Neutral Citation [2016] IEHC 763

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 148 JR]

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000, (AS AMENDED)

BETWEEN

A.A.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 8th day of November, 2016

Introduction

1. The within matter came before the Court on 20th October, 2016 by way of application for *certiorari* for judicial review to quash the decision of the respondent to issue a deportation order against the applicant on 29th January, 2015 and notified by letter dated 12th February, 2015.

2. Leave was afforded on 27th April, 2015 to the applicant to bring the within application.

3. The application is based upon the statement required to ground the application for judicial review and the affidavit of the applicant together with the exhibits therein, respectively dated 16th March, 2015. The application is resisted by the respondent based upon the respondent's statement of opposition of 3rd February, 2016 and the affidavit of verification of James Boyle of 1st February, 2016.

Background

4. The applicant claims to have been born in April, 1986 in Somalia. He claims that he is a national of Somalia, a Muslim and a member of the Baguni tribe. The applicant claims to have arrived in Ireland on 14th November, 2011 and made an application for asylum on 15th November, 2011. His claim for asylum was initially based upon his assertion that he left Somalia and went to Kenya and made his way from there to Ireland. He claimed in his questionnaire and during the s. 8 interview that he did not have a passport or a visa. During an interview with the RAC it was put to him that information had been obtained from the British authorities which showed that his fingerprints had matched ones held by them in respect of a Tanzanian national with a different name and date of birth – K.S.S., allegedly born in March, 1985. The applicant denied all knowledge of such match.

5. The applicant did not provide any documentation in support of his application nor state any reason in respect of such lack of documentation in his initial application for asylum.

6. The applicant subsequently stated that when in Koyama he experienced persecution at the hands of unknown groups and in 2009 his parents had been murdered. He claimed immediately thereafter that he travelled to Uganda and then on to Kenya and then onto the UK.

7. The statement of grounds suggests that his application for asylum was rejected and he asserts that the principal basis was on the grounds of credibility arising from the fact that he had provided false information about his travel to Ireland and failed to disclose that in fact he had applied for a UK visa. The grounds upon which the application for judicial review is based is set out at para. 10 of the statement of 16th March, 2015 and although five grounds are set out, only four are relevant now (the fifth ground referring to an extension of time within which to challenge the decision of the respondent). These grounds might be summarised as that the respondent acted unlawfully and/or *ultra vires* in:

1. A determination that the applicant is a national of Tanzania,

2. By endorsing the conclusion of the RAT that the information provided by the UK Border Agency amounted to irrefutable and incontrovertible evidence,

3. By failing to confirm the applicant's nationality with the Tanzanian authorities or conduct an independent inquiry that the applicant is a Tanzanian national,

4. The respondent failed to consider representations submitted by the applicant including country of origin information.

8. In its statement of opposition the respondent denies that it made a determination that the applicant was a national of Tanzania but rather treated him as holding a Tanzanian passport. The respondent denies that adopting the reasons of the RAT or by referring to them in the case of the s. 3 analysis that the respondent had acted unlawfully and it is further asserted that as the applicant did not challenge the decision of the Tribunal such a decision is valid and the applicant is not entitled to mount a collateral challenge to them. The respondent denied in the circumstances that it was necessary for the respondent to confirm the applicant's nationality with the Tanzanian authorities or to conduct independent enquiries before treating him as the holder of a Tanzanian passport or that by treating him as a holder of a Tanzanian passport the respondent acted unlawfully. The respondent denies that it failed to consider representations submitted by the applicant or that the applicant is entitled to an extension of time or that the applicant is entitled to the relief sought. It is specifically pleaded that country of origin information showed that Baguni was not spoken in Somalia only or that the applicant adduced any evidence to support his claim and the respondent asserts that the deportation order was lawfully made and its validity should be upheld.

9. In the affidavit of verification of James Boyle, at para. 7 it is stated that during the course of an appeal to the Refugee Appeals Tribunal against the negative recommendation of the Commissioner the applicant admitted having given misleading evidence to the Commissioner. The RAT upheld the Commissioner's recommendation and notified his decision to the applicant by letter of 27th April, 2012. Mr. Boyle refers to para. 16 of the applicant's grounding affidavit in which he was advised to challenge the decision of the Tribunal but did not do so as he was unaware of the legal system at the time and did not believe he could afford the services of a

private solicitor. Mr. Boyle points to the fact that the applicant has not identified the person who gave him such advice or what, if any, steps the applicant took to secure a private solicitor.

10. At para. 9 of the grounding affidavit of the applicant, the applicant states that he deeply regrets having misled the authorities about how he came to arrive in Ireland but he was afraid he would be deported if he told them that he had been in the United Kingdom. He confirmed that the passport that he used to travel to the United Kingdom was not his own.

