Neutral Citation: [2015] IEHC 144

THE HIGH COURT

JUDICIAL REVIEW

[2010 No 1469 J.R]

BETWEEN

H.A.A. [SUDAN]

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL MINISTER FOR JUSTICE AND LAW REFORM ATTORNEY GENERAL, IRELAND

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 5th day of March, 2015

1. This is telescoped hearing for judicial review seeking *certiorari* to quash a decision of the Refugee Appeals Tribunal dated 14th October, 2010, and remitting the appeal of the applicant for *de novo* consideration.

PRELIMINARY ISSUE

2. A preliminary issue arose at the outset of the hearing with regard to an extension of time within which the applicant sought to commence the judicial review leave application. The two-week delay arose as a result of the applicant changing solicitors. The delay was not inordinate and counsel on behalf of the respondents indicated that no issue and/or objection was being taken to the extension of time. In those circumstances I am satisfied there is sufficient reason to extend the time within which to bring the proceedings before this Court.

BACKGROUND

3. The applicant states that he was born on 15th April, 1967; is a national of Sudan; and a member of the Nubian ethnic group.

4. At first it is worthwhile setting out the events leading up the applicant's alleged persecution, as per the applicant's account.

5. Since 1996, when the Sudanese government announced the building of the Kajbar Dam and displacement of citizens from the region, the applicant claims to have been among the opponents to the building of the dam. The applicant claims that it would have flooded his farm and house; therefore, he supported the Nubian political party in their efforts against the dam.

6. The applicant claims that in 1998, when the authorities found out about his activities, they arrested him, held him for ten days and released him on the condition that he not continue to support the groups opposed to the building of the dam. He further contends that he had to periodically sign at a local security office.

7. In June 2005, the applicant claims to have attended a peaceful protest where he was again arrested and held for a one-month period. He contends that he was tortured while in custody but later released on the condition that he remain in the area and not continue to gather support for the anti-dam group. He states that although he signed a pledge promising same, he continued his activities in secret. He states that he was again arrested in April 2007 and held for 13 days.

8. Later the applicant states that he attended a protest on the 3rd June, 2007, where four protesters were shot by government forces. He claims that the authorities attempted to arrest him on this occasion but he escaped and fled. He claims to have fled to al-Badeen Islands on the Nile where he stayed for a five-month period. He then went to Khartoum. He left Sudan on the 8th December, 2007. He claims to have boarded a ship at Port Sudan whence smugglers transported the applicant to Ireland.

9. He arrived in Ireland on the 3rd January, 2008. Since arriving in the State, the applicant claims that he has been in contact with his family in Sudan and they informed him that state agents are seeking his whereabouts, having been to his home on a number of occasions.

10. The applicant claimed asylum on the 3rd January, 2008, and completed an interview at the Offices of the Refugee Applications Commissioner (ORAC) pursuant to s.11 of the Refugee Act 1996 (as amended) on the 6th May, 2008. He received a negative recommendation by decision dated 22nd May, 2008. The Commissioner made adverse credibility findings against the applicant as well as findings in relation to the well-foundedness of the applicant's fear of persecution stating that although people involved in the protests had been arrested, they were later released by security forces.

11. A notice of appeal was lodged on behalf of the applicant dated the 21st June, 2008, and an oral hearing took place in respect of that appeal on the 11th November, 2009. However it was adjourned due to an issue with the interpreter and to allow for the submission of documents. The documents, and translations, were received by the Refugee Appeals Tribunal (RAT) on the 5th June, 2010, and the oral hearing took place on the 30th September, 2010.

