Neutral Citation Number: [2008] IEHC 133

THE HIGH COURT
JUDICIAL REVIEW

2006 No. 875 J.R.

BETWEEN

T. R. A.

APPLICANT

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

RESPONDENTS

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

1. The applicant in this application for leave to seek an order of *certiorari*, an order of *mandamus* and various declarations, by way of judicial review, is a single male Nigerian national, who gives his date of birth as 18th February, 1978. His address (is given) in his country of origin was in the city of Warri in Edo State. He states that he travelled here from Lagos airport on the 11th April, 2006, via Amsterdam and completed the ASY 1 Form, applying for refugee status in this State on his arrival here on the 12th April, 2006. He claims to be a primary school teacher. He states that he is a Christian and his first language is English. He personally completed the Questionnaire for Application for Refugee Status on 25th April, 2006, without legal assistance.

2. He was interviewed, in accordance with the provisions of s. 11 of the Refugee Act, 1996 (as amended) by Michael Grange, an Officer authorised by the Refugee Applications Commissioner. This interview took place on the 24th June, 2006, in English without an interpreter.

3. The applicant told the interviewing officer that he joined the Niger Delta Political Party in or about 2001 or 2002 and became an active member of that party. He said that he also became a member of the Niger Delta Peoples Volunteer Force, the military section of that Party and received weapons training. He said that he worked in the primary school from 08.00 hours to 14.00 hours and when he went home he acted as a spier (sic), for the Ijan ethnic group to which his mother belonged, against the Itshekiri ethnic group to which his father belonged and he sometimes acted as a double agent for both.

4. He told the interviewing officer that in December 2005 the Itshekiri discovered his activities. He was threatened, his mobile telephone was taken and his motor car was shot at on the 11th January, 2006, and on the 18th January, 2006. He said that on the advice of his Party boss he left his home and resigned from his teaching position and went to stay with a girlfriend who also lived in Warri. He said that he could not go to the police because they were corrupt and also because they were looking to arrest any member of a military group and they knew that he was a member of a military group and they might kill him. He said that some Itshekiri are in the police. Some two or three weeks after the second shooting, on the advice of his girlfriend he went to stay with a friend in Lagos. He asked his girlfriend to get some money from his house in February 2006. She found that his house had been ransacked and that photographs of him had been taken. People then started telephoning his friend saying that they wanted to contact the applicant to give him back his mobile telephone. His friend became afraid that these people would kill him and his family. In March 2006 on the advice of his friend and his girlfriend the applicant decided to leave Nigeria.

5. In the report of the Refugee Applications Commissioner, made pursuant to the provisions of s. 13(1) of the Refugee Act, 1996 (as amended), it was held that the applicant had failed to establish a well founded fear of persecution in accordance with the provisions of s. 2 of the 1996 Act, and it was recommended that he should not be declared a refugee. This decision was notified to the applicant by a letter dated 3rd July, 2006. The originating notice of motion is dated 19th July, 2006. At the hearing of this application, the respondents did not object to the application for an extension of time by two days. Having considered the various matters specified by Finnegan J. in *"GK" v The Minister for Justice, Equality and Law Reform* [2002] 1 I.L.R.M. 81, I considered that there was good and sufficient reason as required by s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act, 2000 to extend the time and I made the Order accordingly. The Statement to Ground Application for Judicial Review is dated 19th July, 2006, and is supported by a Verifying Affidavit sworn by the applicant on the 19th July, 2006.

6. At the hearing of this application, Senior Counsel for the applicant, while referring to the written submissions filed on behalf of the applicant, (replying submissions were filed on behalf of the respondents on 10th December, 2007), submitted that the decision and recommendation of the Refugee Applications Commissioner should be set aside on what she stated were a number of substantial grounds as required by s. 5(2)(b) of the Illegal Immigrants (Trafficking) Act, 2000.

