Neutral Citation Number: [2008] IEHC 137

THE HIGH COURT
JUDICIAL REVIEW

2006 No. 187 J.R.

BETWEEN

E. E.

APPLICANT

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

RESPONDENTS

Judgment of Mr. Justice Herbert delivered on the 8th day of May, 2008.

1. In this case, leave to seek judicial review was granted to the applicant by the Court (deValera, J.), on 15th June, 2007, on each of the twelve grounds set out at paragraph (e) of the Statement Required to Ground Application for Judicial Review, filed on the 16th February, 2006. A Statement of Opposition was delivered by the respondents on the 5th December, 2007.

2. The decision of the Refugee Applications Commissioner is dated 26th January, 2006. There was no issue between the parties at the hearing of this application, that a woman of homosexual orientation could properly claim to be a member of "a particular social group", within the definition of "refugee", contained in s. 2 of the Refugee Act 1996, (as amended). The Authorised Officer of the Refugee Applications Commissioner accepted as plausible and credible the following elements of the applicant's story, which he sets out in his Decision.

3. In 1994 the applicant became involved in a physical relationship with another woman, who she met through family friends. This woman supported her while she was attending University. In 1995 she moved to Warri where she lived with this woman. Between 1995 and 1998 she held a number of positions, but in 1998 she became employed as the secretary in an Investment Company. In 2003 her partner was diagnosed as suffering from human immunodeficiency virus. In 2003 their relationship became known to members of her partner's family and also to people in the area where they lived.

4. In early 2004 a male cousin of her partner beat the applicant, accusing her of bringing bad luck to his cousin. She was wrongly accused of being responsible for her partner's illness, which she said resulted from a previous heterosexual relationship. Neighbours began to avoid her and her partner, and children in the neighbourhood threw stones at her. Matters became much more serious on the 2nd December, 2004 when she was assaulted by a number of youths aged between nineteen and twenty four years whom she recognised as living in the same area. She suffered serious injuries and required in-patient care in hospital. She complained to the police in Warri about this attack. The police asked her for money. They detained a number of persons whom she pointed out to them but no charges were made because of a claimed lack of evidence.

5. In 2005, as a result of threatening telephone calls she again complained to the police in Warri. The District Police Officer insulted her and attempted to "fondle her" so that she ran out of his office. In May 2005, her employment was terminated because somebody informed her employer that she was a homosexual and might be suffering from human immunodeficiency virus. She produced a photocopy of a letter of termination from her employer dated 3rd June, 2005. On the 2nd December, 2005, while she was absent, her home was set on fire and her partner died as a result of the fire. Neighbours advised the applicant to leave for her own safety as the fire had been caused by the same youths who had attacked her on 2nd December, 2004, together with some relatives of her partner. On 3rd December, 2005, she left Warri and went to her home town. Her lifestyle was considered abominable by her mother and her relatives so she felt she could not remain in the town.

6. Three or four weeks prior to her death her partner had become worried about the applicant's safety and had made contact with a person (named), to help the applicant to leave Nigeria. On 4th December, 2005, the applicant made contact with this person and on the 5th December, 2005, they travelled together to Lagos. On the night of 6th December, 2005, they flew from Lagos to Dublin, via "an unknown airport". The other person retained the passports at all times. All the costs had been paid by her late partner when she first contacted this person. On arrival in Dublin on 7th December, 2005, the applicant completed the ASY 1 Form seeking asylum in this country.

