Neutral Citation: [2014] IEHC 163

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 745 JR]

BETWEEN

B. H.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL

RESPONDENT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

NOTICE PARTY

JUDGMENT of Mr. Justice Barr delivered the 28th day of March, 2014

Introduction

1. The applicant in this case is an Ethiopian national. He was born on 27th May, 1976. His ethnicity is Amhara and he is an Orthodox Christian. He is a married man and does not have any children. He allegedly fled Ethiopia on 20th May, 2008, and arrived in Ireland on 25th May, 2008. He first sought asylum in the State on 26th June, 2008.

2. The applicant completed the necessary forms and had two interviews with the Office of the Refugee Applications Commissioner ("ORAC"). In the s. 13 report, it was recommended that the applicant should not be declared a refugee. He appealed this recommendation. In its decision dated 12th March, 2010, the Refugee Appeals Tribunal ("the RAT") affirmed the recommendation of the Refugee Applications Commissioner, made in accordance with s. 13 of the Refugee Act 1996 (as amended). The applicant has instituted these proceedings seeking an order of *certiorari* in respect of the decision of the RAT. In essence, his claim is that even though the RAT did not find his account of what had happened to him in Ethiopia to be credible, the Tribunal should still have considered whether he had a well founded fear of persecution in his home country on the grounds that he: (i) was a deserter from the army; (ii) had sought asylum in Ireland; and (iii) had provided confidential information to the opposition political party in Ethiopia about the government having transferred certain lands to the neighbouring country, Sudan. In order to understand these assertions, it is necessary to give some background in relation to the applicant's application for asylum in the State.

Background

3. The applicant claims that he was forced to join the army in 1998. At that time, he had just finished his first year of study of electrical engineering in university. The applicant stated that he was appointed to train civilians who joined the army; this, he said, was because he had attended university, had a good understanding of liaising with civilians, and was literate, unlike the other recruits. The applicant maintained that he had been promoted to the rank of vice corporal and that in 2005, he was further promoted to the rank of second lieutenant. This meant that he had a higher responsibility for training, discipline, controlling and leading the army and setting programmes and motivating the recruits. He was also head of military intelligence in the training centre in 2005.

4. The applicant claimed that he participated in the war between Ethiopia and Eritrea which started in 1998. He submitted a certificate dated 27th February, 2001, to verify this evidence. The applicant also submitted a number of photographs showing him in military uniform. The applicant stated that although he did not support the war, he was forced to participate in it. The applicant claims that he made a number of requests to leave the army, but these requests were refused. After 2005, he was promoted to head of intelligence and when he made a further request to leave the army, he was warned that he would be killed if he persisted with his request. He was warned to keep quiet.

5. The applicant claims that at meetings from 2005 to 2007 he voiced his opposition to the war. He also voiced his opposition to the sending of troops to Somalia and said that the poor people in Ethiopia should be looked after. He was told that his views were that of the opposition who were primarily of his ethnic group. He claims that on 19th June, 2007, he was detained in Hurso Training Centre for a period of 15 days. He was told not to raise these issues again.

6. The applicant claims that he was subjected to ill treatment during his period in detention. In particular, he claims that he was detained underground in a dark room and fed once a day. He said that he was made to dig a hole up to his height and then to fill it up. He was forced into a barrel of water in his military uniform, was forced to roll on the ground, and then forced back into the barrel. The applicant claims that he was released, reinstated as a trainer and intelligence officer, and was given a warning not to address future meetings. He claims that he was constantly followed by a member of the intelligence group in rotation and that they became aware of his activities. The applicant claims that, at the beginning of February 2008, the government illegally allocated land ("the allocation") measuring 1600kms by 25kms to the Sudan government without the knowledge of the people in the area. Sudan sent a brigade to this area, resulting in 500 people being displaced by the Sudanese government. The applicant was aware of the allocation, displacement and harassment of the people because it was his birthplace.