7. The first ground advanced by Senior Counsel for the applicant is that the decision of the Refugee Applications Commissioner is not merely incorrect, but that the manner in which it was reached was so totally lacking in basic fairness that it would be unjust to permit the Decision to stand, particularly having regard to the provisions s. 16(A) of the Refugee Act, 1996 (as amended) and s. 11A(3) of that Act. Though the system is an inquisitorial one, Senior Counsel submitted that the Refugee Applications Commissioner had reached conclusions of fact, adverse to the applicant, in respect of material issues as to credibility, without ever questioning the applicant about the particular matters and affording him a reasonable opportunity of dealing with the issues involved, if he wished. Senior counsel for the applicant instanced the following findings by the Refugee Applications Commissioner:-

> "1. He also claims that the police knew he was a member of a military group. Had this been the case it would have been open to the police to arrest him at any stage.
>
> 2. It is difficult to believe that if the police had information on him being a NDPVF member that they would not have also known that he was a teacher in a State school and they could have readily arrested him there.
>
> 3. He claims that his friend invited him to move to Lagos and he did so in the middle of February 2006. This means that the applicant stayed in Warri for two or three weeks where he alleges that he was twice shot at rather than immediately leaving for Lagos, this does not appear consistent with him holding a genuine fear for his life.
>
> 4. He claimed that he contacted his girlfriend [in Warri] and asked that she go to his house to retrieve money that he had left in his house in Warri. He claims that she told him that the house had been broken into …. There is no evidence other than the applicant's claims that the Itshekiris were responsible. It seems strange that the applicant had left money in his house when he had a number of weeks to plan his departure to Lagos.
>
> 5. The applicant claimed to have lived in Lagos for two months without incident. While his friend may have become

> concerned that he was getting involved in the applicant's affairs, it was open to the applicant to move to another part of Lagos."

8. Each of these matters, Senior Counsel said, could and should have been raised with the applicant at Interview before the Refugee Applications Commissioner reached the conclusion on foot of them that the applicant's story was improbable and that he himself lacked credibility.

9. The second ground advanced by Senior Counsel for the applicant relates to the following findings by the Refugee Applications Commissioner:-

> "Country of origin information indicates that the NDPVF engages in "bunkering" a process in which an oil pipeline is tapped and the oil extracted into a barge. See TAB A. This is regarded as a crime by the Nigerian State. The applicant denies that the NDPVF organisation does bunkering but claims that some men do it (Q. 50, p. 20). As objective information indicates that the NDPVF engages in such activity, his denial raises a credibility issue of whether the applicant is actually an important member of the NDPVF as he would wish this Office to believe. He admits that this organisation kidnaps foreign workers employed by oil companies."

10. This information regarding the practice of "bunkering" was obtained, Senior Counsel said, by the Refugee Applications Commissioner from an internet document sourced by the Commissioner, known as the Wikipedia Free Encyclopaedia, dated 23rd June, 2006. A copy of the extract from this document was appended to the Report and Recommendation of the Refugee Applications Commissioner. The relevant paragraph of the extract states as follows:-

> "The NDPFV attempted to control such resources primarily through oil 'bunkering', a process in which an oil pipeline is tapped and the oil extracted into a barge. Bunkering is illegal in the eyes of both the Nigerian State and the oil corporations, but is justified by the militias on the basis that they are being exploited and have not received adequate profits from the monstrously profitable but ecologically destructive oil industry. Bunkered oil can still however be sold for profit, usually to destinations in West Africa, but also abroad. Bunkering is a fairly common practice in the Delta, but in this case the militia groups are the primary 'perpetrators'."

11. Senior Counsel for the applicant submitted that the Refugee Applications Commissioner had formed a view adverse to the applicant on this very fundamental issue and contrary to the reply given by the applicant to a specific question, by reference to this document, which though obviously the source of the question was neither disclosed to nor put to the applicant. The applicant was not given any opportunity of perusing, checking on, assessing or evaluating this purported country of origin information, or of providing evidence in rebuttal, if he wished. This procedure, said Senior Counsel, was contrary to every concept of procedural fairness and of natural and constitutional justice. It was not sufficient to assert that the matter could be addressed at an appeal hearing before the Refugee Appeals Tribunal at which time the applicant would have had sufficient opportunity to prepare an answer and to challenge what is stated in this extract, by adducing contrary country of origin information if he so desired. Such a course would be both unjust and unfair and would deny the applicant the remedy of *certiorari* which was the appropriate remedy where a decision was reached in such a manner.

12. The third ground advanced by Senior Counsel for the applicant is based on the following finding by the Refugee Applications Commissioner:-

> "Hathaway states that there cannot be said to be a failure of State protection where a Government has not been given an opportunity to respond to a form of harm in circumstances where protection might reasonably have been forthcoming. The applicant decision not to avail of State protection is out of his concern that the Nigerian State would wish to arrest him as a member of the NDPVF. Paragraph 56 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status states:-
>
> > 'Persecution must be distinguished from punishment for a common law offence. Persons fleeing prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim – or potential victim – of injustice, not a fugitive from justice.'"

