Neutral Citation Number: [2008] IEHC 366

THE HIGH COURT

2006 1239 JR

BETWEEN

K. E. A.

APPLICANT

AND

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

RESPONDENTS

Judgment of Mr. Justice Hedigan, delivered on the 25th day of November, 2008.

1. The applicant is seeking an order of *certiorari* quashing the recommendation of the Office of the Refugee Applications Commissioner (ORAC), dated 12th September, 2006, that he should not be declared a refugee. The applicant is also seeking an order of mandamus directing his claim to be re-admitted to the asylum process, and related declarations. Leave was granted on consent by Finlay Geoghegan J. on 16th June, 2008.

Background

2. The applicant is a national of the Ivory Coast. He claims to be a member of the Apollo tribe, which is a small ethnic group; the tribe has its own language, also called Apollo. The applicant had little formal education and has difficulty in reading and writing. His parents' language was Apollo. He is now 35 years of age. He arrived in Dublin airport on 4th June, 2006. It seems that he communicated with the airport police in English. He applied for asylum by filling out an ASY-1 form through French, giving basic biographical details, and he conducted a "section 8" interview at ORAC offices with the assistance of a French interpreter. The basis on which he claimed asylum is not material to the within proceedings; perhaps more noteworthy is that on the typed version of his ASY-1 form, his language is given as Apollo, but the words "or French" were added in handwriting. The applicant completed his ORAC Questionnaire in French on 13th June, 2006. He filled in his personal details, his wife's details and his parents' details in Part 1 of the Questionnaire ("biographical information"), but not the sections relating to his educational and work history and his family background. Parts 2 ("documentation"), 3 ("basis of the application for refugee status"), 4 ("travel details") and 5 ("completion") were left entirely blank. The Questionnaire was signed and dated.

3. The applicant attended a pre-interview consultation with the Refugee Legal Service (RLS) on 19th July, 2006, at which the RLS communicated with him through a person who it appears spoke either Apollo or a dialect related to Apollo. The RLS made a request to ORAC on behalf of the applicant that an Apollo interpreter be provided at his "section 11" interview.

4. At his first "section 11" interview on 25th July, 2006, ORAC provided a French interpreter. The applicant requested an Apollo interpreter, claiming (through French) that he did not understand French. The interview was adjourned while the ORAC officer consulted with his supervisors. When the interview resumed, the officer informed the applicant that it would not be possible to provide an Apollo interpreter on that day or at any other time, and that ORAC is required to provide an interpreter in the applicant's chosen language only when they could do so. The ORAC officer strongly advised the applicant to continue with the interview in French, indicating that he considered the applicant's proficiency to be more than sufficient in order to proceed. Although the applicant continued to resist for some time, he eventually agreed to continue the interview in French and thereafter proceeded to answer a series of questions, giving detailed answers. When asked about the details in his Questionnaire, he stated that he did not fully understand certain aspects of the form. At the end of the interview, he was given his incomplete Questionnaire and asked to complete it before the next interview. The applicant did not do so.

5. Between his first and second "section 11" interviews, the applicant again attended at the offices of the RLS, who communicated with him through an Apollo speaker and requested an Apollo interpreter for his next "section 11" interview. ORAC replied by letter dated 16th August, 2006, stating that it was not possible to obtain an Apollo interpreter and that in the view of the ORAC interviewer, the applicant had sufficient knowledge of French to allow him to proceed without an Apollo interpreter. At the second "section 11" interview on 7th September, 2006, the applicant was provided with a French interpreter. Although he initially resisted, the applicant proceeded to give detailed answers in French to a series of questions.

The "Section 13" Report

6. The ORAC officer compiled a report, dated 12th September, 2006, in compliance with section 13 of the Refugee Act 1996, wherein the officer found that the applicant's account of events "lacked coherence and consistency, frequently wildly so." He cited country of origin information to the effect that it is unlikely that persons from the Ivory Coast would qualify for refugee status. He noted that the applicant had been "at least mildly aggressive" during his interviews, and was uncooperative and obstructive throughout the process. He noted that although requests had been made for an Apollo interpreter, it had not been possible to provide an interpreter for such a minority language. The officer stated that he had formed the opinion, through observation and feedback from the interpreters, that the applicant had clearly demonstrated an ability to communicate effectively in French. He stated:-

> "At his first interview, in particular, the applicant was largely able to answer questions in French without seeking clarification from the French interpreter, and even, on at least a couple of occasions, began to answer questions in French before the interpreter had begun to interpret the interviewer's questions into French."

