Neutral Citation Number: [2010] IEHC 148

THE HIGH COURT

JUDICIAL REVIEW

2007 1221 JR

BETWEEN/

X. L. C.

APPELLANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered on the 10th day of February, 2010.

1. This is a further case in which leave is sought to apply for judicial review of a report and negative recommendation made by the Refugee Applications Commissioner (R.A.C.) under s. 13 of the Refugee Act 1996 (as amended) in circumstances where an appeal to the Refugee Appeals Tribunal (R.A.T.) has been lodged but left in abeyance pending the outcome of the present proceeding.

2. The approach of these Courts to the issue as to the availability of a specific alternative remedy in the asylum process in the form of the appeal to the R.A.T. under s. 15 of the 1996 Act has now been made clear in a series of judgments delivered over the last eighteen months including notably that of the Supreme Court in the case of *A.K. v. M.J.E.L.R.* of 28th January, 2009 (Unreported). This Court has endeavoured to summarise that position more briefly in cases such as *F.O. v. M.J.E.L.R. & Anor*. [2009] I.E.H.C. 300 and *Olunloyo. v. M.J.E.L.R. & Anor* (Unreported, High Court, Cooke J., 6th November, 2009) in these terms:

> "It is now settled law that, consistently with the scheme and the legislative intention of the 1996 Act, this Court should intervene to review a s. 13 report and recommendation in advance of a decision on appeal by the R.A.T., 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, 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 on appeal."

3. Accordingly, the immediate issue before the Court on this application is whether its circumstances and the grounds proposed to be raised are such as bring it within the category of cases in which the Court will exercise its discretion to intervene by way of judicial review in advance of the completion of the examination of the asylum application by the conclusion of the pending appeal to the R.A.T.

4. Counsel for the applicant argues that it is such a case because the contested s. 13 report makes findings of lack of credibility against the applicant and contains in its final paragraph, 6, an express finding to the effect that s. 13 (6) (c) of the 1996 Act applies namely, that the applicant, "without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State".

5. The applicant arrived in the State in 2000 and apparently lived and worked here without a work permit and only applied for asylum in 2007 when arrested and detained in prison. There can be no doubt, therefore, that the factual basis clearly existed which entitled the Commissioner to make that statutory finding and counsel for the applicant does not contend otherwise.

6. The consequence of that finding is that s. 13 (5) of the Act now operates to require that the pending appeal be determined by the Tribunal without an oral hearing. Paragraph (c) of subs. 6 is one of five findings which have this effect, the others being:

> (a) The application showed either no basis or a minimal basis for the contention that the applicant is a refugee;
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> (c) The applicant made statements or provided information of such false, contradictory, misleading or incomplete nature as to lead to the conclusion that the application is manifestly unfounded;
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> (d) The applicant had applied for asylum previously in another State, a party to the Geneva Convention;
>
> (e) The applicant is a national of or has a right of residence in a designated safe country of origin.

It is not disputed that the resulting exclusion of an oral hearing is mandatory so far as both the Commissioner and the Tribunal are concerned. The exclusion cannot be waived either by them or by the Minister.

7. It is this feature of the case which, it is submitted, entitles the applicant to seek and requires the Court to treat the case as one in which the challenge to the report should be entertained. It is argued that the report depends upon a finding of lack of credibility and the applicant is now deprived of an opportunity of persuading the decision-maker on appeal, the Tribunal member, to take a different view of his credibility by giving testimony in person. The case, it is said, is on all fours with that considered by Clarke J. in his judgment of 23rd June, 2005, in *Moyosola v. R.A.C. & Ors*. [2005] I.E.H.C. 218).

8. Before considering these issues it is necessary to summarise briefly the factual and procedural background from which the present application arises.

9. The applicant is a Chinese national who claims to have fled China in 1998. He says he spent two years in France. In a s. 11

interview he said he had paid $10,000 for two years lodging and food in France and for travel to France but could not remember where he had lived during that period or the name of the town in question. He spoke no French and did not work there.

10. He says he came to Ireland not to claim asylum but to work and in the latter objective he was obviously successful having first worked in Cork and then in Carnew, Co. Wicklow where he now has a proprietary interest in the restaurant in which he was employed. He speaks no English.

11. When he claimed asylum the applicant maintained that if returned to China he would face a risk of arrest because in early 1998 he had distributed leaflets or flyers for the Falun Gong movement in his home area. In the s. 11 interview he said that he had never wanted to be in France but had been left there by the agent whom he had paid to arrange his travel. He wanted to get to Ireland because, before he left China, he had friends who were working in Ireland on work permits. (Q. 34) He said he had not applied for asylum when he first arrived here because:- "I was not sure what asylum was when I came here – I had to apply for asylum when I was arrested by immigration officers".

