Neutral Citation Number: [2009] IEHC 300

THE HIGH COURT

2006 1459 JR

BETWEEN/

F. O.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr Justice Cooke delivered on 26th day of June, 2009.

1. The applicant is from Nigeria and arrived in the State, according to her affidavit, on an unspecified date "in or about the month of August 2006" although she appears to have made an application to the Minister for a declaration of refugee status on the 26th July, 2006.

2. She gave birth to a daughter on the 19th September, 2006 in Dublin. On the 23rd October she signed a form confirming that she wished to have her daughter included in her application for asylum but her daughter is not a party to the present application.

3. She attended for interview under section 11 of the Refugee Act 1996 on the 18th November, 2006 and on the 23rd November, 2006 she received the section 13 report of the Commission's authorised officer which appears to be made on the date of the interview, the 18th November, 2006. The authorised officer found that the applicant had failed to establish a well founded fear of persecution for the purposes of s. 2 of the 1996 Act and recommended that she should not be declared a refugee. An appeal against that report and recommendation has been initiated before the Refugee Appeals Tribunal but has been left in abeyance pending the outcome of the present proceeding.

4. The applicant now seeks leave pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000 to apply for, *inter alia*, an order of *certiorari* to quash that report. If it is to grant leave, the Court must be satisfied that there are substantial grounds for contending that the section 13 recommendation is invalid and that it ought to be quashed.

5. As presented, the application has reduced the 17 grounds envisaged in the proposed statement of grounds as lodged, to five grounds which might be formulated more succinctly as follows:

> (1) The Commissioner's authorised officer acted unlawfully by relying selectively upon country of origin information which was not disclosed or put to the applicant at the interview in breach of the principles of natural and constitutional justice and in breach, in particular, of the principle *audi alteram partem*.
>
> (2) The authorised officer acted unlawfully and in breach of the same principles by failing to put to the applicant during the interview and to allow the applicant to answer or resolve, apparent doubts held by the authorised officer as to the credibility and veracity of the applicant's claim.
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> (3) The report failed to have any adequate regard to the provisions of the European Communities (Eligibility for Protection) Regulations 2006; a mere statement that they had been considered being insufficient in law.
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> (4) The report failed to comply with the obligation to discharge a shared duty to ascertain and evaluate all relevant facts; and, in particular, the authorised officer failed to make her own inquiries as to the availability of treatment for the applicant's HIV Aids condition in Lagos.
>
> (5) No proper assessment or analysis of the applicant's child's case for asylum was carried out when the child was included in the asylum application.

6. This is an application for leave directed at the annulment of the report and recommendation of the Commissioner. Accordingly, in addition to being satisfied that the proposed grounds for quashing the measure are substantial for the purposes of section 5 of the 2000 Act, the Court must be satisfied that if leave is granted on that basis, this is one of the cases in which the court would not refuse to exercise its discretion to intervene in the asylum procedure, upon the ground that the statutory appeal to the Tribunal is available to the applicant and is the more suitable remedy for the adjudication on the proposed grounds of invalidity in the report and recommendation of the Commissioner.

7. Following upon the judgments of the Supreme Court in the cases of *Stefan v. The Minister for Justice, Equality and Law Reform & Others*, and *Kayode v. The Refugee Applications Commissioner*, (Unreported, 29th January, 2009), there have been a series of judgments of the High Court which have affirmed its approach to this issue as it arises in the particular context of the two stage scheme of the asylum process established by the Oireachtas in the 1996 Act, as it now stands amended. These judgments include notably the following, *B.N.N. v. The Minister for Justice, Equality and Law Reform*, *Diallo v. The Refugee Applications Commissioner*, *Mhlanga v. The Refugee Applications Commissioner*, Akintunde v. *The Minister for Justice, Equality and Law Reform*, *Ajoke* v. *The Refugee Applications Commissioner*, N.N. v. *The Refugee Applications Commissioner*, and Shange v. *The Refugee Applications Commissioner* (Unreported, 18th June, 2009).

8. Indeed immediately prior to the commencement of the hearing of the present application, the Court gave judgment in the case of *Adebayo v. The Refugee Applications Commissioner & Another*, (Unreported, 25th June, 2009), in which the applicant was represented by the same senior and junior counsel as in the present case. It is therefore unnecessary to set out once more the full effect of that case law for the purpose of making the present ruling. It is sufficient to say that the Court considers that it is now settled law that, consistently with the scheme and legislative intention of the 1996 Act, this Court should intervene to review a section 13 report and recommendation in advance of a decision on appeal by the RAT, 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 the appeal.

9. The Court is satisfied that the present case is one in which any ground of substance proposed to be advanced is capable of being considered and is more suitable to be considered and determined by means of the statutory appeal to the Tribunal. The first proposed ground alleges that the report relies on country of origin information which was not disclosed to the applicant and was selectively used to the disadvantage of the applicant, having regard to the specific testimony she gave of being refused treatment in Lagos and of the fact that the Nigerian authorities frequently claim that treatment is available when in reality it is not because the hospitals are on strike and the patients have to provide their own blood donors.