7. The applicant claims that he secretly gave information of the allocation to the All Amhara Party (AAP) who are in opposition. The media became aware of the allocation and that the displaced people were returned to Ethiopia from Sudan. The allocation was being investigated by the Ethiopia/Sudan Border Committee. The applicant claims that he was aware that it was very dangerous to inform the opposition of the allocation. He said that he knew that his life was in danger for so doing.

8. The applicant claims that on 20th May, 2008, the government convened a five day meeting with all Amhara intelligence officers in a

small school located in a forest, which was chaired by a regular colonel who was not an intelligence officer. The meeting was attended by 15 intelligence officers, half of whom were Tigrays and the other half Amharas. The agenda was to ascertain who had leaked the information about the allocation to the media. The Amhara members, who were the main suspects, denied being responsible for the leak. The argument continued for an hour and then shots were discharged by both ethnic groups. The applicant, who was at the back of the room, could not get his hands on a firearm and the only option was to escape and save his life. The applicant claims that he was shielded by other soldiers who were in front of him and who were killed. He fled through the back door and ran for an hour until he arrived at a forest. He states that he realised that if he returned to the venue he would be killed, because he suspected his ethnic group were to be killed at the meeting. The applicant claims that he fled to Bereket, situated near the border with Sudan. He changed into civilian clothes and discarded his military uniform. He travelled to Khartoum by lorry where he stayed for four days in a hotel owned by an Ethiopian lady from his region, to whom he spoke of the allocation of the land.

9. The applicant claims that on 23rd May, 2008, he was introduced to a man by the lady. This man took his photograph. He gave the man $8,000 when he was informed that he would be supplied with a genuine document and that he would be taken to a safe country. He was not told the name of that country. The applicant did not ask the agent his ultimate destination because the lady told him not to do so but to follow his instructions. The applicant claims that he gave the agent 40,000 Birr which is $4,500 before they left Sudan and he gave the lady 20,000 Birr. The applicant claims that he and the agent left Khartoum for Dubai on 25th May, 2008, and then boarded another aircraft and travelled to Ireland. He claims that he used a British passport which had his photograph and the name "Patrick Henry", and that he presented this passport at Immigration Control at Dubai Airport. The applicant claimed that a disagreement arose with the immigration officer, who initially refused him entry; however, after the intervention of the agent, who spoke Arabic and was standing behind the applicant, he was granted entry. The applicant could not relay the conversation because he did not speak Arabic. When he asked the agent what had transpired, he was told that there was no problem.

10. On 25th May, 2008, the applicant arrived at Dublin Airport. He stated that the agent was ahead of him. The applicant stated that he produced his passport to an immigration officer and that he was permitted to enter the State and was not questioned. He stated that the agent then took back the passport. The agent led him to a house outside Dublin where he remained for 21 days because he had to pay the agent the balance of the money. He claims that his mother-in-law sold cattle and paid the lady in Sudan the balance within 21 days.

11. After the transaction, the agent informed the applicant that he was taking him to Canada. They moved to another house, but some days later, the agent informed him that "*everything was cancelled*". The agent then accompanied him to ORAC. The applicant asked the agent for the passport so that he could show it to an official at ORAC to establish his identity, but this request was denied because the agreement was that the agent would take back the passport.

The Applicant's Claim

12. The applicant claims that as the RAT were prepared to give him the benefit of the doubt and accept that he had been in the army, this meant that the Tribunal had to go on to consider whether he would face persecution on the following grounds:

(i) that he was a whistleblower in relation to the allocation of land by Ethiopia to Sudan;

(ii) that he was a deserter from the army; and

(iii) that he had been a failed asylum seeker in Ireland.

13. The applicant claims that even where a large portion of the narrative was rejected by the Tribunal, because there were other grounds on which he could be persecuted, they had to be addressed by the Tribunal. The applicant argued that just because part of the narrative was not accepted by the Tribunal, did not mean that that was the end of the question raised before the RAT.