13. Senior Counsel for the applicant submitted that the only country of origin information before the Refugee Applications Commissioner, clearly indicated, that not only could the applicant not reasonably be expected to seek State protection as a member of the NDPVF, but even if he had not been such a member and was an ordinary victim of crime, he could not reasonably be expected to seek State protection nor might such protection reasonably be expected to be forthcoming. Senior Counsel for the applicant pointed to the fact that the extract from the Wikipedia Free Encyclopaedia sourced by the Refugee Applications Commissioner, referring to the conflict in the Niger Delta states:-

> "Victims of crimes are fearful of seeking justice for crimes committed against them because of growing 'impunity from prosecution' for individuals responsible for serious human rights abuses [which] has created a devastating cycle of increasing conflict and violence."

14. Senior Counsel for the applicant further submitted that the Refugee Applications Commissioner appears to have concluded that the applicant was guilty of a common law offence in Nigeria and was a fugitive from prosecution and not persecution. This was not put to the applicant. If the Refugee Applications Commissioner was aware of a charge or a warrant or other judicial documents to support such a conclusion it was not revealed to or put to the applicant. If the Refugee Applications Commissioner was aware of the existence of such a document, not to have put it to the applicant was a breach of fair procedures and contrary to natural and constitutional justice. If there was no such document, then the only rational inference to be drawn from this conclusion by the Refugee Applications Commissioner, is that the Commissioner acted on nothing more than hearsay or surmise in making this most material finding against the applicant.

15. Counsel for the respondents submitted that it was reasonably and rationally open to the Refugee Applications Commissioner, upon whom the duty of assessing credibility lay, to reach the conclusions which the Refugee Applications Commissioner did on the evidence. Counsel submitted that there was no lack of fairness of procedures. She submitted that the Refugee Applications Commissioner had reached these conclusions after a full and fair appraisal of all the evidence and, there was no obligation on the part of the Refugee Applications Commissioner to put his conclusions to the applicant. While accepting that the grounds advanced by the applicant were arguable, he submitted that there were not "substantial grounds" – that is, reasonable, arguable and weighty and not trivial or tenuous – as required by s. 5(2)(b) of the Illegal Immigrants (Trafficking) Act, 2000 as interpreted by the Supreme Court in *Re: The Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360 at 394/5 per Keane C.J.

16. In addition, and principally Counsel for the respondents submitted, that if the applicant was entitled to a remedy, an appeal to the Refugee Appeals Tribunal was a more appropriate remedy than judicial review because the points raised by the applicant were matters relating "to the quality of the decision rather than the defective application of legal principles", (*Ajoke Kayode v the Refugee Applications Commissioner* (Unreported, High Court, 25th April, 2005, per O'Leary J.)). Counsel for the respondents further referred to the decision of the Supreme Court in *Petrea Stefan v The Minister for Justice, Equality and Law Reform and Others* [2001] 4 I.R. 203; *Fatimo Oyedele and Others v The Minister for Justice, Equality and Law Reform and Others* (Unreported, High Court, 16th May, 2007, McGovern J.); *Voke Akpomudjere v The Minister for Justice, Equality and Law Reform and Others* (Unreported, High Court, 1st February, 2007, Feeney J.), and *Ceaser Carlos Chukwuemeka v The Minister for Justice, Equality and Law Reform and Another* (Unreported, High Court, 7th October, 2007, Birmingham J.).

17. In the Stefan case (above cited) Denham J. (McGuinness and Hardiman J.J. concurring) approving the decision of Barron J. in *McGoldrick v An Bord Pleanála* [1997] 1 I.R. 497 at 509 and Geoghegan J. in *Buckley v Kirby* [2000] 3 I.R. 431, held as follows:-

> "*Certiorari* may be granted where the decision maker acted in breach of fair procedures. Once it is determined that an order of *certiorari* may be granted, the court retains a discretion in all the circumstances of the case as to whether an order of *certiorari* should issue. In considering all the circumstances, matters including the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences to the applicant if an order of *certiorari* is not granted and the degree of fairness of the procedures, should be weighed by the court in determining whether *certiorari* is the appropriate remedy to attain a just result."

18. In that case information material to the credibility of the applicant was not considered by the decision maker because of an omission to translate part of the Questionnaire. The court held that the procedure was therefore unfair and granted the order of *certiorari* sought. At p. 218 of the report it was further held by Denham J. that:-

> "The appeals authority process would not be appropriate or adequate so as to withhold *certiorari*. The applicant is entitled to a primary decision in accordance with fair procedures and an appeal from that decision. A fair appeal does not cure an unfair hearing."