12. He also said that his national identity documents and family registration booklet had been cancelled by the Chinese authorities in February, 1998 before he left China because he had helped the Falun Gong by distributing leaflets. He was not himself a member of the Falun Gong; he had been paid to distribute the leaflets. He said he had lost his passport about a year prior to the s. 11 interview and when he tried to renew it at the Chinese Embassy he was refused but did not know why. He also feared he could not live in China without proper I.D. documents and would face difficulties.

13. The basis of the negative recommendation in the contested report can be summarised as follows:

> (a) Although country of origin information indicated that some high profile Falun Gong leaders suffered harassment in the late 1990s, the movement was not prohibited as an organisation until 1999, a year and a half after the applicant had left China. It was not plausible, therefore, that the applicant would be targeted for persecution for having distributed leaflets nine years ago. (Paragraph 5.2).
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> (b) He had said that the police cancelled his I.D. documents after he left China because of his leaflet distribution. Country of origin information shows that a person leaving China to travel has a duty to cancel residency I.D. documents before leaving and that people who leave illegally sometimes have difficulty renewing them. (Paragraph 5.3) It also indicates that while the penalty on return without having had an exit permit is in theory a one year term of imprisonment, in practice a first time offender would receive a sentence of up to three months. (Paragraph 5.3)
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> (c) While there is some uncertainty as to the penalties for illegal exit, the applicant did not submit any evidence that he would be targeted for excessive or unusually cruel punishment for any reason: he would be subject to the same law as any fellow Chinese citizen. (Paragraphs 5.5 and 5.6)
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> (d) At interview the applicant stated he would not fear anyone if he went back to China and that he had come to Ireland to work and not to claim asylum. He did not submit any credible evidence that he faces persecution for distributing flyers for the Falun Gong.

14. The report then concludes:

> "The applicant did not present any evidence that he would suffer persecution on any Geneva Convention grounds if he returned to China."

15. The remaining matters recited in paras. 5.2 – 5.6 of the report consist of citations from the applicant's answers in the s. 11 interview and a comparison of them with the note of the interview confirms that the matters in question are very accurately recited.

16. Thus, it is apparent that there is a two-fold basis to the negative recommendation in the contested report;

> (1) Any difficulties, penalties or punishment the applicant may face by reason of the cancellation of his I.D. documents would result from the application of Chinese law on the requirements for lawful exit and travel. Those laws apply to all citizens of that country and a fear of facing such prosecution or punishment does not constitute a convention ground for asylum status:
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> (2) The authorised officer of the report did not disbelieve the claim to have distributed leaflets for the Falun Gong in 1998 but regarded the claim to fear persecution as a result of that to be exaggerated and therefore unfounded having regard to the applicant's low profile; to the lapse of time; to the fact that the Falun Gong was only proscribed after he had left China; and the fact that he had no apparent intention of claiming asylum either in France or Ireland until he was arrested.

17. As already mentioned, the essential case made against the validity of that report and the legality of the procedure by which the recommendation was reached, is that because it is based upon a finding of lack of credibility, the exclusion of an oral hearing on appeal is a denial of constitutional justice as the issue of credibility cannot now be revisited. Before considering the correctness of these assertions and the reliance placed in the judgment on the *Moyosola* case, it is useful to reiterate the view this Court has taken of the scheme put in place in the 1996 Act for the examination and determination of asylum applications. This view has been expressed in a number of judgments including, *inter alia*, that of *Olunloyo v. M.J.E.L.R.* of 6th November, 2009, referred to above; *Ajoke v. R.A.C*. (Unreported, High Court, Cooke J., 30th April, 2009) and *G.O.I. v. R.A.C.* [2009] I.E.H.C. 463.

18. The essential point of distinction to be borne in mind in applying the provisions of the 1996 Act is that the statutory function of both the R.A.C and the R.A.T. is that of the examination of the asylum application. The function of the Commissioner and his officers is to receive the application, to conduct a personal interview of each applicant under s. 11; to carry out such investigations and inquiries as are appropriate; to obtain any information including information relating to the social, political, economic or other conditions in the country of origin as may be relevant to the claim made as the basis for refugee status. The purpose, is, in effect, to collect that information and to make an assessment of the credibility of the applicant with a view to preparing a report for presentation to the Minister with a recommendation as to whether the declaration which the Minister makes under s. 17 (1) of the Act should or should not be made. It is, in essence, an exercise in information gathering and personal appraisal of the applicant.