7. The authorised officer of the Refugee Applications Commissioner found in his Decision of 26th January, 2006, that:-

> (a) The applicant's claim was not sufficiently serious in its nature or repetition to constitute a severe violation of basic human rights and therefore did not amount to "a persecution".
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> (b) Because the applicant did not live openly as a homosexual woman or associate with homosexual groups while at University or while living in Warri or attend homosexual events and, because her sole long term partner had many previous heterosexual relationships and, because that partner was now deceased, "it lacked credibility that the applicant could readily be identified and be subject to violence for her lifestyle in any part of Nigeria with the possible exception of Warri where the alleged agents of her persecution were local people and members of her deceased partner's family".
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> (c) While a Human Rights Watch Report of January, 2005, and a United Kingdom Home Office Report of October, 2005, on conditions in Nigeria stated that police in Nigeria had committed serious human rights abuses, the experiences described by the applicant did not fall into the category of "serious human rights abuses" or "persecution".
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> (d) The applicant had not demonstrated that she had been deprived of the effective protection within Nigeria. When asked at interview had she made any complaint concerning the behaviour of the District Police Officer, the applicant responded that, "she did not bother". It was stated at pp. 104 and 105 of Professor Hathaway's book, "The Law of Refugee Status", that the maltreatment anticipated must be demonstrative of a breakdown of national protection.
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> (e) The employment termination letter of 3rd June, 2005, was a photocopy so that the authenticity of the document could not be verified, but in any event it did not say that the applicant, if she wished to apply for another position in Nigeria, would not be furnished with references.
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> (f) The letter from Phoenix Medical Consultants dated 30th December, 2005, setting out medical particulars of the injuries suffered by the applicant following an attack on 2nd December, 2004, and, of the diagnosis made and treatment given, contains a, "number of surprising errors", which casts some doubt on its veracity, namely; "having been assaulted"

appears as, "haven been assaulted" and, "referred for counselling" , appears as "referred for conseling". (I noted during the hearing that "semiconscious" appears twice as "semiconcious").

(g) Her account of events in December, 2005, lacked credibility in the following respects:-

(i) That her partner would have begun organising the applicant's escape from Nigeria.

(ii) That her partner would have paid the agent in full for the journey.

(iii) That the applicant left Warri and travelled to her home town on 3rd December, 2005, after she had gone to the house of the agent who had begun to make arrangements for her departure from Nigeria, but claims to have left her home town because her lifestyle was unacceptable to her relatives.

(iv) That she travelled to this State with the agent and never handled a passport at the various airports.

(h) That her claim that she was a member of a particular social group - that is, homosexual women in Nigeria - lacked credibility because she stated that she never practiced a homosexual lifestyle other than by her long term relationship with her deceased partner, because she had not demonstrated that she would be identifiable within Nigerian society as a homosexual woman and, because she had no knowledge of Nigerian Law relating to homosexual persons and their rights.

8. The Authorised Officer of the Refugee Applications Commissioner stated in his Decision of 26th January, 2006, that he was satisfied that the applicant had failed to establish a well founded fear of persecution in accordance with the provisions of s.2 of the Refugee Act 1996, (as amended), and recommended that the applicant should not be declared a refugee.

9. Senior Counsel for the applicant submitted that the manner in which the Authorised Officer of the Refugee Applications Commissioner had reached his conclusions were vitiated by the employment by him of unfair procedures and was contrary to natural and constitutional justice, so that the decision of 26th January, 2006, was rendered invalid and should be set aside by this Court. While accepting that the Authorised Officer of the Refugee Applications Commissioner was not obliged to deliver a discursive judgment, Senior Counsel for the applicant submitted that the Authorised Officer was obliged to, and had singularly failed to give reasons for his conclusion, which was pivotal to his final determination, that the applicant's claim was not sufficiently serious, by its nature or repetition, as to constitute a serious violation of basic human rights, and, therefore, did not amount to "persecution". Senior Counsel for the applicant relied on the decision of Keane J. (as he then was) in *Rajah v. the Royal College of Surgeons in Ireland and Ors.* [1994] 1 I.R. 384 at p. 395, where he held that:-

> "In general, bodies which are not courts but which exercise functions of a judicial or quasi-judicial nature determining legal rights and obligations, must give reasons for their decisions, because of the requirements of constitutional and natural justice and in order to ensure that the superior courts may exercise their jurisdiction to enquire into and, if necessary, correct such decisions: see *The State (Creedon) v. The Criminal Injuries Compensation Tribunal* [1988] I.R. 51. The requirement to give reasons may extend even further to purely administrative bodies, at least where their decisions affect legal rights and obligations: see *International Fishing Vessels Ltd. v. The Minister for the Marine* [1989] I.R. 149. A decision such as that of the respondents in the present case, however, was not, in my view, of a nature which necessitated the giving of reasons."

