Neutral Citation Number: [2010] IEHC 150

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2007 1338 JR**

**BETWEEN/**

**M. I. - O. A. (AN INFANT SUING BY HER MOTHER**

**AND NEXT FRIEND M. A.)**

**APPLICANT**

**AND**

**MINISTER FOR JUSTICE EQUALITY AND LAW REFORM AND THE REFUGEE APPLICATIONS COMMISSIONER**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Cooke delivered on 14th day of January, 2010.**

1. The applicant was thirteen years old when she arrived in the State unaccompanied on 26th April, 2007, from Nigeria. Her mother, M.A. and her two sisters had arrived here in 2006 and had claimed asylum. Their claim had been the subject of a report and negative recommendation under s.13 of the Refugee Act 1996 dated 14th November, 2006, and was also the subject of a pending judicial review proceeding.

2. On 28th August, 2007, the mother made an application for asylum on behalf of this applicant as well. The applicant was interviewed under s. 11 of the 1996 Act on 26th September, 2007 in the presence of her mother and on the following day a report under s. 13 of the 1996 Act was made which recommended that she be not declared to be a refugee. An application is now made to the Court for leave to seek judicial review of that report including, in particular, an order of *certiorari* to quash it ("The Contested Report").

3. The first issue that arises on this application is whether the circumstances of this case, including the basis of the Contested Report and the grounds proposed to be raised as to its illegality, are such as to place the case in the category of exceptional cases in which this Court will exercise its discretion to entertain an application for judicial review of the report of the Commissioner rather than require the applicant to pursue the available alternative remedy of appeal to the Refugee Appeals Tribunal under s. 16 of the 1996 Act.

4. This issue and the criteria by reference to which it is decided have been the subject of a series of judgments in the Supreme Court and High Court in the last twelve months such that it is unnecessary to expound upon them in detail in this judgment. The cases have been referred to in argument upon the application and in the written legal submissions and include notably the following:-

- *Kayode v. Refugee Applications Commissioner* (Unreported, Supreme Court, 29th January, 2009);
- *BNN v. MJELR* (Unreported, High Court, Hedigan J., X October, 2008);
- *Diallo v. RAC* (Unreported, Cooke J., 28th January, 2009);
- *Akintunde v. RAC* (Cooke J., 29th April, 2009);
- *Ajoke v. RAC* (Unreported, Cooke J., 30th April, 2009).

5. In effect, the statutory scheme for the examination and determination of applications for asylum as established by the Refugee Act 1996 (as amended) when taken in conjunction with the obligations of the State under European Union law (and particularly, the qualification and procedural standards sought to be attained under the European Communities (Eligibility for Protection) Regulations 2006 and Council Directive 2005/85/EC of 1st December, 2005,) involves a two-stage process leading to the definitive decision of the Minister on each application under s. 17 of that Act. The first stage of the examination of the application is the investigation by the Office of the Refugee Applications Commissioner including, in particular, the section 11 interview of the applicant. Where the section 13 report contains a negative recommendation and an appeal against it is taken, the second stage takes place before the Refugee Appeals Tribunal which may either affirm or reject the negative recommendation. Although designated an "appeal" in the Act and having the format of an appeal especially where an oral hearing takes place, this procedure remains a quasi-investigative procedure in character as the provision of s. 16 (6) of the 1996 Act illustrates. It forms part of the process of examination of the application for refugee status. Both the decision of the Tribunal and the s.13 report are submitted to the Minister for the purpose of his making a decision under s.17 of the Act on the application.

6. It is thus consistent with that statutory scheme that the examination procedure be completed where an appeal to the Tribunal is taken, before recourse to judicial review is invoked. The procedure for examination of asylum applications ought not to be interrupted by the premature intervention of judicial review. It is thus settled law that this Court should intervene to review a section 13 report and recommendation in advance of a decision on appeal by the Tribunal only in the rare and exceptional cases where it is necessary to do so in order to rectify a material illegality in the report which is incapable of, or unsuitable for, rectification by the appeal; which will have continuing adverse consequences for the applicant independently of the appeal; or is such that if sought to be cured by the appeal, it will have the effect that the issue, or that some wrongly excluded evidence involved, will not be reheard but will be examined only for the first time upon the appeal.

7. In the Contested Report, the account given of the events which formed the basis of her claim to fear persecution was effectively disbelieved. On a subordinate basis, the Commissioner's officer considered that, even if the claim was to be taken as true, there was no basis for finding that police and legal protection would not be available to the applicant in Nigeria.

8. The account given by the applicant was the same as that which had apparently been given by her mother when making her own claim. They feared they would be killed by the Oodua Peoples Congress (OPC) or its related criminal gang the Oriyomi. It was said that the applicant had been kidnapped, tortured and enslaved by them and that the applicant's brother had been murdered by them. She said she eventually managed to escape (although she said she did not know when or how,) and that she came to Ireland to join her mother with the aid of a woman who had made all the travel arrangements and provided the documents.

9. The report rejects that claim as incredible in fairly robust terms. Amongst a number of specific criticisms made by the officer in that regard are the following:-

> • She, her father, sister and brother were abducted by the gang from the family home but she could not give the date or time at which this happened;
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> • She did not know the motive for the abduction other than to say that it was "for her father's actions" – her father was a pastor;
>
> • She did not know how long she was held; how or when she escaped or when her mother had left Nigeria for Ireland.