10. However well founded those arguments may be, for the reasons set out in more detail in the court's judgments in the cases of *Akintunde, Ajoke*, and *Shange*, (above) the Court considers that in the particular scheme of the 1996 Act, as now amended by s. 10 of the Act of 2003, there is no general obligation on the Commissioner to disclose or put country of origin information to an applicant where the information is consulted only in order to verify general circumstances or conditions in the country of origin. As described in those judgments, there may well be cases where the need to respect the right to a fair procedure will require specific information to be put to an applicant for rebuttal before a report is finalised but that will normally arise only when the effect of the information is to contradict some specific fact or event peculiar to the personal history which is the basis of the claim to a fear of persecution given by an applicant.

11. Here, the country of origin information was consulted to obtain general information on the availability of treatment of persons with the applicant's condition in Nigeria. If the applicant considers that the country of origin information in question is wrong, out of date, incomplete, or that it has been selectively misused in the report, then she is entitled to so argue on the appeal and to challenge it by the submission of new country of origin information. That is the precise purpose and function of the statutory appeal remedy.

12. The second proposed ground concerns the issue of credibility. The report finds the applicant's story lacking in credibility, particularly in relation to the role of her husband. She had claimed that he had thrown her out because she had Aids and wanted nothing to do with her. The authorised officer questioned the plausibility of this, given that the husband was said to have funded her trip to Ireland with his unborn child. (The husband is apparently a banker, a well paid occupation in Nigeria.) Again, it is not the function of this Court on judicial review to assess credibility. It is the function of the Commissioner and on appeal, the function of the Tribunal member. That is why, where no section 11 (6) findings have been made the appeal will enable the applicant to give personal testimony again, and the statutory appeal is the appropriate remedy for alleged failings in the assessment of credibility by the Commissioner. It is argued that doubts should have been, as it was put, "teased out" with the applicant in the interview. While not accepting that proposition as a legal requirement, the Court notes that the authorised officer in this case did, in fact, put to the applicant the question as to why her husband would help her to leave if he had rejected her (see p. 9 of the section 11 interview).

13. The third ground relates to the European Communities (Eligibility for Protection) Regulations 2006. The Court considers that no ground of substance has been raised or explained under this heading. The report states on its face that the regulations have been taken into account in assessing the application and it is clear that most of the matters which arise to be considered under the regulations overlap with matters which arise to be considered also under the 1996 Act. It was argued that, in particular, the provisions of Regulation 5, para. 1 at headings a) to d); Regulation 5 para. 2; and Regulation 5, para. 3 at heading c) should have been addressed in the report. The Court does not accept that an authorised officer is obliged under the regulations to set out mechanically in the report a checklist of matters itemised in Regulation 5 and to, as it were, tick off each of them whether relevant to the case or not. Whether or not there has been a failure to comply with the regulation depends upon the substantive content of the report taken as a whole and in this instance the Court is satisfied that no substantial ground for the existence of such a failure has been made out.

14. As regards the complaint that there was a failure on the part of the Commissioner in the shared duty to inquire into all relevant facts by conducting specific inquires into the availability of treatment for HIV Aids in Lagos hospitals, the Court considers that any such investigative obligation, as may fall upon the Commissioner, does not extend that far. The authorised officer accepted that the applicant could be said to belong to a particular social group namely, one comprised of women with a HIV Aids condition and that she expressed a fear of serious harm if returned because she would not get medical treatment for that condition. In addressing that claim in the report, the authorised officer assesses the level of medical care available to that group in Nigeria. The applicant may well disagree with the adequacy of that assessment and insist that it should have gone further or been less selective or biased. Again however, that is pre eminently an issue capable of being, and suitable to be, addressed on the appeal before the Tribunal. It is essentially a contention that a different view should be taken as to availability of such treatment in Nigeria. If there is evidence that the assessment was wrong, then it must be evaluated by the Tribunal with the aid, if necessary, of the applicant's personal testimony and any new country of origin information she may wish to produce together with any researches of his own that the Tribunal may consider it proper to conduct in the light of her claim. Until that process has been completed by an appeal decision, however, any alleged illegality in the full assessment is not apt for judicial review.

15. Finally, it is argued that no separate analysis of the child's claim to asylum was made. No oral argument was addressed to the court by either party in relation to this ground and no mention of it was made in the written legal submissions lodged. The child is not a party to the proceeding and no separate case appears to be made to the Commissioner on the child's behalf apart from the answers given by the applicant at the interview to questions as to what she feared for her child if they were both returned to Nigeria. She is recorded as answering, "No one is going to want my child. He, (her husband), didn't care about the child." She was asked also about the possibility of her child receiving HIV treatment in Nigeria. Paragraph 4.6 of the report then states, "Her allegation concerning the welfare of her child is linked to her own claim. I do not find credible the applicant's claim that she has no family support in Nigeria particularly that of

her husband. She claims her child may be HIV positive. However this can only be verified pending results from Crumlin Children's Hospital and is not certain."

16. It is not strictly correct therefore to say that the position of the child was wholly ignored, even if it was not explicitly subjected to a distinct analysis. Nevertheless, the statement that the two claims were linked is clearly correct. If the applicant wishes to elaborate upon what was said in relation to the child at the interview, it is again a matter that is apt to be dealt with by means of the statutory appeal. The complaint, in other words, is directed not at the total absence of consideration of the child's position but at the adequacy, depth, or thoroughness of the Commissioner's investigation. In that sense it goes to the quality of the report and not to its inherent unlawfulness.

17. For these reasons, the Court will refuse leave in this case and the applicant will be left to the remedy of the statutory appeal. It is therefore unnecessary to consider the application for an extension of time.