10. That was a case of an application by a student, unsuccessful in a pre-medical examination, to bodies established by the Rules and Regulations of the Medical School of the College, who alleged that the respondents had failed to state reasons for their decision refusing her application for readmission to the Medical School. Senior Counsel for the applicant also referred to the decision of Clarke J. in *Zhuchkova v. Refugee Appeals Tribunal* [2000] 2 I.R. 360.

11. The issue of the necessity to give reasons was addressed by the Supreme Court in *"F.P." and "A.L." v. The Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164 at p. 172, per. Hardiman J. Section 3(3)(a) of the Immigration Act 1999, provides that where the Minister proposes to make a deportation order, he or she shall notify the person concerned in writing of his or her proposal and *of the reasons for it* (the emphasis is mine). It was contended that the communication to the applicant from the Minister for Justice, Equality and Law Reform was not an adequate compliance with this duty to give reasons. Hardiman J. cited the case of *Ni Eili v. The Environmental Protection Agency* (30th July, 1999 - Supreme Court), approving the dictum of Evans, L.J. in *M.J.T. Securities Ltd. v. The Secretary of State for the Environment* [1998] J.P.L. 138 at p.144 where he said:-

> "The Inspectors' statutory obligation was to give reasons for his decision and the courts can do no more than say that the reasons must be 'proper, intelligible and adequate' as had been held. What degree of particularity is required must depend on the circumstances of each case."

12. Hardiman J. then continued:-

> "In the case of administrative decisions, it has never been held that the decision maker is bound to provide a ' . . . discursive judgment as a result of its deliberations.' (See *O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M. 750 at 757. Moreover, it seems clear that the question of the degree to which a decision must be supported by reasons stated in detail will vary with the nature of the decision itself . . . that in a case where there could be many possible reasons for a decision, as distinct from a simple case where the issue was more defined, a more ample statement of reasons may be required."

13. In that case, Hardiman J. considered, that the following statement from the Minister for Justice, Equality and Law Reform was sufficient:-

> "The reasons for the Minster's decision are that you are a person whose refugee status has been refused and having regard to the factors set out in section (3)(vi) of the Immigration Act 1999, including the representations received on your behalf, the Minister is satisfied that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration system, outweigh such features of your case as might tend to support your being granted leave to remain in this State."

14. In respect of his conclusion that the applicant's claim was not sufficiently serious in its nature or repetition to constitute a severe

violation of basic human rights and therefore did not amount to "persecution", the Authorised Officer of the Refugee Applications Commissioner exhaustively set out all the elements of her story in his Decision. It is not alleged that he made any material error of fact in so doing. In the same section of his Decision he cited an extract from pp. 104 and 105 of Professor Hathaway's well known work on "*The Law of Refugee Status*", which the Authorised Officer considered set out the principles of law applicable, that is, that a person should only be regarded as a refugee where the anticipated maltreatment was demonstrative of a breakdown of country of nationality protection. That extract states:-

> "The refugee is a person who stands in need of international protection because he or she is deprived of that protection in his or her own country."

15. Emphasizing the latter phrase, the Authorised Officer of the Refugee Applications Commissioner found that the applicant in the instant case had not demonstrated that she had been deprived of effective protection within Nigeria.

16. I find, that it was abundantly clear that the Authorised Officer of the Refugee Applications Commissioner considered and, it was reasonably and rationally open to him to so consider on the material contained in the country of origin information available to him, that the option of relocating within her country of nationality, was fully and freely available to the applicant. The Authorised Officer of the Refugee Applications Commissioner concluded and, I am satisfied that it was reasonably and rationally open to him to so conclude on the evidence considered in the context of the country of origin information available to him, that the applicant had not established that the State Agencies in Nigeria, particularly the Police System, the Justice Administration System and the Judicial System were unable or unwilling to protect her, as a homosexual woman, from homophobic attacks and threats. I find that it was entirely within jurisdiction for the Authorised Officer of the Refugee Applications Commissioner to find that the failure of the police in Warri to charge and prosecute the youths identified by the applicant following the incident of 2nd December, 2004, and the behaviour of the District Police Officer in Warri in 2005, fell far short of establishing that the State Agencies in Nigeria were either unwilling or unable to provide the applicant with adequate protection.