7. The officer then suggested that at certain stages, the applicant had made "deliberate attempts to feign a far lower level of French language comprehension than he actually possesses." He also noted that the applicant comes from a predominantly French-speaking country and had been given responsibility as part of his work in the Ivory Coast for supervising French-speaking co-workers.

8. After the negative recommendation made by ORAC was notified to the applicant, the RLS requested that the applicant be re-interviewed using the Apollo interpreter that the RLS had used to communicate with the applicant. ORAC made a detailed response by letter of 2nd October, 2006, declining to provide a further interview. The applicant filed a Notice of Appeal to the RAT on 4th October, 2006, and commenced the within proceedings on or about 20th October, 2006.

The Relevant Law

9. Section 11(2) of the Refugee Act 1996, in the relevant part, provides that :

> "In a case to which *subsection (1)* or *section 12 (2)* applies, the Commissioner shall, for the purposes of that provision, direct an authorised officer or officers to interview the applicant concerned […] and an interview under this subsection shall, *where necessary and possible*, be conducted with the assistance of an interpreter." (emphasis added)

The Applicant's Submissions
10. The applicant submits that ORAC acted in breach of fair procedures by failing to provide an Apollo interpreter at his "section 11" interviews. It is submitted an Apollo interpreter was necessary because that the applicant was unable to fully and properly communicate his evidence. It is said that he feels uncomfortable using the French language and that while he can understand words and phrases and speak with those words, he does not have an extensive vocabulary, mixes up words and cannot express sentences fully. Furthermore, it is contended that in the light of the RLS's ability to make such an interpreter available at the pre-interview consultations, it was possible to provide an Apollo interpreter.

11. The applicant also complains that it was the ORAC officer who made the assessment that the applicant was able to understand the questions posed to him in French; it is submitted that such an assessment is a matter for a linguist, e.g. the interpreter, and not the ORAC officer.

12. As to the relevance of the applicant's alternative remedy by way of appeal to the RAT, it is said that this case is akin to *Stefan v The Minister for Justice, Equality and Law Reform* [2001] 4 IR 203, and as such constitutes an exception to the decision of this Court in *B.N.N. v The Refugee Applications Commissioner* [2008] IEHC 308.

The Respondents' Submissions
13. The respondents contend that it was neither possible nor necessary to provide an Apollo interpreter. It is said that it cannot be the role of an interpreter to determine proficiency, and it is further said that this case is not amenable to judicial review as the applicant has a full and adequate remedy by way of appeal to the RAT.

(a) Section 11(2): Possible and Necessary
14. The respondents submit that it is not always possible to provide an interpreter for minority languages such as Apollo. It is said that efforts were made by ORAC to recruit an Apollo interpreter but no interpreter could be sourced in Ireland or the UK; a letter from Lionbridge interpreters to the same effect has been exhibited.

15. Moreover, the respondents contend it was not necessary to provide an Apollo interpreter as the answers given by the applicant at his interviews suggest that he has a much higher proficiency in French that he originally claimed. It is contended that it is implausible that a person who lived in the Ivory Coast since birth would not be able to communicate in the national language, i.e. French. It is further submitted that the applicant's level of education is not necessarily indicative of an inability to communicate in French, and it is maintained that a person does not have to be literate in a language in order to be able to communicate through it.

16. It is submitted that the applicant's conduct suggests that he stood by his claim that he did not speak French fluently only as a matter of principle. Particular emphasis is laid on the fact that although he was given his incomplete Questionnaire at the end of the first interview and thereafter consulted the RLS with the Apollo interpreter, he ultimately failed to complete the Questionnaire. It is said that this indicates a deliberate strategy on the part of the applicant and/or his legal advisers. In the circumstances, reliance is placed on *Hakizimana v The Refugee Applications Commissioner* [2006] IEHC 355, where Feeney J. held that in examining the fairness of procedures at a section 11 interview, "the court is obliged to look at the totality of the administrative process". In that context, the respondents contend that it is also relevant that the applicant had the opportunity to put in written submissions but did not do so, and that there is available to him an appeal to the RAT.