19. Where the s. 13 report makes a recommendation in favour of the applicant's claim, the Minister must grant the declaration under s. 17 (1). Where the recommendation is negative, the applicant is entitled to appeal to the R.A.T. against it. Again, if the Tribunal reaches a positive conclusion the Minister must grant the declaration. When the negative recommendation of the Commissioner is not

appealed or is affirmed by the Tribunal, the Minister nevertheless retains a discretion under s. 17 (1) to grant the declaration as the permissive "may" in subpara. (b) makes clear.

20. The scheme of the 1996 Act, therefore, when viewed purely as a piece of national legislation, is such that a s. 13 report containing a negative recommendation does not have immediate decisive effect or a decisive character. The decision which determines that the asylum application be rejected is made by the Minister under section 17(1).

21. The same is true of an appeal decision of the Tribunal which affirms a negative recommendation. It is to be noted that when the Minister makes the decision under s. 17 (1) he has before him both the s. 13 report and the appeal decision and this is so even where the tribunal comes to the opposite conclusion. The former is not subsumed into or replaced by the latter. The s. 13 report continues to have an autonomous existence as an administrative measure. (See the judgment of Finlay Geoghegan J. in *Adan v. R.A.T*. [2007] I.E.H.C. 54).

22. It follows from these considerations and from the more detailed provisions as regards the powers and functions of the Commissioner and the Tribunal in the Act that, although the remedy provided for before the Tribunal is phrased in terms of an appeal proceeding, with an onus of proof placed upon the appellant, the function discharged by the Tribunal remains part of the composite process of examination of the asylum application. Thus, the Tribunal member has a continuing investigative role and especially since the commencement of the European Communities (Eligibility for Protection) Regulations 2006 on 10th October, 2006, the Tribunal member is also a "protection decision-maker" and required to comply with the terms of Regulation 5 including, for example, the obligation to consult relevant information relating to the country of origin and to do so whether or not it has been put forward as part of the appeal. The Tribunal member is also equipped with the power under s. 16 (6) of the Act to request the Commissioner to conduct further inquiries and to attain for the tribunal such further information as it may consider necessary.

23. The importance of these aspects of the statutory scheme is that, in the Court's judgment, it is a mistake to regard a s. 13 report and an appeal decision as two separate and autonomous administrative or quasi-judicial decisions each equally susceptible to challenge according to the more traditional criteria and precepts of administrative law when applied to inferior jurisdictions, tribunals or decision making administrative agencies. As the Court observed in the *Ounloyo* case, caution ought for this reason to be exercised in transposing to the procedures of the asylum process in the 1996 Act some of the concepts and principles employed in the more familiar case law of judicial review and particularly that body of case law informed by the application of principles of constitutional justice to administrative and quasi-judicial bodies whose decisions may affect constitutionally protected rights of the addressees of decisions by finding facts which may expose to liability, apportion blame or impugn reputations. In such procedures constitutional justice requires that the principle *audi alteram partem* applies; and that the addressee be entitled to know the case against him and be in a position to rebut information adverse to his interest before it is relied upon.

24 The asylum process of the 1996 Act is, in the Court's judgment, different in an important respect. As indicated above, both the Commissioner and the Tribunal member are examining an application made by the asylum seeker. They must investigate it and they must question the applicant to assess whether it is a well-founded claim. But there is no case being made by either against the applicant which the applicant is required to answer.

25. Furthermore, it is because in the event of a negative recommendation the application can be further examined and the report reviewed by the Tribunal that, in the Court's judgment, caution must be exercised in seeking to apply the concepts of fair procedures to the consultation of and use by the Commissioner of country of origin information. As already stated, the role of the Commissioner is to collect information relevant to the claim made, to report upon it in the light of the interview and to form an opinion. The s. 13 report must be furnished to the applicant (s. 13 (4) (a)) and, in the event of an appeal, the Commissioner must furnish to the Tribunal and the Tribunal must furnish to the applicant, all documents and information which the Commissioner has, in effect, gathered in the course of the investigation. (See subss. 5 and 8 of s. 16).

26. It is for that reason that, as the Court has held in previous cases, a s. 13 report is not unlawful and apt to be quashed as a defective administrative or quasi-judicial decision because its reliance on documentary material or country of origin information can be questioned as being selective or inadequate. It is not a "decision" and the examination of the application is not at that stage closed .Defects can be challenged and remedied by the appeal.