11. Having admitted misleading the authorities, the applicant in his grounding affidavit of 16th March, 2015 for this Court at para. 6 now states that "in or around 2009" he arrived home from school to find his parents had been murdered.

12. At para. 17 the applicant deposes to the fact that following the issue of the letter proposing to deport him in or around the 24th May, 2012 he submitted a humanitarian leave application on 5th February, 2013 "but failed to submit an application for subsidiary protection. I say that I follow the advice of the RLS and I acted when they called me to make the application."

13. The above averment is contradicted in fact by one of the applicant's exhibits namely a letter from the Refugee Visa Services of the 18th March, 2016 when they state as follows:-

> "Please note that there is no record on file of an application for subsidiary protection having been made from this office. Client failed to attend a consultation arranged for taking of instructions. He indicated later that he would make his own application."

14. Following the letter from the Minister of 24th May, 2012 advising the applicant of the options available to him given that the Refugee Appeals Tribunal rejected his claim for refugee status on the 24th April, 2012, the applicant made a s. 3 application under cover letter from three refugee legal services of 5th February, 2013 wherein it is stated:-

> "We are now enclosing on behalf of our client an application for leave to remain in the state pursuant to s. 3 in Immigration Act 1999. The document is enclosed on the understanding that all documents and other information submitted in the context of the asylum application, including country of origin information, are available to you."

15. In my view it is noteworthy that the applicant did not raise in his s. 3 application any difficulty which he encountered with the findings of the Commissioner or the Refugee Appeals Tribunal. For example, he did not in any manner refer to the fact that he spoke Bajuni, which was central to all of his applications. Nor did he assert that the prior Commissioner's decision and/or the decision of the Tribunal was erroneous in not finding that the fact that he spoke Bajuni was of such significance as to outweigh the adverse credibility findings against him and the information secured from the UK Border Agency under cover letter of the 7th December, 2011 (when the Irish authorities were informed that the fingerprints of the applicant provided by the Irish authorities matched the UK Border Agency records with an individual of Tanzanian nationality who secured a visa from the 4th October, 2009 to the 5th January, 2010 to travel to the United Kingdom which visa was issued in Nairobi.).

16. The executive officer who made the recommendation to the Minister to make a deportation order in respect of the applicant, on 27th August, 2014, found:0

> "I find that Mr. Awadh, aka Mr. Kriungi is the holder of a valid Tanzanian passport and has not submitted any fear of return to that country, refoulment to Tanzania is not a (sic) issue in this case."

The applicant's submissions

17. The applicant submits as follows:-

> 1. By determining that the applicant is a national of Tanzania the respondent acted *ultra vires*. In this regard the applicant acknowledges that there is no explicit finding that the applicant was a national of Tanzania but argues that this is implicit from the report of Ms. Power, Executive Officer, on 28th August, 2014 aforesaid and by stating that the applicant is a holder of a valid Tanzanian passport is equated to a determination that he was a national of Tanzania.
>
> 2. By endorsing the conclusion of the R.A.T. that the UK Border Agency amounted to irrefutable and incontrovertible evidence that the applicant was not who he said he was, was unlawful. The applicant suggests that such endorsement of the conclusion of the R.A.T. is implicit from the report of Ms. Power aforesaid.
>
> 3. By failing to confirm the applicant's nationality with the Tanzanian authorities or to conduct some other independent enquiry, the respondent acted *ultra vires*.
>
> 4. By failing to consider representations made by the applicant the respondent acted *ultra vires.* In this regard in submissions it was suggested on behalf of the applicant that the representations submitted by the applicant which were not considered was the fact that the applicant spoke Bajuni and was familiar with the geographical area. The above argument is made notwithstanding that Ms. Power in her report quotes from the Refugee Appeals Tribunal finding as follows:- "I have read in great detail the section 11 interview carried out and the applicant's questionnaire and the responses contained therein. The Commissioner was concerned that otwithstanding the applicant's claim to be a Bajuni from Koyama, his knowledge of the topography and geography of the area and mainland was scant to say the least. The Commissioner was of the view as is the Tribunal that upon reading the applicant's interview the applicant was somewhat evasive in his responses."

The respondent's submissions

18. 1. By way of a preliminary point under s. 2(3) of the Immigration Act 2004 there is an onus of proof on the applicant where any question arises whether any person is or is not a non-national shall lie on such person. The respondent argues that the applicant has not taken any steps in this regard and in accordance with the decision of ZNH v. Minister for Justice, Equality and Law Reform [2012] IEHC 221 the Minister is clearly entitled to be astute and rigorous in insisting upon adequate proof.

> 2. The respondent denies that there was a finding that the applicant was a national of Tanzania and asserts that by treating him as holding a Tanzanian passport the respondent acted lawfully.

3. The respondent denies that by adopting the reasons of the R.A.T. that there was any unlawful act on the part of the respondent. The respondent points out that the applicant never sought to challenge this decision of the Tribunal.