19. In the course of her judgment (p. 217 of the report) the learned Supreme Court Judge held that the presence of a pending appeal is not a bar to the court exercising its discretion but was a factor to be considered, the issue being whether the applicant had gone too far down that road so as to be estopped from changing his mind.

20. In the instant case the applicant has delivered a notice of appeal to the Refugee Appeals Tribunal, but I am satisfied that this was done out of caution, and to prevent an issue of time being raised in the future and nothing further has been done on foot of the notice of appeal. In these circumstances I am quite satisfied that the applicant should not be estopped from seeking judicial review.

21. It appears to me that there are substantial grounds for contending that the apparent finding by the Refugee Applications Commissioner, – apparent because the language employed is somewhat uncertain and there must remain some doubt as to whether or not a definite finding in this regard was intended, – that State protection might reasonably have been available to the applicant against the alleged threats to and assaults on himself and attacks on his property , by non-government agencies, had he been willing to claim it, lacks any sufficient evidence to sustain it, having regard to the content of the only objective country of origin information before the Refugee Applications Commissioner. There can be no doubt but that this finding, (if it was intended to be such), was adverse to the applicant and was or would have been very material to the conclusion of the Refugee Applications Commissioner that the applicant was not a refugee.

22. I find that there are substantial grounds for contending that the finding by the Refugee Applications Commissioner that the applicant was outside the country of his nationality because he was fleeing prosecution or lawful punishment and not, as claimed by him, due to persecution because of his political opinion, is based on hearsay, speculation and conjecture. This finding by the Refugee Applications Commissioner adverse to the applicant, is of the utmost significance having regard to the provisions of s. 2(c) of the Refugee Act, 1996 (as amended) and to the finding by the Refugee Applications Commissioner that:-

> "Persons fleeing prosecution or punishment for such an offence [common law] are not normally refugees. It should be recalled that a refugee is a victim – or potential victim – of injustice, not a fugitive from justice."

23. I find that there are substantial grounds for contending that the apparent failure of the Refugee Applications Commissioner to disclose to the applicant and to put to him, at least the relevant contents of documents containing country of origin information, which were sourced by the Refugee Applications Commissioner and from which a question clearly crucial to the credibility of the applicant in the eyes of the decision maker was derived and, upon which material findings as to this credibility adverse to the applicant were based, is an unfair procedure and contrary to natural and constitutional justice. The issues involved are material because they concern the applicant's alleged membership of the NDPVR which is at the very core of his claim that he has a well founded fear of being persecuted in his country of nationality because of his political opinions and is unable and unwilling because of that fear to avail himself of the protection of that country.

24. Considered in isolation, I do not accept that there are substantial grounds for contending that the several matters of fact identified by Senior Counsel for the applicant, should have been put to and explored with the applicant before the particular conclusion was reached by the Refugee Applications Commissioner. Even if the applicant had been questioned about these matters one could not assume with any degree of probability that as a consequence it would no longer have been rationally or reasonably open to the Refugee Applications Commissioner to reach the conclusion that these aspects of the applicant's story were not plausible. However, even if one should consider, particularly having regard to the inquisitorial nature of this scheme, that fair procedures required that these matters should have been put to the applicant despite the foregoing, it seems to me that applying common sense, the ability to deal with the questions raised and the degree of fairness of the procedure adopted by the Refugee Applications Commissioner, the more appropriate remedy in order to obtain a just result would be a full rehearing of the applicant's claim before the Refugee Appeals Tribunal, and that for this reason the discretionary remedy of judicial review would very likely be refused.

25. However, when considered in the context of the other complaints, it seems to me that these matters add to and strengthen the contention that the means whereby the Refugee Applications Commissioner reached a conclusion that the applicant had failed to establish a well founded fear of persecution in accordance with s. 2 of the Refugee Act, 1996 (as amended), and should therefore not be declared a refugee, were not in accord with fair procedures and with any notion of natural or constitutional justice. In such circumstances, I consider that to sever them from the other grounds upon which I find that there are substantial grounds for contending that the decision and recommendation of the Refugee Applications Commissioner is invalid and ought to be quashed, would be unjust as presenting the Court with a possibly distorted and incomplete picture of the true nature of the means by which the

Refugee Applications Commissioner came to a conclusion in this matter.

26. The Court will therefore grant leave to the applicant to seek judicial review.