10. In the statement of grounds for the judicial review application, a total of 24 grounds are proposed to be advanced as to the illegality of the Contested Report. In oral argument and in the written legal submissions, these have been helpfully reduced and consolidated so that the essential grounds upon which the application for leave is based can be summarised as follows:-

> (a) The Contested Report is flawed in its form. It is incomplete in that para. 3 ends unfinished so that the full extent of the findings reached is unclear. There are inordinate grammatical errors and spelling mistakes which demonstrate a "fast track" approach as confirmed by the fact that it issued the day after the section 11 interview.
>
> (b) The Contested Report is vitiated by bias. The language used throughout reflects a culture of disbelief and a zealousness to discredit the claim from the outset.
>
> (c) The principles of fair procedure and *audi alteram partem* have been infringed in that the officer failed to put to the applicant or to her mother and next friend none of the matters upon which doubts as to credibility were to be based and country of origin information relied upon was not put to them for comment.
>
> (d) There was a fundamental failure to assess the claim by having regard to objectively acquired country of origin information.
>
> (e) There was a failure properly to assess the issue of State protection in Nigeria.
>
> (f) There was a failure to take into account the matters required to be considered under the above regulations of 2006 and the matters referred to in s. 11 B of the 1996 Act.
>
> (g) There was a failure to give adequate reasons for the decision.

11. Having regard to the criteria set forth in the case law referred to above, the Court is satisfied that there is no reason for the intervention of the High Court in exercise of judicial review in the asylum process in this case. Each of the grounds proposed to be advanced as elaborated upon in argument is entirely apt to be dealt with by the statutory appeal. This is not a case in which an oral hearing on appeal is excluded. As indicated, the essential basis of the section 13 report of the Commissioner is that the personal history recounted by the applicant has been disbelieved. Because the examination of the asylum application takes place in two stages, the applicant has the opportunity in the second stage of convincing the Tribunal member to reassess that account, take a new view and come to a different conclusion. In this case, each of the complaints raised against the section 13 report of the Commissioner is directed in one way or another at the form, content and quality of the report. Although formulated in terms of error of law, infringement of principles of fair procedure and so forth, the essential basis of those complaints is that the officer dealt wrongly with the claim and ought to have taken a different view.

12. So far as concerns ground (a) above, it is true that there appears to be part of a sentence missing from para. 3 of the Contested Report. The omission is not however material because the sentence in question is a recital of the persecution claimed by the applicant at the interview and that is clearly repeated in more complete terms in s. 4.1.1 of the Contested Report. Contrary to the submission made, s. 3 under the heading "persecution claimed" does not contain any findings and is therefore not relevant to an understanding of the conclusions reached or the reasons given for them.

13. The complaint of bias in the Contested Report is, in effect, a quarrel with the language used in particular places. The complaint is, in the Court's view, probably exaggerated but is in any event perfectly capable of being remedied, if necessary, by the appeal. The grievance is, for example, that the applicant is described as "declaring her date of birth as that of 9th February, 1994". The expression appears to be attributable to the fact that the date given orally at interview by the applicant was at variance with the date of 6th February, 1994 appearing on the birth certificate. Exception was also taken to the reference to the above next friend as the applicant's "*declared* mother". Again, this appears to be attributable to a spelling discrepancy in the mother's forename. The use of the expression "imputed birth certificate" (which is in any event probably linguistically inexact if the officer intended "alleged",) seems again to reflect some doubt as to the reliability of the document. In the judgment of the Court even if these are considered to be matters of justifiable complaint, they are incapable in law of vitiating the validity of the report as such. It must be borne in mind that the authorised officer is not, as such, making a definitive decision; he is collecting information and making a personal appraisal of the credibility of the applicant before him with a view to formulating a report to be placed before the Minister under s. 17 so that the definitive decision can be made. If doubts thus expressed are said to be misplaced or exaggerated, it is the function of the appeal before the Tribunal to revise them.

14. The same response falls to be given to ground (c) above, the alleged infringement of the principles of fair procedure and *audi alterem partem*. In essence, the complaint made is that if the doubts in the mind of the officer had been openly articulated at the interview they could have been resolved. That can be done on appeal.

15. Again, if any of the negative views expressed in the section 13 report are dependent upon country of origin information as such (which appears at this stage to be open to question,) the appeal before the Tribunal is the forum in which new, better and more up-to-date country of origin information can be submitted for consideration.

16. So far as concerns the issue of State protection, this was a secondary basis for the negative recommendation but it is, in any event, open to the applicant to prove that point on appeal provided, of course, the credibility of the persecution feared can be established and the fact that no State protection appears to have been sought in respect of the claimed kidnapping, can be overcome.

17. Again, because the examination of an asylum application involves a two-stage process under the Act, the Tribunal is equally obliged to comply with the requirements of the 2006 Regulations in taking into account the matters required to be considered. It is not immediately apparent to the Court what particular "relevant facts" are relied upon for this purpose but insofar as they appear to be related to country of origin information, they are clearly capable of being put before the Tribunal.

18. Finally, it is suggested in very general terms that the Contested Report is defective in its statement of reasons. This ground is clearly unfounded. The purpose of the obligation in an administrative decision of this kind is to give a statement of reasons so that the addressee of the decision can understand why it has been made and to place the Court in a position to exercise its function of judicial review. As will be apparent both from the summary of the content of the Contested Report given earlier in this judgment and from the detail of the grounds which the applicant has been able to formulate for the purpose of the application for leave, it is perfectly clear both that the applicant has fully understood why the negative recommendation has been reached and that this Court is in a position to rule upon the application.

19. For all of these reasons the application for leave will be refused.