Neutral Citation Number: [2010] IEHC 133

THE HIGH COURT

JUDICIAL REVIEW

2007 1280 JR

BETWEEN

S. B. E.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered on the 25th day of February, 2010.

1. It is a useful, if perhaps superficial, test of the soundness of a negative decision of the Refugee Appeals Tribunal to read it as a whole and then pose the question: "Is it clear from the decision why this applicant is not to be declared a refugee?" In this case the immediate answer to that question would be two-fold: first, because the applicant was found to be "less than credible and in his demeanour, he presented as an educated individual who simply was not telling the truth;" and secondly, because the Tribunal member formed the opinion that the applicant could have relocated to another part of Nigeria thereby avoiding the need for international protection.

2. To satisfy scrutiny as to the legal validity of the decision, however, it is necessary to ask a more precise question: Is it clear from a reading of the decision as a whole that those two conclusions have been reached by a process which is soundly based on evidence and information available to the Tribunal which has been objectively and fairly assessed by the Tribunal member?

3. Leave to bring this application was granted by order of 28th October, 2009 because the Court considered that two substantial grounds had been made out which it decided should be expressed as follows:

"1. In forming the opinion that the applicant may have had economic motives for leaving Nigeria, the Tribunal member erred in law and misapplied the definition of 'refugee' in s. 2 of the Refugee Act 1996 by failing to consider, decide and explain whether the events which he accepted as having occurred as a 'crisis' giving rise to the applicant's flight, constituted in fact a valid basis for a well-founded fear of persecution.

2. The decision of the Tribunal is unlawful in that it purports to find that internal relocation in Nigeria would be available to the applicant when no such finding had been made in the section 13 report the subject of the appeal and where no particular part of that country had been identified or investigated as a potential site for relocation either by the Commissioner or the Tribunal member, contrary to the requirement of Regulation 7 of the European Communities (Eligibility for Protection) Regulations 2006."

4. In granting leave the Court expressed the view that, at least on a first reading, the appeal decision appeared to betray a degree of ambiguity or internal contradiction which created uncertainty as to the coherence of the process by which the Tribunal member had reached the two conclusions given as the basis for affirming the negative recommendation of the section 13 report.

5. The applicant is from Nigeria. In 2006 he was living in Onitsha with his wife and daughter and he ran a store. In June and July 2006, violent upheavals broke out in Anambra state where Onitsha is situated. The section 13 report accepted that the applicant's description of the violence, clashes with police and attacks attributed to activists in the Movement for a Sovereign Biafra (Massob) was supported by country of origin information.

6. The applicant claimed, in effect, to have been a victim of this violence. He said that his store was vandalised and his goods were stolen: his wife was kidnapped and a ransom demanded. He reported this to the police but they did nothing and even told him to pay the ransom. A friend of his knew a member of Massob who helped his wife escape. They were told to leave the country for their own safety. His sister introduced him to an agent who arranged for them to travel from Lagos to Cork and then to Dublin. He arrived in Ireland in 2006 and claimed asylum.

7. In the Contested Decision at Section 3 under the heading "Applicant's Claim" the Tribunal member sets out a summary of the above events as recounted by the applicant as his reason for fleeing from Nigeria. It includes a record of questions put to the applicant at the appeal hearing directed at his credibility including the absence of any photo identification or driving licence and the fact that he and his wife were described as civil servants on their marriage certificate.

8. The Tribunal member mentions that he has studied in depth a written submission presented on behalf of the applicant and notes that his counsel had stated that internal relocation was not an option. The issue of internal relocation received no consideration in the s. 13 report but apparently, in anticipation of its being raised at the hearing, written submissions lodged for the appeal had referred to the issue but upon the curious basis that the Commissioner's authorised officer had made a finding on the point without conducting the necessary substantive inquiry. Clearly, there is no such finding in the s. 13 report.

9. In Section 6 of the Contested Decision under the heading "Analysis of the Applicant's Claim", the Tribunal member sets out the analysis leading to the two opinions which form the basis for the conclusions in s. 7 namely the confirmation of the negative recommendation in the s. 13 report.

10. The reason why the Contested Decision can be read as creating misgivings as to the coherence of this analysis and therefore as to uncertainty as to the process leading to the conclusion is as follows.