27. This is not to say that there is never an obligation on the Commissioner to put contradictory evidence or country of origin information to an applicant at the s. 11 interview or, if consulted afterwards, to allow an opportunity for comment or rebuttal prior to finalising the s. 13 report. It depends upon the effect of the material and the purpose for which it is to be relied upon. If, for example, general country of origin information is consulted to confirm that circumstances or conditions exist in the country of origin such that the particular cause of persecution may or may not be plausible, there may be no such obligation. On the other hand, if the claim made relies upon the occurrence of a specific event or the existence of a particular place or institution and the country of origin information is to be relied upon to find that the event never happened or that the place or institution does not exist so that the story told is considered untrue, then the opportunity to explain or rebut may be necessary. It may be necessary not only as a matter of the fairness of the procedure but because it is an essential objective of the examination of the asylum application that the appraisal be made impartially and objectively and , where appropriate, that doubts arising may be resolved to the benefit of the asylum seeker. Nevertheless, even in cases where there is a failure on the part of the authorised officer in this regard when completing the s. 13 report, it does not follow that the report itself is necessarily unlawful or that it requires to be quashed if the findings are capable of being challenged and corrected upon appeal.

28. Because this scheme of the 1996 Act is informed primarily by international standards and procedures for the examination and determination of asylum applications in the implementation of the Geneva Convention, it is particularly important in the Court's view, that the High Court should not intervene by way of judicial review in the process of examination of an asylum application prior to its completion by the conclusion of an appeal unless it is necessary to do so in order to remedy some fundamental illegality in the process up to that point which is incapable of being remedied by the appeal with the result that the appeal would necessarily take place upon a false or unsound basis.

29. As indicated above (Para 20,), this view of the scheme in the 1996 Act is based upon an interpretation of that Act as a piece of domestic legislation. The Court would point out that further considerations may arise where the 1996 Act falls to be applied in the light of the provisions of Council Directive 2005/85/EC of 1 December 2005, (the "Procedures Directive") in cases to which the directive has application. As pointed out by the Court in observations made *obiter* in the judgment in the *Olunloyo* case mentioned above, the Procedures Directive has not been transposed into domestic law because its requirements were considered to be already covered by the 1996 Act and the 2006 Regulations. The period for its transposition expired on 1st December, 2007 and its provisions apply to asylum applications made after that date. The application in the present case was made in July 2007 so those provisions have no relevance to the present proceeding. In any event, as pointed out in that judgment, any need to reconcile the scheme of

the 1996 Act with the minimum standards of the directive does not appear to have any bearing on the relationship between the s. 13 report and the Tribunal appeal decision as described in the preceding paragraphs of this judgment. The directive does not require that an appeal or effective remedy against a decision taken on an asylum application involve any fresh interview or any oral hearing (see Article 39). Indeed, it is to be noted that the Procedures Directive does not require that an applicant be allowed to remain in the Member State concerned pending the outcome of any appeal.

30. It is accordingly against that background that it is necessary to consider whether any substantial ground is raised which would require or warrant the intervention of the Court to judicially review the s. 13 report in this case upon the basis that it is tainted by a breach of fair procedures and that the exclusion of an oral hearing deprives the applicant of an effective appeal against its findings of lack of credibility.

31. The Court is satisfied that no ground is proposed to be raised which would warrant such intervention for the following reasons.

32. First, a careful reading of the s. 13 report shows that the conclusion reached does not in fact depend upon findings of lack of credibility in the factual evidence and information given by the applicant. It is to be noted that, unlike many other s. 13 reports, the authorised officer at no point describes the applicant as being evasive or even hesitant in his replies to questions at the interview. Nor does he make any comment upon the applicant's demeanour.

33. Secondly, when carefully analysed, it is clear that the report does not in fact disbelieve but rather accepts, the only key fact advanced by the applicant namely, that he distributed leaflets for the Falun Gong in 1998 and did so because he was paid and not because he was a member. A s. 13 report – or for that matter an appeal decision – turns upon credibility when the conclusion reached depends upon a finding that the factual account given or the evidence relied upon as the basis for the claim is untrue.