(b) Who should decide?
17. The respondents object that the question of who should determine the applicant's proficiency was not raised in the papers. That notwithstanding, it is submitted that it should not be for the interpreter to make such a decision as the role of the interpreter is to be the medium through which the interview is conducted; the interpreter has, it is said, no role in offering any subjective views. Reference is made to Instruction 1 of the "Interview – Interpreter Form", which is contained at the front of the section 11 interview notes, and which states as follows:-

> "The interpreter is engaged solely for the purpose of oral translation during the course of an interview to enable effective communication with applicants and must provide his / her services in a professional manner at all times during the course of an interview, and must not omit, add to, or offer an opinion on anything said during the course of the interview."

18. Reliance is placed on *H. P. O. v The Refugee Applications Commissioner* (ex tempore judgment of Feeney J., High Court, 6th December, 2007), where Feeney J. stressed that the functions of interpreters retained by ORAC are strictly limited; their sole function is to interpret the questions and responses literally and accurately. Feeney J. continued as follows:-

> "By so limiting the function of the interpreter, the procedure ensures as far as possible that the interview will be a direct interaction between the interviewer and the applicant."

The Court's Assessment
19. The applicant herein has filed a Notice of Appeal to the RAT as well as commencing the within proceedings. If an applicant coming before ORAC was not provided with adequate interpreter assistance such that the applicant was unable to present his or her case in a full manner, any decision emanating from ORAC might be thought to have been conducted with such a breach of fair procedures that ORAC was robbed of jurisdiction and was acting *ultra vires*. It is hard to imagine such a scenario arising.

20. That notwithstanding, the circumstances of the present case come nowhere close to such a hypothetical scenario; it is not the case that the applicant herein was unable to make out his claim. After forcefully arguing through French that he did not understand the questions posed to him in French, the applicant went on to give involved and complicated answers to the questions posed of him at the ORAC interviews through the language that he claimed not to understand; moreover, at the conclusion of the interview, when the interview notes were read back to him, he requested that certain portions thereof be clarified and expanded. Further, at no point did the applicant say "I don't understand" or "can you repeat that?"

21. Moreover, instruction 5 of the "Interview- Interpreter Form", which is in the "section 11" interview notes, states that "[w]here an interpreter encounters any difficulty in interpreting during an interview, such as problems with dialect, this should clearly be stated to the interviewer." There is no evidence on the record, nor has it been suggested at any point, that the interpreter indicated to the interviewer that she had any difficulty in communicating through French with the applicant.

22. In the light of the foregoing, I am of the view that the applicant's complaints are not amenable to judicial review; rather, the

applicant should be left to his remedy on appeal. I would note that I consider it most unfortunate that it was not until after the section 13 report was notified to the applicant that the RLS provided to ORAC the details of the Apollo interpreter through which they had communicated with the applicant. It is scarcely necessary to observe that every participant in this process has a duty to assist in every way possible, and that failure to do so is contrary to the best interests of any applicant. As was noted by Feeney J. in *H.P.O. v The Refugee Applications Commissioner* (ex tempore judgment of Feeney J., High Court, 6th December, 2007), the ORAC stage is an inquisitorial rather than adversarial process and there is an obligation on the applicant to fully cooperate and to be completely truthful. The applicant in the present case did not complete his ORAC questionnaire when given the opportunity to do so, he appears to have deliberately misrepresented his proficiency in French, and he made no written submissions in support of his application, nor were any submissions made on his behalf. In the circumstances, I am satisfied that the respondent acted reasonably, rationally and in accordance with fair procedures.

