Neutral Citation Number: [2010] IEHC 361

THE HIGH COURT

JUDICIAL REVIEW

2008 293 JR

BETWEEN/

Z. D. Y.

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 14th day of October, 2010.

1. By order of 20th May, 2010, leave was granted to the applicant by Clark J. to seek judicial review of a report dated 22nd November, 2007, made by the Refugee Applications Commissioner under s. 13 of the Refugee Act 1996 in which a negative recommendation was made on the applicant's application for asylum. Leave was granted on the basis of a single ground as follows:

> "Whether before determining the s. 13 (6) applied, the ORAC officer should have considered the effect of that finding on the applicant's ability to dispute the implied internal relocation finding contained in the report at an oral hearing in accordance with the reprimanded (sic) procedures contained in Part III of the UNHCR Guidelines on Internal Relocation."

2. Somewhat unusually, although this judicial review application was commenced more than fourteen days after the receipt by the applicant of the notification of the Contested Report, a decision on the application for the necessary extension of time for the purpose of s. 5 of the Illegal Immigrants (Trafficking) Act 2000 was not made by Clark J. but was apparently postponed by consent of the parties to be determined at the substantive hearing. The Court will deal with this issue at the end of the judgment.

3. The single ground above arises in the following context. The applicant is a native of China who arrived, lawfully, in the State in 2001 on a one-year visa which he had obtained in Beijing. He remained after the expiry of that period and though he claims not to speak English, he has been able to work and support himself and to pursue a career as a musician including, notably, playing at a concert with the popular group "The Chieftains" in the Royal Dublin Society premises.

4. He did not apply for asylum on arrival in the State in 2001 nor in Denmark through which he travelled on his way here. It was not until 23rd April, 2007, that he made the application. When doing so he claimed to fear persecution if returned to China for his beliefs in and practice of the Christian religion. He said that while in university in China in 1997 he had become interested in Christianity. On finishing his studies he returned to his home town of Shenyang where he was a practising Christian. He claims that a prayer meeting which he attended was broken up by the police; that he was later detained and then sent to a labour camp for six months. On release he went to the house of an aunt in Liaoyang where he stayed for a year during which he was able to practice his religion without difficulty. He then travelled to Beijing and obtained the visa.

5. His claim for asylum as made to the Commissioner and in the s. 11 interview was based primarily on the mistreatment he claimed to have suffered as a practising Christian in China as supplemented by country of origin information confirming the repressive treatment of practising Christians by the Chinese authorities.

6. Although the above single ground refers to "the implied internal relocation finding" it would appear to the Court that on any fair reading of the Contested Report, the negative recommendation is in fact supported by two findings, both of which are reasonably explicit. In section 4.2 of the Report the Commissioner's officers point to the fact that the mistreatment occurred in the applicant's home town of Shenyang but that he was able to live freely and practise as a Christian for a year while he was with his aunt in Liaoyang. They then give what appears to be a specific finding in these terms:

> "When asked why he did not remain in this city, the applicant replied 'no matter how safe it was, Liaoyang was not my home and I did not want my aunt to be disturbed.' Although it is true that Liaoyang is not the applicant's home, he has Christian relatives there and it is clear that he was not in any immediate danger and did not suffer any form of persecution while in the city. Moreover, there is nothing to suggest that he would be in any danger were he to return to that city."

7. In section 4.3 of the Report the officers first cite a passage from Professor Hathaway's "*The Law of Refugee Status*" to the effect that those in genuine fear of persecution do not delay in seeking international protection when they reach a place of refuge. The officers then note the six year delay on the part of the applicant and quote his explanation for this namely: "I was very worried that if I applied for asylum that the Chinese government would find out". He further stated that he decided that it was safe to apply for asylum when he "learned that people from Falun Gong had applied for asylum and nothing bad had happened to them."

8. The Report then gives the conclusion at which the ground for which leave was granted is directed:

> "This is not considered a reasonable explanation for the applicant's delay in seeking asylum. The applicant has been working in Ireland and has had approximately six years in which to learn about the asylum process – including the fact that asylum applications are dealt with in confidence – in the State. The fact that he did not apply for asylum on, or soon

> after, his arrival in the State suggests that he did not feel in need of international protection when he left his native country."

9. It was on that basis that the officers then went on to include in the report a specific finding by reference to s. 13 (6) (c) of the 1996 Act:

> "As set out above, I find that s. 13 (6) (c) of the Refugee Act 1996 (as amended) applies: that the applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State."

10. Having regard to the facts that the applicant: a) lived without persecution for one year after his period in the labour camp; b) was able to leave China legally with a valid passport and a visa for Ireland; and c) was able to live openly and work for six years in Ireland without seeking protection; this can only be construed in the Court's judgment as a finding of an absence of credibility in the assertion by the applicant that he had fled China as a result of religious persecution and that he had any genuine fear of such persecution when applying for asylum in 2007.