11. There is on the one hand no doubt but that the tone in which the analysis is expressed conveys a general scepticism on the part of the Tribunal member as to the entirety of the account given by the applicant. However, when the analysis is read in

detail there is no explicit finding that the particular events essential to the fear of persecution (the loss of the store and the kidnapping of the wife,) did not happen. Specific disbelief is expressed in respect of four matters:

(1) The fact that the applicant had left 400,000 Naira with his mother while his wife was held by kidnappers demanding ransom. (This is described as "the most significant of the applicant's test of credibility" by which the Tribunal member appears to mean that in testing the full account for credibility, this is the aspect which the Tribunal member found most difficult to believe.)

(2) That the applicant did not know he was coming to Ireland but came nevertheless and coincidentally his wife had a child very shortly after arrival;

(3) He said he knew nothing about asylum but still applied very promptly;

(4) He was prepared to pay 300,000 Naira to a travel agent in advance not knowing where he was to be taken.

12. It would be noted that all but the first of these matters are incidental and subsequent to the events and factual claims which form the basis of the alleged fear of persecution.

13. The Tribunal member then gives the opinion "that the applicant travelled more for economic reasons than to avoid what was happening in Anambra. There is no doubt about it but a crisis did arise and it is the opinion of the Tribunal that he was opportunistic in his efforts to travel particularly to Ireland".

14. The ambiguity which this opinion creates is that the Tribunal member appears to be accepting that the applicant may have been prompted into flight partly by non-economic reasons and that those may be the result of or connected with the "crisis" but it is not clear if the "crisis" is simply the unrest and violence in Anambra state or the specific incidents of the loss of the store and the kidnapping which form the basis of the claim.

15. This uncertainty as to the precise basis for the opinion thus expressed is aggravated by the apparent contradiction of then expressing the further opinion: "It is further the opinion of the Tribunal that the applicant could have relocated in another part of Nigeria which has 130 million citizens".

16. If the opinion thus expressed in that single sentence is intended to be a finding which supports the confirmation of the negative recommendation, it is in the Court's judgment clearly inadequate. It is devoid of any substantiation by reference to the facts of the case, the circumstances of the applicant and of his family or to the nature of the threat of persecution which relocation would serve to avoid.

17. It is well settled law both generally in the application of the Geneva Convention and of the 1996 Act and specifically by virtue of Regulation 7 of the European Communities (Eligibility for Protection) Regulations 2006, that a finding that internal relocation will provide protection involves a two fold consideration:

(a) First, the identification – if only in general terms – of an area or place in the country of origin which can reasonably be expected to be free of the particular source of persecution from which the applicant requires protection; and

(b) Secondly, an inquiry sufficient to confirm that a relocation there is feasible and reasonable to expect of the applicant (even if it involves hardship,) having regard to the personal circumstances of the applicant and of his family.

18. This second consideration is relevant because there may well be reasons of ethnicity, religion, political affiliation or family history why an applicant might not be able to move to or be safe in a given relocation and that can only be decided if the area or place is identified and has been made known to the applicant. In this case no particular area of possible relocation was mentioned either by the Tribunal member or in the s. 13 report so the applicant has never had it identified. No consideration was given as to whether there were areas outside Anambra state where Massob was active and if so which areas they were. This omission is all the more surprising in this decision because the Tribunal member quotes directly from para. 91 of the UNHCR Handbook: "In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would have been unreasonable to expect him to do so."

19. Clearly, therefore, if this opinion as to internal relocation was the only finding in this decision *certiorari* would have to issue to quash it. However, as counsel for the respondent has strongly argued, this decision turns first and foremost on an explicit finding that the applicant was "simply not telling the truth" so that the issue of internal relocation is irrelevant unless that primary finding is shown to be defective.

