Neutral Citation Number: [2007] IEHC 230

THE HIGH COURT

[2005 No. 1028 J.R.]

JUDICIAL REVIEW

IN THE MATTER OF THE REFUGEE ACT 1996 AND THE IMMIGRATION ACT 1999 AND THE ILLEGEAL IMMIGRANTS (TRAFFICKING) ACT 2000

BETWEEN

N.N.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL (ELIZABETH O'BRIEN), TRIBUNAL MEMBER, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

Judgment OF Mr. Justice McGovern delivered on the 28th June, 2007.

1. The applicant arrived in the State on the 29th March, 2005. She presented as a South African national and made an application for asylum. As part of the asylum process she was obliged to complete a questionnaire and she did so on the 6th April, 2005. In the questionnaire she claimed to be from Zimbabwe and stated her place of birth as Bulawayo. She claims that she would be persecuted if she returned to that country because she is a member and supporter of a group who are opposed to the ruling Mugabe regime and she also fears that if returned as a failed asylum seeker she would be subject to torture, arrest, detention and violence.

2. The applicant previously applied for asylum in the United Kingdom in 2002 and her application was rejected. She was deported to Harare on the 10th January, 2005.

3. It appears from the evidence that the applicant entered the State on foot of a South African passport but that this may have been a forgery. In any event when her application for asylum was heard before a Refugee Applications Commissioner she was deemed to be Zimbabwean. The Commissioner accepted that she was from Zimbabwe but rejected her claim on credibility issues relating to her well founded fear of persecution. In the course of the hearing the RAC stated:

> "It would appear that the applicant is in fact Zimbabwean (see documentation in pouch held on file)."

The entire assessment of her claim was based on the fact that she was from Zimbabwe although her account of her alleged and apprehended persecution in that country was not considered plausible or credible.

4. The applicant appealed to the Refugee Appeals Tribunal (RAT). There was no oral hearing. The RAT dealt with the applicant on the basis that she was from South Africa. In the course of the report the Tribunal member stated:

> "The only reliable evidence of nationality available to me is of South African nationality, by virtue of the passport on file. In all of the circumstances there is insufficient evidence for me to make a finding that the Appellant is a national of Zimbabwe and accordingly I find that the claims she makes in relation to fear of persecution in Zimbabwe are irrelevant to my consideration which must be carried out by reference to her country of nationality, South Africa."

Strangely, the Tribunal member goes on to deal with the applicant's previous claim for asylum in the United Kingdom and the fact that she was unsuccessful and deported to Harare in January, 2005. This statement is made without comment on the fact that she was returned to Zimbabwe.

5. In short the RAT dealt with the applicant's case on the basis that she was from South Africa and also found that her account was implausible and that there were credibility issues concerning her fear of persecution. Accordingly she failed in her appeal.

6. The applicant was granted leave to challenge the decision of the first named respondent in refusing her asylum application and also the decision of the second named respondent in refusing the applicant a declaration of refugee status. The applicant also obtained leave to challenge the second named defendant's entitlement to make a deportation order.

7. I think it is of some importance in this case that the appeal to the RAT was not by way of oral hearing. The applicant made her appeal on the basis that she had been accepted as a citizen of Zimbabwe and that her fears of persecution related to being returned to that country. In those circumstances, while she had to apply herself to the credibility issues that arose in her application, she had no reason to believe that her nationality was in issue. Certainly she had no reason to believe that she should be raising, in her appeal, any matter pertaining to the question of her nationality.

8. When one looks at the decision of the RAT it is quite clear that it was based entirely on the fact that the applicant was South African and the Tribunal member even went so far as to state that the claims made by the applicant in relation to fear of persecution in Zimbabwe "…are irrelevant to my consideration…".

9. Counsel for the respondent states that because s. 16 of the Refugee Act 1996 states that "the applicant may appeal in the prescribed manner against a recommendation of the Commissioner under s. 13…" that the applicant had no legitimate reason to expect that all issues concerning her arrival in Ireland would not be enquired into, including the fact that she entered the State under a South African passport. This seems to me to be engaging in sophistry. It is of course true that the recommendation of the RAC was that she should not be declared a refugee. But to suggest that an applicant who had failed on one issue (credibility) and succeeded on another (nationality) should then have to reopen the area on which she had succeeded, seems to me to be both unfair and unnecessary. A vast amount of time would be wasted in hearings before the RAT if every issue which had come before the RAC had to be canvassed, including those issues on which the appellant had received a favourable result.

10. It may well be that the first named respondent was entitled to question the nationality of the applicant when the matter came before the Tribunal on appeal. But in my view if this were to occur the applicant would have to be put on notice that the RAT wanted this issue reopened on the appeal. To do otherwise would be to treat the appellant in a manner which was wholly unfair.

11. In this case the applicant claimed fear of persecution in Zimbabwe and her hearing before the RAC was based on her fear of persecution in that country. For the RAT to then deal with her application on the basis that she was not from Zimbabwe and that her fear of persecution must be considered in relation to South Africa, amounted to a fundamental reassessment of the applicant's claim.

It was open to the RAT under s. 16(6) of the Refugee Act 1996 to request the Commissioner to make such further enquiries and to furnish the Tribunal with such further information as the Tribunal considers necessary for the purpose of carrying out its functions under the Act. There is no evidence that the RAT did so. One would have expected that if the RAT was going to take such a fundamentally different position to the RAC on the issue of nationality that there would have been some communication between the RAC and RAT under s. 16(6).

12. There can be no doubt that the RAT and other organs established under the refugee legislation have to act with fairness towards asylum seekers. Where the RAT (as the appellate body) intends to approach the hearing of an appeal on an entirely different premise from that adopted by the RAC, and where this matter has not been raised as a ground of appeal, basic fairness requires that the appellant in the procedure be informed that he or she will have to deal with this issue. If this requires giving the appellant additional time to formulate his or her arguments in relation to this issue then so be it. It is wholly unjust and unfair to deprive the appellant of the opportunity to make an argument on an issue which is deemed to be fundamental by the Tribunal when this issue has already been resolved in the appellant's favour by the RAC and has not, for this reason, become a ground of appeal.

13. In the circumstances of this case I have no hesitation in holding that the applicant was unfairly treated by the first named respondent in not being given an opportunity to offer arguments as to why her case should not be dealt with on the basis that she was from South Africa.

14. In reaching this conclusion I am not holding that the first respondent is not entitled to revisit the issue of nationality. It seems to me that the Tribunal is entitled to do so but if it proceeds on this basis it must do so by means of fair procedures.

15. I make an order quashing the decision of the first named respondent and remitting the matter back to the Refugee Appeals Tribunal for a rehearing. I also make an order quashing the decision of the second named respondent refusing the applicant a declaration of refugee status and I make an order restraining the second named respondent from making any deportation order in respect of the applicant pending the outcome of the rehearing of the appeal.