34. In this instance as pointed out in para. 12 above, the negative recommendation is effectively based upon two conclusions. These are first, that there is no reality to the fear that someone who was a non-member of the Falun Gong distributing leaflets in 1998 would now face persecution on return as a result. It is to be noted that the applicant never claimed to have been persecuted in China before he left. At the interview when asked why his I.D. documentation had been cancelled he replied, (somewhat inconsistently in view of some later answers,):

> "Because I helped Falun Gong to distribute their flyers and the government put me against the law – I left before they could arrest me." (Q. 43)

Thus, the conclusion is not dependent upon any finding that the truth was not told but upon a common sense judgment based upon the story given to the effect that the expressed fear was exaggerated and unrealistic. That is very much the sort of appraisal which forms the purpose of the statutory interview of an asylum seeker.

35. The second effective conclusion concerns the loss or cancellation of the I.D. documents. Again, the authorised officer's conclusion is not based upon credibility as such but upon the proposition that no fear of persecution arises out of non-possession of those documents; only the sanction of Chinese law of general application to all citizens who left the country without going through appropriate formalities to obtain an exit permit and then returning without documentation. The authorised officer had recourse to country of origin information as the source of information in relation to those procedures and laws but not as a basis for finding that the applicant was not truthful in relation to the non-possession of that documentation. The authorised officer accepts that the applicant would possibly face sanction on return but points out that first time offenders tend to receive lighter sentences.

36. Neither of these conclusions is such as would require an oral hearing for an appeal to be an effective if such is needed. If the applicant contests either the information as to the harassment of Falun Gong leaders or the date of proscription of the group, appropriate evidence to counter it can be submitted. The country of origin information relating to the sanctions in respect of I.D. documentation is actually supportive of the applicant's own complaint but, again, can if necessary be the subject of alternative information on appeal if it is relevant.

37. The exclusion of an oral hearing does not preclude the applicant giving evidence. He is entitled to require the Tribunal to consider such testimony as he wishes to have taken into account by way of written statement. The absence of an oral hearing is only a disadvantage where the contested issues of fact depend upon an appreciation of the personal truthfulness of an applicant. It is true that at an appeal hearing a presenting officer from the office of the Commissioner will be present and may put questions to an applicant who is contesting the content of the s. 13 report. However, the officer's function in that regard is not to make any new case against the applicant but, for the benefit of the Tribunal member, to test the consistency of the account then being given by an applicant as against the account given and claim made at the interview or in the asylum application.

38. It follows that the Court does not consider that the present case is, as suggested, on all fours with the *Moyosola* case. It is true that the approach outlined above as to the role of constitutional principles of fair procedures in the asylum process differs in some respects from that of Clarke J. in that judgment. The case in question was, however, one in which it had been expressly held that the conclusions of the s. 13 report were based in important respects upon a finding that certain assertions made by the applicants were contradicted by country of origin information.

39. The text of the judgment which has been furnished to the Court does not, unfortunately, identify in any detail the matters upon which the applicants were apparently disbelieved. These seem to have included the explanation given as to why the applicants had not sought protection from the alleged threats made against them by occult societies in Nigeria. This explanation was said to have been contradicted by certain unidentified country of origin information. At any rate, it is clear that Clarke J. based his judgment on an assessment that the finding by reference to s. 13 (6) was "at least in material part influenced by a finding of lack of credibility on the part of the applicant concerned …"

40. It is also relevant to note the following points in relation to that judgment:

> (A) The case dealt with asylum applications and procedures which pre-dated the coming into operation of the 2006 Regulations;
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> (B) The respondents had consented to the grant of leave in respect of some of the reliefs sought and the grounds relied upon; although the judgment does not indicate the precise scope of the leave order and whether it covered those for which consent had not been given;
>
> (C) The learned judge refers throughout the judgment to the "decision of the R.A.C." in the s. 13 report and does not

appear to have had his attention drawn to the significance of the decisive role of the Minister under s. 17 (1) of the Act.

41. For these reasons the Court does not consider that the judgment in the *Moyosola* case can be regarded as authority for the proposition that in all cases where a s. 13 report contains conclusions founded on lack of credibility, the report ought to be quashed as unlawful for incompatibility with constitutional justice if a s. 13 (6) finding is also made so as to exclude an oral hearing on appeal to the R.A.T.

42. More importantly, however, the Court finds that the s. 13 report in this case does not in fact depend for its negative recommendation upon any finding of lack of credibility on the part of the applicant which would require to be revisited by oral testimony at an appeal hearing. Accordingly, the Court will refuse leave in this case both upon the ground that the alternative remedy of appeal is appropriate and suitable and upon the basis that no substantial ground has been made out as to the illegality of the way in which the s. 13 report was compiled and the negative recommendation was reached.