20. Nevertheless, this second opinion or finding is relevant to the validity of the finding of lack of credibility because its presence in the decision is contradictory. The need to consider the availability of domestic protection within the country of origin by relocation only arises where it is accepted that there exists an actual source of persecution from which protection is required. If the applicant's story including the loss of the store and the kidnapping has been disbelieved in its entirety, then those events never happened and no need for national protection by relocation arose. In particular, in the absence of any issue on the point in the s. 13 report, it was unnecessary for the Tribunal member to introduce or address the issue unless he was concerned that some part of the story was at least possibly true. This is not to say that a Tribunal member is not entitled in an appeal decision, where two or more grounds have been raised, to make additional findings for the sake of completeness on secondary issues when the claim has been rejected primarily for lack of credibility. It is by no means clear that in this case the Tribunal member is effectively expressing the opinion on relocation on the basis: "Even if I were to accept the applicant's claim as credible, I find he could avoid persecution by relocation".

21. This is because, first, the lack of any express finding of disbelief in respect of the events claimed to have constituted the persecution other than the failure to pay the ransom using the money left with his mother. Secondly, there is the failure to identify or explain what part of the story, if any, was accepted as being part of the "crisis" which arose and which seems to be acknowledged as having played some role in provoking the flight.

22. In reviewing a decision which turns predominantly on credibility the Court is fully conscious of the fact that the issue is one which is exclusively for the decision maker to determine. It must resist any temptation to substitute its own view of credibility for the assessment made by the Tribunal member. It is concerned only to ensure the legality of the process by which that conclusion has been reached.

23. This brings one back to the question posed at the outset: "Is the process by which this conclusion on credibility has been reached clear from the decision?" In spite of the ambiguities referred to above the process appears to have been as follows:

(a) It was noted that the applicant had no identification documents and his explanation of the manner in which he travelled from Nigeria without documentation was found to lack credibility. These were two matters identified specifically as aspects of his story on which he was simply not telling the truth.

(b) These are also items which the Tribunal member was entitled and obliged to consider under s. 11B of the Act amongst the statutory indices of credibility of an asylum seekers claim. There can be no doubt in the circumstances of this claim that the Tribunal member was entitled to so find. Section 11B does not stipulate what the consequence of such a finding is to be but it is clear that unless there are other aspects to a claim which are sufficiently plausible and likely to have happened to overcome those indices of doubt, such findings alone may be sufficient as a basis for the negative recommendation;

(c) While there is some uncertainty as to the extent of the "crisis" which the Tribunal member seems to accept in the final sentence of the s. 6 analysis, reading the decision as a whole it is reasonably clear that this refers back to the incidents and upheaval in Anambra state in June and July 2006 which the Tribunal member refers to as a "crisis" in the opening sentence of the description of the applicant's claim on page 2 of the decision. The crisis accepted as having arisen therefore is the general unrest and violence and not the specific incidents the applicant claimed to have suffered.

24. The obvious implication of the disbelief expressed as regards the 400,000 Naira left with the applicant's mother is that this too was something which the applicant was simply not telling the truth about: in other words, the Tribunal member did not believe that there had been a kidnapping or a ransom demand. Read as a whole, therefore, the thrust of the analysis is that while the violence which erupted in Anambra state including Onitsha in June and July 2006, the Tribunal member did not believe the applicant had been directly caught up in it but saw it as an opportunity to leave Nigeria in the hope of making a new life elsewhere.

25. There is no doubt as to the conclusion reached – the applicant was not telling the truth – but a balanced reading of the decision as a whole indicates with sufficient certainty, in the Court's judgment, that the Tribunal member disbelieved the full basis of the claim and not merely the four points mentioned specifically on pages 14 and 15 of the decision.

26. This, therefore, in spite of the difficulties, is a conclusion on credibility which cannot be interfered with by the Court.

27. In the light of this analysis the Court would add one observation. It is, in the view of the Court, unsatisfactory that it should be necessary to undertake such a lenghty examination of an appeal decision in order to reach that view. Where a finding is made on credibility, an appeal decision of this kind should show clearly the process by which it is reached and identify the salient points or issues on which an applicant has not been believed. If not already in place, it would be highly desirable that some arrangement should operate within the Tribunal for the review or proof-reading of draft appeal decisions before they are signed. An officer or other Tribunal member with appropriate experience but uninfluenced by familiarity with the facts of a case should read the draft as a whole and ask the question: Is it clear from this why this applicant is not to be declared a refugee? If that question cannot be confidently answered in the affirmative on a first but careful reading, the draft decision should be rewritten before it is signed.

28. For all of these reasons therefore the application must be refused.