14. The applicant pointed to the decision in *Salim v. Refugee Appeals Tribunal & Ors* (Unreported, Birmingham J., 15th September, 2010). In that case, the RAT did not accept the applicant's core narrative, but made some findings which could give rise to a fear of persecution. In particular, it was argued that if it was accepted that the applicant was a Somali of Banjuni ethnicity, this of itself could give rise to persecution without more. Simply rejecting the applicant's narrative did not end the question, because there could be independent reasons for persecution independent of the narrative itself. These independent reasons could give rise to a well founded fear of persecution, for example by being part of an ethnic group that suffers persecution. In the course of his judgment, Birmingham J. stated as follows:

> *"Overall and the view that I have formed is that the question of ethnicity and nationality was absolutely central to the case that the applicant was going to advance. If he was accepted as being of Somali nationality and Bajuni ethnicity, then even if the specific account that he gave of the events in 2003 on the Island and of the circumstances in which his parents came to loose their lives was disbelieved, then the fact that even though that was disbelieved, he was nonetheless of the claimed nationality and ethnicity would have provided a significant and substantial basis why his claim had to be considered and it seems to me that a decision that leaves one guessing as to whether or not that was the view of the Tribunal member is arguably, in the sense that there are substantial grounds for contending that such a decision is inherently flawed. And in those circumstances I propose to grant leave."*

15. Similarly in *MTTK (Congo) v. Refugee Appeals Tribunal* [2012] IEHC 155, the applicant claimed to be a refugee on various grounds. The RAT did not accept his narrative. However, he had an independent fear of persecution due to the fact that he was a Rwandan Tutsi. The court held that the RAT legitimately discounted the applicant's narrative but because there was an independent ground for fear of persecution, this should have been addressed by the Tribunal. In the course of his judgment, Cross J. stated as follows:

> *"21. Drawing on these statements, it is obvious to this Court that it was entirely clear to the Tribunal Member that the applicant's alleged ethnicity was a distinct and separate point warranting individual consideration.*
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> *22. Turning to the examination at hand, it is quite clear to the court that at no point in the five page analysis of the decision did the Tribunal Member weigh the merits of this claim. I do not accept, as urged by the respondents, that the applicant's total lack of credibility is commentary enough."*

16. In *C.B. (D.R. Congo) v. Refugee Appeals Tribunal & Anor* [2012] IEHC 487, this case involved a woman from the eastern part of the Congo. She gave an account of being subjected to beating and rape due to her membership of a particular group. This account was rejected by the Tribunal. However, simply because she was from the eastern part of the country and was a woman, it was held that this could give rise to a legitimate fear of persecution. While the narrative was rejected, the RAT should have considered whether, given the fact that she was from one part of the country, could give rise to persecution. In the course of her judgment,

Clark J. stated:

> *"16. The applicant is without doubt a person shorn of credibility. The sole objective document before the Tribunal was the UNHCR email which indicates that her children are in the eastern DRC. The only aspect of her assertion which was not specifically rejected was her gender and asserted nationality and possibly that she is from eastern DRC. If that is so, then it is arguable that given the well documented prolonged violent conflict in that region, the Tribunal Member ought to have gone on to apply a forward-looking assessment of risk based on those basic elements. In M.A.M.A. (Abdullah), Cooke J. adopted the findings made by Peart J. in Da Silveira and continued:*
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> *'17. The sole fact that particular facts or events relied upon as evidence of past persecution have been disbelieved will not necessarily relieve the administrative decision-maker of the obligation to consider whether, nevertheless, there is a risk of future persecution of the type alleged in the event of repatriation. In practical terms, however, the precise impact of the finding of lack of credibility in that regard upon the evaluation of the risk of future persecution must necessarily depend upon the nature and extent of the findings which reject the credibility of the first stage. This is because the obligation to consider the risk of future persecution must have a basis in some elements of the applicant's story which can be accepted as possibly being true. The obligation to consider the need for 'reasonable speculation' is not an invitation for gratuitous speculation: it must have some basis in, and connection to, the apparent circumstances of the applicant.*
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> *18. It must be borne in mind that in making an asylum claim there is a basic onus of establishing the fundamental elements of a claim which rests with the applicant even if the examination of the claim is strongly investigative in character on the part of the asylum authority and is to be carried out in cooperation with the applicant. Furthermore, one of the crucial elements in the definition of 'refugee' as stated in s. 2 of the Act of 1996 based upon Article 1A of the Geneva Convention, is that the asylum seeker 'is outside the country of his or her nationality' owing to a well founded fear of persecution for one of the Convention reasons. The assessment of the fear claimed thus involves identifying a country of origin. Accordingly, if the finding on credibility goes so far as to reject a claim that the asylum seeker has a particular nationality or ethnicity or that he or she comes from a particular region or place in which the source of the claimed persecution is said to exist, there may be no obligation upon the decision-maker to engage in 'reasonable speculation' as to the risk of repatriation in the case. On the other hand, if the decision-maker concludes that the asylum seeker is opportunistically seeking to place himself in the context of verifiable events in a particular place but decides that while such events did occur, the asylum seeker was not involved in them, the risk of future persecution may still require to be examined if there are elements (the language spoken or obvious familiarity with the locality for example,) which establish a connection with that place. Thus, opportunistic lying about participation in events involving previous persecution will not necessarily foreclose or obviate the need to consider the risk of future persecution provided there are some elements which furnish a basis for making that assessment.'"*

17. One of the grounds on which the applicant claimed asylum in Ireland was that if he were repatriated to Ethiopia as a failed asylum seeker, he would face persecution on that ground alone. In *MTTK*, Cross J. accepted the test for persecution under this heading, as formulated by Irvine J. in *F.V. v. Refugee Appeals Tribunal* [2009] IEHC 268. Cross J. held:

> *"32. In F.V., Irvine J. expressed the view that failed asylum seekers are not, as a matter of course, members of a social group. Irvine J. recognised the possibility that this type of claim was open to abuse, and accordingly required that particularly cogent evidence would be required before the RAT decision would be quashed for a failure to consider it. The test outlined at para. 37 of F.V., which I accept is as follows:*
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> > *'…given the scope for abuse of the asylum process, the court is satisfied that cogent, authoritative and objective COI that failed asylum seekers were targeted for persecution in the person's country of origin and demonstrating a Convention nexus would have to be shown.'*
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> *33. In Okito, Ryan J. when faced with similar circumstances, stated:*
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> *'If the material achieves a certain minimum level of materiality and credibility, then it should have been taken into account and the method by which it should have been weighed and considered and balanced out in the context of the case as a whole is a matter for the Tribunal. So in those circumstances, if the material does achieve this standard, then judicial review ought in general to follow. I say that it ought in general to follow, because there may be exceptions and qualifications, depending on the circumstances. On the other hand, if the material does not achieve this standard of relevance and credibility, then it is legitimate for the court to say that it is not sufficiently important to warrant the remedy of judicial review and the discretion is appropriately and properly exercised in refusing relief.'*
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> *34. I do not see any conflict between the observations of Irvine J. in F.V. and Ryan J. in Okito. The evidence must be cogent, authoritative and objective but that does not mean that the court should in any way engage in a judgmental issue to determine its merits (that would fall foul of the Supreme Court's observations in Talbot) but the level of materiality and credibility as stated by Ryan J. need only achieve a minimum of standard that would require them to be assessed as evidence by the RAT. When the court is assessing whether there is in existence, cogent, authoritative and objective COI, it must not fall into the trap of weighing up and coming to any decision on the merits of this evidence."*

18. The applicant argued that the Tribunal erred in failing to address whether it was likely that he would face persecution due to the fact that he was a deserter from the army, was a failed asylum seeker, and had given information to the opposition political party about the land allocation.