11. That being so, it may be open to question whether, even if the present application is successful on the above single ground, it would be necessary or appropriate to quash the report in its entirety. It must be borne in mind that, strictly speaking, a s. 13 report does not, as such, contain a "decision" on the asylum application. Under the 1996 Act the Commissioner is required to interview the asylum seeker and to report to the Minister on his investigation of the asylum claim with a recommendation which is either positive or negative. The decision to refuse a declaration of refugee status is that made by the Minister under s. 17 of the Act. Thus, where a s. 13 report contains two distinct conclusions, an error as regards one of them may not deprive the Minister's decision to accept the negative recommendation of its validity.

12. However, as this possibility has not been adverted to by the parties or argued in the present case, it is appropriate and necessary to deal with the ground for which leave has been granted.

13. The essential argument advanced in support of the ground is that an authorised officer has a discretion, or at least a margin of subjective judgment, in deciding to include or exclude a finding for the purposes of s. 13 (6) (c). Counsel submits that, because the consequence of including that finding is to deprive an applicant of an oral hearing on appeal, the officer has an obligation in law to consider whether it is appropriate or necessary to do so where the report makes a finding as to the availability of national protection in the form of internal relocation. More particularly, reliance is placed upon the UNHCR Guidelines in relation to the approach to be recommended in assessing internal relocation. Thus, para. 36 of the Guidelines provides:

> "Given the complex and substantive nature of the inquiry, the examination of an internal flight or relocation alternative is not appropriate in accelerated procedures, or in deciding on an individual's admissibility to a full status determination procedure."

These Guidelines, it is submitted, should have been considered but appear to have been ignored and if it had been felt appropriate to depart from the Guideline the reason for so doing in the case should have been explained in the report.

14. It is argued that, as a result, this applicant would be materially disadvantaged in attempting to appeal to the Tribunal against the relocation finding because he would be unable to testify in person as to the reasons why internal relocation to Liaoyang would not provide protection. (In passing it should be pointed out that an appeal to the Tribunal was apparently lodged in the present case without prejudice to the present judicial review application but was rejected by the Tribunal as being out of time.)

15. The issues thus raised on this application turn primarily upon the effect to be given to subs. (5) and (6) (c) of s. 13 of the Act. The provisions, so far as relevant to the issue raised are as follows:

> (5) Where a report under subs. (1) includes a recommendation that the applicant should not be declared to be a refugee and includes among the findings of the Commissioner any of the findings specified in subs. (6) then the following shall, subject to subs. (8) apply: … the applicant may appeal to the Tribunal under s. 16 against the recommendation within ten working days … and any such appeal will be determined without an oral hearing;
>
> (6) The findings referred to in subs. (5) are …
>
> > (c) That the applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State."

16. The argument upon which the ground is based is predicated, in effect, on the proposition that the author of the s. 13 report has a discretion as to whether to include or omit any one or more of the findings of subs. (6) even when the relevant facts have been indisputably established by the investigation of the asylum application. If, in deciding to include or omit a subs. (6) finding, the officer is to be required to consider the impact of excluding an oral hearing on the conclusions which support the negative recommendation, it can only be by the exercise of a discretion to ignore the effects of facts found in the investigation whenever it is necessary to guarantee an appellant an oral hearing.

17. It should first be pointed out that so far as the factual basis of the report is concerned, the Commissioner was entirely justified in concluding that the applicant had failed to make an asylum application as soon as practicable after arrival in the State. Given the fact that he claimed to have suffered actual persecution in China together with the lapse of over five years following arrival, that conclusion was inevitable and is unassailable. The only other element involved in the decision of the authorised officer to include the statutory finding is the absence of a "reasonable cause" and that, obviously, requires an assessment or judgment on the part of the officer. If the effect of the finding in excluding an oral hearing is irrelevant to that assessment, it is equally obvious in the judgment of the Court that the officer was entirely justified in concluding that the applicant's explanation did not constitute a "reasonable cause". To paraphrase the quotation from Professor Hathaway, if the applicant did indeed leave China because of his previous persecution and if he genuinely feared further persecution if returned, it is extremely hard to believe that he would take no step to eradicate that fear for up to six years following his safe arrival in the country which he had deliberately sought out as place of refuge and for which he had lawfully obtained a visa. Even if there had been some delay immediately upon arrival, it is difficult to understand why, upon the expiry of his one-year visa, he would not then have applied for asylum rather than risk coming to the attention of the Irish authorities as undocumented. For that reason alone the officer was clearly entitled to assess the explanation given as not constituting a reasonable cause.