IMPUGNED DECISION

12. By decision dated the 14th October, 2010, the RAT issued a negative decision in respect of the applicant and the applicant was informed of same by letter dated 22nd October, 2010. The tribunal member made credibility findings against the applicant. First, the tribunal member states that the applicant did not refer to one arrest in his initial questionnaire that the applicant later referred to at the interview stage. Secondly, the tribunal member states that the ASY1 form did not contain information regarding that arrest. This, it is stated, affected the applicant's credibility. Thirdly, the tribunal member found that because the applicant did not correctly identify photographs of four people who were killed during a protest he claimed to have attended, this was held to have adversely affected his credibility. Further the tribunal member states that medical evidence filed in support of the applicant's claim was submitted, however, the tribunal member held that the applicant's difficulties could have been caused by other agents and for other

reasons. This is in reference to the SPIRASI report submitted by the applicant in regard to the alleged torture he was subjected to while in the custody of stage agents.

SUBMISSIONS

13. Mr. Mark de Blacam S.C., on behalf of the applicant, submits that this is a case where credibility has been rejected; however, the tribunal member should have applied a forward-looking test. The applicant submits that the tribunal member should have considered, not just political grounds, but also grounds of race, which were stated by the applicant from the outset. The applicant, it is asserted, is still being sought in Sudan and has submitted country of origin information, which indicates that Nubians who are apprehended by authorities are at risk of suffering harm, thereby providing the necessary convention nexus. Therefore, the applicant submits, that the applicant's case is not only in relation to his political activities but also in relation to the fact that he is a Nubian who is sought by the authorities. The applicant submits that having rejected the core claim in relation to the dam, the tribunal member should have applied the forward-looking test in relation to the applicant's contention that he is a Nubian who is being sought by the authorities.

14. The tribunal member found that the applicant is Sudanese and no issue was taken with the fact that the applicant is a Nubian, as evidenced by the questions put to the applicant in the s.11 interview. Counsel for the applicant relies on a passage from *M.L.T.T. (Cameroon) v. Minister for Justice, Equality and Law Reform & anor.* [2012] IEHC 568 at paras.11 to 14, which states as follows:

> "First, there is no doubt that it is well established as a matter of international and domestic refugee law that the test for determining whether a person is a refugee is forward-looking. In his seminal work *The Law of Refugee Status* (1991), Hathaway explains the origins and development of the definition of a refugee in the 1951 Convention. Originally, past persecution was sufficient to warrant refugee status but following discussion and agreement, the Convention was drafted so as to require either present or prospective persecution, or both. The later *Michigan Guidelines on Well Founded Fear* which were agreed by expert participants at a Colloquium on Challenges in International Refugee Law led by Professor Hathaway at the University of Michigan in 2004 state at paragraph 4 that the 1951 Convention requires *"the demonstration of "fear" understood as a forward-looking expectation of risk".* At paragraph 12 the Michigan Guidelines further state:-
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> > *'Even where there is a finding that an applicant's testimony is not credible, in whole or in part, the decision maker must nonetheless assess the actual risk faced by an applicant on the basis of other material evidence. In particular, the existence of a well-founded fear may be grounded in evidence that the applicant is a member of a relevant, at risk group of persons shown by credible country data or the credible testimony of other persons to face a significant risk of being persecuted.'*
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> This principle is also accepted and applied in the caselaw of this and other jurisdictions where it is consistently reiterated that the decision-maker may look to the past as a guide to what is likely to occur in the future but that the past is not determinative. In Da Silveira (cited above), Peart J. held:-
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> > *'The task of the Tribunal is not simply to be satisfied that there is a well-founded fear of persecution arising from the past, but also that, owing to such well founded fear for a Convention reason is outside the country of nationality, and is unable or owing to such fear is unwilling to avail himself of the protection of that country. In other words, that if returned to that country he would be likely to suffer persecution in the future. It is therefore not sufficient for the adjudicator to be satisfied or not as the case may be about particular facts and details relating to past persecution. A lack of credibility on the part of the applicant in relation to some, but not all, past events, cannot foreclose or obviate the necessity to consider whether, if returned, it is likely that the applicant would suffer Convention persecution.*
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> > *In the context of the present case, this could mean that simply because the Tribunal, on an inference drawn from incorrect facts in relation to the rape has concluded that the applicant cannot be believed, or that her account of her escape seems somewhat far-fetched, it cannot thereby lightly or automatically discount completely her evidence of membership of the UFC and her involvement at political rallies, since that evidence is relevant on its own in relation to whether if she were returned to Togo she would suffer persecution in the future on account of her political opinion.'*
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> It is equally well established that where the very core of an applicant's claim is not believed, the decision-maker is not obliged to carry out an artificial exercise and assess what might occur if a hypothetical person with the applicant's disbelieved history and characteristics were returned to the applicant's country of origin. This was the situation in *Imafu v. Refugee Appeals Tribunal & anor.* [2005] IEHC 416. However it is certainly arguable that this case is not one of the exceptional cases which equates to an Imafu type finding where the core of the applicant's claim was disbelieved.
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> It seems to this Court that in circumstances where much of what may be described as the applicant's core claim to have been a student activist in Cameroon appeared to have been accepted, the Tribunal Member ought to have gone on to ask himself whether the applicant has a well-founded fear of persecution if returned to Cameroon, in the light of the accepted past experiences and having regard to objective COI relating to previously arrested students there. It is not suggested that the Tribunal Member was bound to answer that question in the affirmative but he was nonetheless bound to give consideration to it. It is not for this Court to speculate upon the answer he would have reached or the materials he might have consulted had he gone on to assess future risk. As Cooke J. held in *I.R. v. Refugee Appeals Tribunal* [2009] IEHC 353,
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> > *'The determination as to whether a claim to a well-founded fear of persecution is credible falls to be made under the Refugee Act 1996 by the administrative decision-maker and not by the Court. The High Court on judicial review must not succumb to the temptation or fall into the trap of substituting its own view for that of the primary decision makers.'"*