The Respondent's Case

19. The respondents state that the applicants in the cases cited were in a different position to the applicant in this case. In those cases, the fear of persecution arose from the applicant's membership of a particular ethnic group. This existed quite independently of the narratives of the various applicants. This gives rise to a two part decision making process, requiring the decision maker to ask: (i) is the applicant's story credible; and (ii) is the applicant likely to suffer persecution due to their belonging to a particular ethnic group?

20. The respondents argue that, in this case, the applicant was in the army, was arrested and tortured, but was subsequently returned to his former relatively high position in the army. After the alleged shooting incident in May 2008, he fled to Ireland. The applicant never claimed that, due to his ethnic origin, he would face persecution. The RAT gave him the benefit of the doubt and said that he may have been in the army. The respondents argue that the Tribunal had only gone so far as to hold that he may have been

in the army at some stage. The Tribunal did not go so far as to accept his account of what he alleged had happened while he was in the army. The respondents argue that the COI which reported the imposition of the death sentence on four air force pilots who had sought asylum while undergoing a training exercise in Israel was a very specific case. It was not comparable to the applicant's position in this case. The respondents argued that the analysis arrived at by the Tribunal was very thorough. In the portion of the decision dealing with whether the applicant was in the army, the Tribunal stated as follows:

> *"I have some doubt whether or not the applicant was in the army as he alleges, but giving him the benefit of the doubt, the applicant should have been aware of the term of service. If he was aware as he alleges that he would be forced to serve a further seven years for the reasons given by him, he nonetheless sought permission and incurred the alleged penalty (four and five above). I do not believe that this would be the action of an intelligent person."*

21. The respondents argue that the Tribunal was doubtful whether the applicant was in the army at all. If he was in the army, he should have been aware of the usual length of service in the army. The Tribunal did not say that the applicant was not in the army; it made a finding that it was possible that he was in the army but that is as far as it went. The respondents argued that the Tribunal was entitled, on the evidence before it, to reject the narrative as put forward by the applicant. The respondents stated that just because the applicant had been in the army and had sought asylum in Ireland, did not of itself expose him to a risk of persecution if repatriated to Ethiopia. This was not a case where a person belonged to a particular ethnic group or professed a particular religion, which would of itself expose the person to a risk of persecution. The respondents submitted that, on the evidence before it, the Tribunal was entitled to reject the narrative as given by the applicant. The respondents argued that the finding of the Tribunal was sound and should not be disturbed.

Decision

22. The applicant was out of time to bring this application. He received the decision of the RAT on 19th March, 2010. The present proceedings were not commenced until 4th June, 2010. The applicant explained the delay in paras. 15 and 16 of his affidavit sworn on 4th June, 2010. Essentially, the delay arose by virtue of the fact that he changed solicitor and there was a delay in effecting the change of solicitor and in obtaining a transfer of the full file from his former solicitor to his present solicitor. The notice of motion was issued on 4th June, 2010. I am satisfied that the applicant was not at fault for the delay that occurred. I am also satisfied that the respondent has not been prejudiced in any material respect by this delay. Accordingly, I extend the time for bringing these proceedings up to and including 4th June, 2010.

23. Having regard to the submissions made by counsel and to the authorities cited in argument, I am satisfied that the RAT was entitled to reject the narrative as put forward by the applicant. However, having held that he was in the army, the Tribunal member should have considered the likely fate of a deserter who is repatriated to Ethiopia. The evidence before the Tribunal in this regard was the evidence in relation to the four air force pilots who deserted and sought asylum in Israel: they were sentenced to death in absentia. The Tribunal should have considered what fate the applicant would likely meet if repatriated as a deserter from the army, and as a whistleblower in relation to the land allocation and as a failed asylum seeker. It seems to me that these were questions which should have been addressed by the Tribunal before reaching its final decision. Accordingly, I will quash the decision of the RAT dated 21st March, 2010 and remit the matter back to the RAT for consideration by a different Tribunal member.