4. The respondent denies that there was any obligation on the part of the respondent to confirm the applicant's nationality with the Tanzanian authorities as suggested.

5. It is denied that the respondent failed to consider the applicant's representations.

Discussion on legal authorities

19. The applicant relies on the case of *Meadows v. Minister for Justice* [2010] 2 I.R. 701 and in particular the judgment of Murray C.J. at paras. 78 and 90. At para. 90 the Chief Justice stated:-

> "On the other hand if such material has been presented to him by or on behalf of the proposed deportee, as the case here, the first respondent must specifically address that issue and form an opinion. Views or conclusions on such issues may have already been arrived at by officers who considered a proposed deportee's application for asylum, at the initial or appeal stages, and their conclusions or views may be before the first respondent but it remains at this stage for the first respondent and the first respondent alone in the light of all the material before him to form an opinion in accordance with s. 5 ... This position is underscored by the fact that s. 3 envisages that a proposed deportee be given an opportunity to make submissions directly to the first respondent on his proposal to make a deportation order at that stage".

20. The applicant argues that he should have been afforded an opportunity prior to a finding that he was Tanzanian to respond to such a potential finding. On the other hand, the respondent claims that no such finding that the applicant was a Tanzanian national (rather the applicant was the holder of a Tanzanian passport) was made and therefore the principle identified by the applicant in the *Meadows* decision did not arise.

21. The applicant refers to the case of *K.S. v. Secretary of State for the Home Department* [2004] UK IAT 00271 which endorsed the general test required in cases in which claims to be Somalian nationals and Bajuni clan identity are made. The test is to the effect that there must be an examination of at least three different factors, namely:-

1. knowledge of the Bajuni language,

2. knowledge of Somalia, and

3. knowledge of matters to do with life in Somalia for Bajunis.

The relevant assessment must not treat any one of these factors as decisive.

22. The applicant argues that that test was not undertaken by the Commissioner and further argues that the fact that the R.A.T. decision was not challenged is effectively irrelevant as neither the Commissioner's decision nor the R.A.T. decision contained a finding that the applicant was a Tanzanian national. The respondent counters that there was no such finding and that in fact the applicant was clearly as evasive in his responses to the Commissioner and failed to identify a nearby town and in addition identified a non-existent island. To this extent therefore the respondent argues that the test was undertaken although the applicant counters that even with the respondent's argument there was no enquiry of the applicant of knowledge of matters to do with life in Somalia for Bajuni people.

23. The applicant refers to the case of *A. v. Minister for Justice* [2013] IEHC 355 and the judgment of Mac Eochaidh J. delivered on 18th July, 2013. That case involved a consideration of both the Minister's decision to refuse subsidiary protection and the decision to make a deportation order. In that case there were two language reports and the court held that the defendant should have referred to and given weight to the language reports and claimed nationality of the applicant before arriving at a decision. The court concluded:-

> "In essence, the decision maker should have balanced the evidence from the UK that the applicant was Tanzanian with the evidence from the language reports that he was Somalian. This exercise never occurred. In my view the conclusions reached in the absence of this exercise are unlawful".

24. The applicant argued that no linguistic test was undertaken. However, the respondent counters that the applicant did not produce any additional evidence and did not himself produce a linguistic report. I would add to the foregoing that neither did the applicant in his s. 3 application refer to any lapse or difficulty with the R.A.T. finding that the applicant was not credible in circumstances where no linguistic report was undertaken.

25. The respondent relies on the judgment of Hardiman J. in the Supreme Court in the case of *GK v. Minister for Justice* [2002] 2 I.R. 418 where he states:-

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

26. The applicant counters that there is no reference in the Minister's report and decision dealing with the fact that the applicant speaks Bajuni.

27. The respondent refers to the case of *Z.A.B. v. Refugee Appeals Tribunal* [2015] IEHC 345 and to the decision of *B.W. v. Refugee Appeals Tribunal* [2015] IEHC 759, as well as the earlier decision of *N. v. Refugee Appeals Tribunal* [2009] IEHC 434. The cumulative effect of these decisions from the respondent's point of view is effectively that the applicant was aware of adverse concerns emanating from the decision of the R.A.T. and had a fair opportunity, in his s. 3 application, to deal with same by evidence or argument and he did not avail of this opportunity. Although each of the cases deal with a challenge to an R.A.T. finding, which is not in fact similar to the within matter, nevertheless I consider these cases instructive. In the *N* case it was stated at para. 21 that the applicant, who was legally represented, was fully aware of the Commissioner's difficulties from the s. 13 report and therefore the applicant was on notice of same. Yet no attempt was made to overcome the shortcomings at the appeal stage and therefore it was inappropriate that she should, at judicial review stage, complain that she was not given an opportunity by the Tribunal member to

address the deficiencies.