15. Therefore it is submitted by the applicant that an essential feature of a refugee determination procedure is the assessment of the likelihood of risk of future persecution and this should be considered by the decision-maker if a decision is to stand. The Commissioner did consider the issue of the forward-looking fear; however, the applicant submits that at the tribunal stage this part of the assessment did not form part of the decision.

16. The applicant further contends that the medical evidence was not appropriately dealt with. Although the weight to be attached to evidence is a matter for the tribunal member, the applicant submits that the tribunal member did not deal with the medical evidence in an appropriate manner. Of particular concern to the applicant is the treatment of the SPIRASI report which, the applicant submits, should have been dealt with in more detail by the tribunal member. Counsel relied on the Istanbul Protocol on the investigation and documentation of torture pointing to para.187 thereof, where the protocol sets out the likelihood that particular lesions have been caused in the manner claimed by an applicant, as follows:

> "(a) Not consistent: the lesion could not have been caused by the trauma described;
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> (b) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;
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> (c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;
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> (d) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;
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> (e) Diagnostic of: this appearance could not have been caused in any way other than that described."

17. In the applicant's SPIRASI report there are findings said to be 'consistent with' torture and other findings said to be 'highly consistent' with torture as claimed by the applicant. When dealing with the medical evidence the tribunal member states that these difficulties could have been caused by other agents for other reasons. Counsel submits that this case is similar to *R.A. (Uganda) v. Refugee Appeals Tribunal & anor.* [2014] IEHC 552 where Mr. Justice Eagar decided that the medical evidence submitted was not appropriately dealt with by the Refugee Appeals Tribunal. Although counsel concedes that the facts of *R.A.* are stronger than in this case, he submits nevertheless that the Refugee Appeals Tribunal is obliged to fully consider the medical evidence when that evidence is *prima facie* capable of substantiating the applicant's claim in a case where the applicant's claim is not accepted based upon rejection of credibility.

18. The applicant submits that the Arabic interpreter provided to him at his interview spoke with an Algerian Arabic dialect and accent and that he was unable to properly understand as a result.