18. Accordingly, insofar as the inclusion of the finding under s. 13 (6) (c) in the report can be said to constitute a discrete decision on the part of the author which has consequential disadvantage for the applicant and, as such, is therefore susceptible of judicial review independently of the content of the report, it is obvious that it could not be challenged in this case as being mistaken in fact or as manifestly unreasonable in its evaluation of the explanation given for the delay in claiming asylum.

19. The first reason why the central argument supporting the ground is unfounded in the Court's judgment is that the Commissioner does not have a discretion to ignore or to decide to omit from the report findings made in the investigation of the application which are relevant to the recommendation made to the Minister. Under s. 11 (1) of the Act of 1996, it is the function of the Commissioner "to investigate the application for the purpose of ascertaining whether the applicant is a person in respect of whom a declaration should be given". Clearly, this involves assessing the truth of the claim and of the facts upon which the claim is based and for this purpose s. 11B requires the Commissioner to have regard to the factors set out in paragraphs (a) – (m). These include at para. (d):

> "Where the application was made other than at the frontiers of the State, whether the applicant has provided a reasonable explanation to show why he or she did not claim asylum immediately on arriving at the frontiers of the State unless the application is grounded on events which have taken place since his or her arrival in the State."

20. It follows that if, as in the present case, the authorised officer has doubt as to some or all of the account given by the asylum seeker, she is bound to have regard to the factor itemised at paragraph (d). If, as a matter of fact, asylum has not been claimed at entry to the State and, *a fortiori*, if a period of years has elapsed since entry, there would be an obvious failure to discharge the essential investigative function on the part of the officer if she should choose to omit a finding to that effect other than on the basis that a reasonable explanation had been sought and given for the delay.

21. Thus, if the chronology of an applicant's personal history there has been a clear lapse of time between arrival in the State and the making of an asylum application, the authorised officer is bound to query credibility and must necessarily report to the Minister on that issue including the explanation given for that delay. The officer cannot therefore choose to omit the resulting finding on that issue from the report.

22. Secondly, it is not the function of the Commissioner to write or adjust the report under s. 13 with a view to facilitating or influencing any possible appeal. The statutory function of the Commissioner is to investigate, report and recommend. What happens thereafter on the basis of the report is a matter for the asylum seeker, the Tribunal and the Minister. There may not be an appeal. The Minister may decide (as he is entitled to do) under s. 17 (1) (b) to grant a declaration notwithstanding a negative recommendation. It is no part of the function of the Commissioner to speculate as to whether there will be an appeal or what the grounds of appeal might be or to formulate his report on an assumption that there will be an appeal. The duty of the Commissioner is to perform his statutory function objectively, impartially and in full. What happens thereafter is not his concern. To allow the Commissioner a discretion to pick and choose which findings go into a report by reference to the possibility of an appeal, is to concede also a latitude to formulate such reports with a view to restricting the possibilities for a successful appeal.

23. Thirdly, it does not follow that because the report includes an apparent finding on internal relocation in this case that the applicant is deprived of some advantage or entitlement on appeal by reason of its being a written appeal only.

24. As counsel for the Minister has pointed out, this particular finding on relocation in the report is based entirely on the applicant's own account of what happened to him in China. Indeed, the finding might more properly be characterised as an observation on the credibility of the applicant's own claim to risk persecution in China rather than as a formal inquiry by the asylum investigation into possible areas of relocation in the country of origin at which the UNHCR Guidelines are directed. The reality of the applicant's position in any appeal is this. He has already given his account of what happened to him before he left China in 2001. That account does not appear to have been questioned. He has not been in China since. He cannot therefore in any oral hearing give personal testimony as to the present treatment of Christians in Liaoyang. If he is to challenge the finding on appeal in order to establish that he now has a basis for a genuine fear founded on a forward looking assessment of what he would face in China if returned, it can only be by means of country of origin information as to the current treatment of practising Christians by the Chinese authorities in that area. That does not involve any necessary oral hearing in the appeal if the appeal is to be effective.

25. For these reasons the Court is satisfied that the application for judicial review to quash the report must be dismissed.

26. In view of that ruling on the substantive issue for judicial review it is probably unnecessary to deal with the outstanding issue of the postponed application for an extension of time. For the avoidance of doubt, however, and for future reference the Court would make it clear that, in its judgment, s. 5 of the Illegal Immigrants (Trafficking) Act 2000 does not permit an order granting leave to be made in a case where the application for judicial review is commenced outside the fourteen day limitation period unless there has first been a determination that there is good and sufficient reason to grant the necessary extension. The terms of s. 5(2)(c) of that Act are clear and mandatory. However, because this issue does not appear to have been adverted to at the leave hearing this Court has dealt with the substantive ground in order to avoid superfluous litigation and expense.