17. The Authorised Officer of the Refugee Applications Commissioner found that the letter terminating her alleged employment furnished by the applicant was a photocopy only and therefore its authenticity could not be verified. I can only conclude that the authorised officer was merely commenting that he could not be satisfied that this photocopy was a true copy of the original. I accept the submission of Counsel for the respondents that despite this comment, the Authorised Officer of the Refugee Applications Commissioner in fact was prepared to accept the photocopy as a true copy of the original because he commented that there was no suggestion in it that the company would not furnish references to the applicant if she sought a position elsewhere in Nigeria.

18. In a similar vein, his comment concerning what he described as "surprising errors" in the document of 30th December, 2005, from Phoenix Medical Consultants, casting "some doubt on its veracity", does not lead the Authorised Officer of the Refugee Applications Commissioner to reject it as a forgery or as reflecting adversely on the credibility of the applicant. I am quite satisfied that these wholly justifiable comments on the quality of the documentation provided by the applicant to the Refugee Applications Commissioner, did not result in any material conclusion adverse to the applicant being reached by the decision maker. There was, therefore, in my judgment, no obligation on the part of the Authorised Officer of the Refugee Applications Commissioner, as a matter of fair procedures, to put these matters to the applicant and afford her an opportunity of addressing them had she so wished. Further, even if the Authorised Officer of the Refugee Applications Commissioner, had in fact given some weight to these matters, in all the circumstances it seems to me that an Appeal to the Refugee Appeals Tribunal, would be a more appropriate remedy for the applicant than judicial review, as this is very much an issue as to the quality of the determination on the evidence, rather than a failure to abide by fair procedures in reaching that determination. I do not accept the submission on behalf of the applicant, that the Authorised Officer of the Refugee Applications Commissioner, "put these documents into centre stage" in concluding that he did not believe the applicant.

19. Senior Counsel for the applicant submitted that the Authorised Officer of the Refugee Applications Commissioner gave no reasons for his stated conclusions at the end of s. 4 of his Decision that the applicant's claim lacks credibility. Undoubtedly, this conclusion of the authorised officer is not immediately followed by stated reasons. However, the Decision must be read as a whole and the author has set out reasons why he considered that the applicant's claim lacked credibility, both prior to and subsequent to, this statement. Earlier in s. 4 of his decision, he states as follows:-

> "On this basis [she did not live openly as a homosexual person or involve herself in homosexual groups], and on the basis that her partner is deceased, it lacks credibility that she could be readily identified and be subject to violence for her lifestyle in any part of Nigeria with the possible exception of Warri . . .
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> It is especially lacking in credibility that her partner . . . would have begun the organisation of her escape from Nigeria with the agent . . . and would have paid in full for the journey.
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> In addition, her account of travelling to her home town on 3rd December, . . . but being told to leave, also lacks credibility as she had allegedly already made plans to meet up with [the agent] on 5th December ,and begin her journey to Ireland.
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> It lacks credibility that she would be able to travel to Ireland from Nigeria and never handle a passport: She claims that [the agent] handled the passports at the airports."

20. In s. 5 of his Decision the authorised officer of the Refugee Applications Commissioner states as follows:-

> "The applicant has claimed to be a member of a particular social group this group being lesbians in Nigeria. This claim is considered to lack credibility on the information provided by the applicant. She states that she never practised a gay lifestyle at any time other than in her one alleged long-term relationship with [her deceased partner] in Warri. She confirmed at interview that she had no knowledge of what the law was in Nigeria in relation to gay people and their rights, and she has not demonstrated to any significant degree that she would be identifiable within Nigerian society as a lesbian."