19. Ms. Kilda Mooney B.L., appearing on behalf of the respondents, submits that credibility was clearly rejected in this case, being fundamentally disbelieved on a number of issues that are core to his claim. The applicant had left out central aspects of his claim and changed his story on a number of occasions. This, the respondents submit, is a fundamental aspect of the applicant's decision and because such basic credibility findings were made against the applicant, the decision should stand on this basis. The respondents submit that the contention that all Nubians generally are persecuted is not well-founded because the applicant's family are all still in the area and they remain there without being persecuted. Therefore the applicant's claim of persecution is solely based on his alleged political activities and not his ethnicity. His political activities were not held to be credible.

20. In relation to the applicant's contention that he could not understand the interpreter, the respondents argue that the applicant gave Arabic as his first language at all times and stated that he understood the interpreter when this question was put to him. This was not claimed in the grounds of appeal to the Refugee Appeals Tribunal and, therefore, the respondents assert, cannot now be claimed to be central to the case.

21. With regard to the SPIRASI report, counsel for the respondents submits that in these medical reports doctors often cross beyond what is within their remit. These scars could have been inflicted for a myriad of reasons. The probative value of the report is for the decision-maker to decide. If the probative value is decided to be very low then the decision, the respondents submit, does not have to deal with the medical reports in detail.

22. The respondents submit that the Court has assessed the approach that should be taken in assessing medical reports and an applicant's credibility in numerous cases. In *R.M.K. (D.R.C) v. Refugee Appeals Tribunal* [2010] IEHC 367 Ms. Justice Clark held that where an asylum decision-maker has rejected the credibility of an applicant's narrative of political involvement and consequential torture, the fact that physical injuries and scars are, in the opinion of a physician, 'highly consistent' with the applicant's account, such evidence is not determinative of a fear of persecution and does not necessarily negate the adverse credibility findings made against the applicant. Therefore, the respondents contend, in such circumstances, it is necessary to carry out an assessment of whether the underlying credibility findings in the case are sufficient to support a rejection of the applicant's claim notwithstanding the strength of the medical report. In the *R.M.K. (D.R.C.)* case, Ms. Justice Clark found that the underlying credibility findings were not of such rigour to dismiss the applicant's claim, and therefore not enough weight had been given to the SPIRASI report by the tribunal in reaching its decision. The respondents submit that this approach was followed by Mr. Justice MacEochaidh in *J.K. v. Refugee Appeals Tribunal & anor.* [2013] IEHC 466.

23. The respondents claim that the tribunal was justified in reaching the conclusion as to the limited probity of the medical reports given the serious adverse credibility findings that were arrived at following a detailed assessment of the applicant's claim. The respondents submit that the reports did not prove a causal link between the applicant's scars and his claim of past persecution and therefore given its limited probity, the tribunal was entitled to dismiss the medical evidence in the manner in which it did.

FINDINGS

24. In this case, in my opinion, the credibility findings made by the decision-maker were substantial and definitive. The tribunal member did not believe the applicant's story. It seems to me that the applicant's case contains such strong adverse credibility findings, that it falls within the parameters of the *Imafu* decision (cited above) and that in those circumstances the tribunal member was not obliged to proceed to carry out a forward-looking test as a result of the substantial and definitive adverse findings in respect of credibility. I would reject the applicant's claim on this ground.

25. With regard to the medical reports it seems to me that the tribunal member did consider the medical reports and considered them in the context of determining the applicant's credibility. It is established law that the probative value to be attached to medical reports is a matter for the decision-maker. The function of this Court is to ensure that the process adopted by the tribunal member was fair and that the evidence was considered. I have no doubt and it is apparent from the decision that the tribunal member did have regard to the medical reports but having considered the totality of matters did not attach any probative value to the reports. In my view the decision-maker was entitled to arrive at this conclusion. For the reasons set out above I would refuse leave.