there may be such a list, and that it is simply unlikely that the applicant's name could be contained on it given his good behaviour during the previous four years. Further support for that interpretation is the statement that it was not plausible that the Palestinian Authority would expel an individual simply because his name was on a list provided by the Israelis, given the poor relations between the Israelis and the Palestinian Authority.

45. The lack of plausibility in the above matters appears to me to be entirely separated from the few other matters about which the Tribunal Member had doubts as to their credibility, such as the likelihood that he could have moved through borders with the ease described on a false passport. In other words, even if that finding as to lack of credibility was not so found, the Tribunal Member's finding about his being handed over because his name was on a list would be no different. It does not appear to me that the doubt about his journey to Ireland, by travelling through Israel to Jordan, to Holland and on to Dublin is central to the adverse credibility

finding, but clearly the Tribunal Member was entitled to have a doubt about these matters. If these were the only matters about which he had a doubt, it may be that they are so peripheral to the real issue to be decided that it would not be appropriate to allow any doubt about those matters to affect a decision on credibility of the central issue of a well-founded fear.

46. It follows therefore that what this Court must decide is whether it is substantially arguable that the Tribunal Member could not reasonably conclude from the material before him that it was implausible (a) that the applicant's name was on any list of names wanted by the Israelis in 2004 after he had remained trouble-free for the previous four years and (b), if it was on the list, that the Palestinian Authority would hand him over. Mr Power has submitted that a decision on the credibility on this issue is based on a hunch or gut-feeling of the Member and that is not an appropriate basis for finding against credibility and that the Member should have explored this matter in a more detailed way by closer examination of the applicant and by consideration of more extensive country of origin information relating to the situation pertaining in Gaza at that time in 2004. He suggests that there is very little, if any, objective material or evidence which is against what the applicant says was the situation.

47. I have come to the conclusion that substantial grounds are made out to argue that an insufficient rational basis exists for concluding that the applicant's story about being on such a list and that he would have been handed over in 2004 if he had not removed himself from that territory is not credible. I have stated before, and it is worth repeating now, that assessing the credibility of an applicant is a very difficult and demanding task. This Court does not have the benefit of seeing the demeanour of the applicant while he is giving his evidence either at interview or at the oral appeal, and it cannot be the case that this Court can substitute its own decision on credibility for that of the Tribunal Member. This Court must confine its gaze to whether in reaching an adverse credibility finding in relation to the central issue of a well-founded fear the Tribunal Member has taken account of some aspects of the story peripheral to the central issue, and which are not so significant as to constitute a rational basis for doubting the issue at the centre of the application. Such matters can go to an assessment of overall credibility, but there must be some identifiable reason for doubting the central issue which is simply supported by these more peripheral doubts. In the present case, it is substantially arguable that the credibility of the central issue has been unduly influenced by the Tribunal Member's doubts relating to the peripheral issues referred to. In relation to the central issues which I have identified there is no particular reason identified other than the feeling that it is an unlikely thing to occur. That easily comes within the realm of speculation and conjecture.

48. There is little evidence within the Decision or the examination by the authorised officer of any thorough examination of country of origin information about the possibility that it might be true that such a list existed in 2004 and that the Palestinian Authority may have at that time complied with the request. There is a dearth of such material disclosed in the papers before the court. It seems to follow that grounds of substance have been put forward for arguing that the process by which the Tribunal Member reached his conclusion as to a well-founded fear, based as it is on a lack of credibility, is lacking in sufficient examination of country of origin information, and rests more on conjecture and gut-feeling.

49. I will therefore grant leave to seek the reliefs set forth in paragraph 4 of the Statement of Grounds on the grounds set forth in paragraph 5 thereof.