21. I am unable to accept the submission of Senior Counsel for the applicant that the statement in the penultimate paragraph of section 4 of the Decision, that the applicant's claim lacked credibility, was an additional material conclusion of the decision maker adverse to the applicant's claim, which was unrelated to these matters and for which no reasons were given. Even if one divided, severed and compartmentalised the conclusions of the Authorised Officer of the Refugee Applications Commissioner as regards the applicant's claim lacking credibility into two wholly separate issues – section 4 concerned solely with the issue of the existence of the well-founded fear and section 5 addressing solely the issue of membership of a particular social group, – it is plain from the foregoing that the Authorised Officer has set out reasons and with a sufficient degree of particularity for his conclusions that the applicant's

claim lacks credibility as regards both these issues.

22. Finally, it was submitted by Senior Counsel for the applicant that the Authorised Officer of the Refugee Applications Commissioner had entirely failed to apply the forward looking test and had entirely failed to consider whether the applicant would suffer persecution as a homosexual woman if returned to Nigeria. Counsel for the respondents accepted that there was no express mention of this test in the decision of the Authorised Officer of the Refugee Applications Commissioner. He submitted, however, that the conclusions of the Authorised Officer as to historical events were such that by necessary inference and implication he had applied the forward looking test by concluding that the applicant had failed to establish that she belonged to a particular social group – homosexual women in Nigeria - and in any event had failed to establish that the State Authorities and Agencies in Nigeria were unwilling or unable to provide adequate protection to such persons.

23. In my judgment this issue is determined by the application of the principles stated by Murphy J. in *Arlovskaya v. the Refugee Appeals Tribunal* (Unreported, High Court, 15th July, 2005). In that case the learned judge noted that the applicant's claim to a well-founded fear of persecution was entirely based upon alleged past events, (relating to alleged trade union membership and activities in Belarus), and a fear that these would be repeated if she returned to her country of nationality. The learned judge held that there did not appear to be substantial grounds for contending that the Refugee Appeals Tribunal erred in law in failing to expressly apply a forward looking test in the light of its conclusions on the alleged past persecution.

24. In the instant case the Authorised Officer of the Refugee Applications Commissioner concluded that even if the applicant had established (which she did not accept) that she was a member of a particular social group in Nigeria, she had not established that the State Authorities and Agencies in Nigeria were unable or unwilling to give her adequate protection. It will also be recalled that the Authorised Officer of Refugee Applications Commissioner concluded that the alleged form of maltreatment suffered by the applicant did not fall into the category of "persecution" for the purposes of s. 2 of the Refugee Act 1996, (as amended). These were conclusions which it was rationally and reasonably open to the Authorised Officer of the Refugee Applications Commissioner to reach on the evidence before him. The applicant did not make the case that there had been a material change of circumstances in Nigeria since 6th December, 2005, as a result of which she would be unable or unwilling, as a homosexual woman, to return to her country of nationality. Her stated fear was that the sort of persecution which she claimed she had suffered prior to her leaving Nigeria on the 6th December, 2005, would be repeated if she returned to that country.

25. I find that this applicant has not shown, as required by the provisions of s. 5(2)(b) of the Illegal Immigrants (Trafficking) Act 2000, that there are substantial grounds, that is reasonable, arguable and weighty grounds and not merely trivial or tenuous, (*Re The Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 394 and 395 per Keane C.J.), for contending that the decision and recommendation of the Refugee Applications Commissioner is invalid and ought to be quashed. The Court will therefore refuse the leave sought and will dismiss the application.

Other cases referred to in argument
Oleed v. Secretary of State for Home Department [2002] E.W.C.A. Civ. 1906.

Idiakhava v. Minister for Justice, Equality and Law Reform (Unreported, High Court, Clarke J. 10th May, 2005)

Moyosola v. The Refugee Applications Commissioner [2005] I.E.H.C. 218

Olatunji v. The Refugee Appeals Tribunal (Unreported, High Court, Finlay Geoghegan J. 4th July, 2007).

Murphy v. The Minister for the Marine [1997] 2 I.L.R.M. 537 per Shanley J.

"*A.N.*" *and Others v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, 18th October, 2007).

"*V.Z.*" *v. The Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal* [2002] 2 I.R. 135

Akpomudjere v. The Minister for Justice, Equality and Law Reform (Unreported, High Court, Feeney J. 1st February, 2007).