The Obligation to provide an interpreter under Section 11(2)

23. The obligation that arises under section 11(2) of the Refugee Act 1996 was also argued before me and I think it would be useful to deal with that also. I have been referred to a number of decisions handed down in other jurisdictions, including the views of the U.N. Human Rights Committee in *Dominique Guesdon v France* (Communication No. 219/1986, CCPR/C/39/D/219/1986) with respect to Breton speakers who refused to participate in criminal proceedings through French; the decision of Tamberlin J. in *Calado v Minister for Immigration and Multicultural Affairs* (unreported, Federal Court of Australia, 19th December, 1997) with respect to an Angolan asylum seeker who claimed to be a member of the Bakongo tribe; the judgment of Nicholson J. *in A v The Refugee Status Appeals Authority & Anor* (unreported, High Court of New Zealand, 25th August, 2000) with respect to a Pakistani asylum seeker who was unsatisfied with a Punjabi interpreter; the decision of the Supreme Court of Canada in *R v Quoc Dung Tran* [1994] 2 SCR 951 with respect to the rights of a Vietnamese citizen to interpretation in criminal proceedings; a decision of the Refugee Status Appeals Authority of New Zealand in *Refugee Appeal No. 72752/01*, dated 15th November, 2001, with respect to a Thai asylum seeker who was a native speaker of the Thai language but who sought interpretation in Pali, an ancient language that was no longer in everyday use in Thailand; and a further decision of the same Authority in *Refugee Appeal No. 73889/02* dated 19th December, 2001, with respect to a Pakistani asylum seeker who was unhappy with interpretation by a Pushtu speaker from Afghanistan.

24. Although certain of these authorities deal with fair procedures in the context of criminal proceedings, it is clear from the decision of Feeney J. in *Hakizimana v The Refugee Applications Commissioner* [2006] IEHC 355 that only high standards of fairness will suffice in the asylum process, and that the requirements identified as being necessary in criminal proceedings represent the highest requirements for fair procedures.

25. From a thorough analysis of these authorities, I have drawn the following general principles which, in my view, equally are applicable in this jurisdiction:-

> a. The right to understand and be understood is a minimal requirement of fair procedures. It is necessary for an applicant to be given the opportunity to put his or her case in as full a manner as is possible; where possible, applicants should have the same opportunity to understand and be understood as if they were conversant in English.
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> b. There is, however, no absolute obligation for ORAC to provide an interpreter who speaks a language that is the applicant's mother-tongue, a language that the applicant speaks fluently or with a maximum of ease, or a language of his of her choice.
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> c. The true benchmark is whether the applicant has sufficient proficiency in the language of the interpreter. The assessment of proficiency will include consideration of whether the applicant is capable of following the interview, making out his or her claim, conversing with some fluency, and making known any difficulties that he or she might have.
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> d. Account should be taken of whether the applicant would be prejudiced or disadvantaged by proceeding in the language of the interpreter.
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> e. The right to interpreter assistance may be denied if there is "cogent and compelling evidence" that an accused's request for an interpreter is not made in good faith, but rather for an oblique motive (*R v Tran* [1994] 2 SCR 951).
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> f. It is not open to an asylum seeker to refuse to be interviewed in his or her first language.
>
> g. Account must be taken of the fact that there may be instances where the limited resources of a small country such as Ireland are unable to provide an interpreter in the first language of every asylum seeker; in such small countries, it is often the case that there is only a limited pool of competent, experienced interpreters.

26. This list of principles is not exhaustive and must be viewed as a whole; furthermore, the application thereof will depend on the circumstances of each case.

27. In my view, the appropriate person to make the assessment of an applicant's proficiency is the ORAC interviewer; this is not a decision that is to be made by the applicant or his legal advisers, although representations may, of course, be made with regard to proficiency. It is clear that in the present case, the ORAC interviewer, having discussed the applicant's language proficiency with him, having observed his interaction with the interpreter, and having received feedback from the interpreter, was in a position to make a reasonable and rational judgment.

28. The approach that is taken by ORAC at present is to make all efforts to secure an interpreter when asked to do so. As a matter of practice, consideration is given to the necessity of providing an interpreter in the language requested by the applicant only if it is proves very difficult to provide an interpreter in that language. In my view, that is a good and sound practice, and is in accordance with the "generous and open-minded" attitude and the "spirit of sensitivity and understanding" which was advocated by the Supreme Court of Canada in *R v Tran* [1994] 2 SCR 951 and which is equally desirable in this jurisdiction.

Conclusion

29. For the above reasons, I refuse to grant the relief sought.