28. In the *B.W.* matter, the court held that the Tribunal or any decision maker does not normally have to give the applicant a specific opportunity to comment on matters to which he or she has already had fair warning. In the *Z.A.B.* matter Eagar J. held as follows:-

> "This Court is also satisfied that the first named Respondent was entitled to have regard inter alia to the s. 13 report in the course of its determination. The Applicants have an opportunity to consider the s. 13 report in advance of the hearing. The Applicants are, therefore, aware of any matters which are set out in the s. 13 report and have had an opportunity to deal with them in the course of the evidence ... The Applicants are already aware of any adverse concerns in the report and had a fair opportunity to deal with same whether by evidence or argument."

29. Similarly the respondent relies on the judgment of Cooke J. in the case of *Z.M.H. v. Minister for Justice* [2012] IEHC 221 where the court held:-

> "the onus lies with an applicant to provide the information, evidence and documentary proofs which the Minister is entitled reasonably to require in order to be satisfied that the conditions of the provisions are applicable in a given case."

30. The applicant counters that that decision was made under s. 18 of the Refugee Act 1996, for family reunification where the family were in a far better position to secure the documentation sought than the applicant would be in this matter because he is resident at present in Ireland.

31. Finally the respondent relies on the judgment of Faherty J. in the case of *M.S.M. & Anor v. Olive Brennnan Acting as the Refugee Appeals Tribunal & Ors* [2015] IEHC 237, in which judgment was delivered on 27th March, 2015. The circumstances of the applicant in that case were quite similar to the applicant in the instant case. However, as the applicant has pointed out in this matter, there was a linguistic report in the matter before Faherty J. which found that although the applicant spoke a dialect of Swahili with certainty it was not in Somalia and with certainty it was in Kenya. In that case the court stated:-

> "In my view, the information which had been obtained by the asylum authorities from the UK Border Agency regarding the Tanzanian passport and the UK visa was capable of sustaining a rational conclusion that the first named applicant was not a Somali national."

32. That case and another case of *R.S. v. Refugee Appeals Tribunal* [2014] IEHC 55 are relied upon by the respondent to the effect that if an applicant's claim of being of a particular nationality is rejected it was not incumbent on the Minister for the purposes of a decision to produce evidence of an applicant's nationality.

Conclusion

33. In my view the difficulty with the applicant's assertion that the Minister failed to weigh in the balance the fact that he was a Bajuni speaker is the fact that the applicant was at all material times legally represented and did not in his s. 3 application avail of that opportunity to make submissions or tender additional evidence as to the significance of the fact that he was a Bajuni speaker. Neither did he alert the Minister to the fact that he had ongoing concerns as to the weight or balancing of his application before either the Commissioner or the R.A.T. by reason of the fact that he was a Bajuni speaker.

34. By reason of the matters referred to in the next proceeding paragraph I am of the view that the applicant now cannot argue that the Minister acted unlawfully in failing to deal with such concerns, same having not been specifically raised by the applicant.

35. I am satisfied that the Minister did not find that the applicant was a Tanzanian national but rather that the applicant was the holder of a valid Tanzanian passport. I am further satisfied, that given the UK Border Agency communication of 7th December, 2011 there was sufficient evidence before the Minister to make such a finding. Insofar as the applicant counters that he does not now have available to him that particular Tanzanian passport or that he is not the party identified in the Tanzanian passport, his difficulty in this regard is his failure to specifically draw the Minister's attention to this assertion in his s. 3 application. Indeed even in his affidavit before this court, the applicant does not appear to appreciate the need to be accurate or truthful - as mentioned earlier in this judgment his affidavit suggests that he did not make a subsidiary protection application because of the nature of the advice he received from the refugee legal services however the letter he has exhibited from this agency does not accord with his sworn averment in his affidavit.

36. I do not accept that by making reference to the R.A.T. decision the Minister adopted it - just as by making reference to the applicant's claim the Minister was not adopting it. The applicant makes the point that the Minister's conclusion regarding the holding of a Tanzanian passport/nationality was not made by the Commissioner or the R.A.T.

37. I do not accept that the Minister did not consider representations made by the applicant. The representations referred to by the applicant were those submitted to the R.A.T. as part of his appeal from the Commissioner's decision and in the within s. 3 application. The applicant did not raise any ongoing difficulty with regard to the R.A.T. finding which included:-

> "There is irrefutable and incontrovertible evidence to the authorities here from the UK Border Agency to the effect that the applicant is not who he claims to be in this jurisdiction ... The applicant's claim is simply not capable of being believed."

The only reference by the applicant was in para. 14 of his solicitor's letter of 5th February, 2013 to the effect that he feared for his life if returned to Somalia.

38. In all of the circumstances I find that the applicant has failed to establish sufficient grounds to secure the relief sought and therefore same is refused.