NEUTRAL CITATION NUMBER [2012] IEHC 308

THE HIGH COURT

JUDICIAL REVIEW

[2008 No. 708 J.R.]

BETWEEN

D. D. A. [Nigeria]

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 18th day of July 2012

1. By order of the Court (Cooke J.) of the 27th July, 2011, the applicant was granted leave to apply for judicial review of the decision of the Refugee Appeals Tribunal dated the 17th April, 2008, given upon his application for asylum under the Refugee Act 1996 (as amended). Leave was granted upon three grounds as follows:

> (1) The Tribunal erred in law in basing the rejection of his appeal upon a finding that protection by means of internal relocation within Nigeria was available to the applicant without considering ground 7, of the notice of appeal dated the 10th February, 2008, and the country of origin information cited therein and in failing to state any reason for the rejection of that ground;
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> (2) The decision is unlawfully flawed and unsound in that it is unclear and ambiguous as to whether the Tribunal member accepts or departs from the findings of lack of credibility on the applicant's claim contained in s. 13 of the Report of the Commissioner when proceeding to deal exclusively with the issue of internal relocation;
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> (3) The decision is an inadequate adjudication on the applicant's appeal in that it fails to consider and decide and to give reasons for rejecting ground 6, of the notice of appeal directed at the finding of the availability of state protection in Nigeria.

2. The applicant is a national of Nigeria who arrived in the State in January 2008, and made an application for asylum. The application was based upon his claim to fear persecution if returned to Nigeria as a result of his involvement in a dispute over a plantation boundary upon which he was required to adjudicate in his position of high chief of his village. He gave an account of having taken over from his father as chief in his rural village which gave him responsibilities in supervising village affairs, including resolving land and boundary disputes. He lived in the village in a house with his wife and daughter and also owned a poultry farm. He ruled on one boundary dispute which gave rise to disagreement among the villagers concerned and he claimed that his house was attacked and burned down. He said his wife had died as a result of the fire. He sent his daughter to live with an aunt.

3. He left the village and went to Lagos where he remained for a week before an agent arranged for his travel from Nigeria via France to Ireland at the beginning of January 2008.

4. In a report under s. 13 of the Act of the 1996, dated the 25th January, 2008, the claim for asylum was given a negative recommendation based partly on doubts as to the veracity of the account he had given but also upon findings that he had not made sufficient efforts to secure protection in Nigeria by reporting the matter to the police. The Authorised Officer also made a finding as follows: "The applicant alleges that he could not relocate to anywhere in Nigeria as he believes he would be killed because of his involvement with land disputes. While this element of his claim cannot be proved (or disproved) it was not accepted that there was nowhere in his country he could go and live safely. Country of origin information from Nigeria would indicate that those who fear non state agents of persecution can quite easily relocate to prevent persecution occurring". Annexed to the s. 13 Report was an extract from a UK Home Office, Border and Immigration Agency "Country of Origin Information Report" on Nigeria dated the 13th November, 2007, which cited at paras. 7.06 and 7.07 a British Danish "Fact Finding Mission" Report to the effect, *inter alia*, that "[i]t is possible for Nigerians to relocate to another part of Nigeria to avoid persecution from non-state agents, however, those Nigerians who do relocate may encounter problems". This was a reference to some individuals facing difficulties with regard to lack of acceptance by others in the new environment as well as lack of accommodation etc.

5. The hearing before the Tribunal took place on the 15th April, 2008, and as already indicated, the appeal decision was given on the 17th April, 2008.

6. Before dealing with the arguments addressed to the Court on the three leave grounds, it is necessary to rule upon a preliminary objection raised by the respondents arising out of events that have occurred since the judicial review proceeding was commenced and since leave was granted by the order referred to above. It was submitted that these developments clearly indicated that the applicant was not a refugee and had no need of international protection and that accordingly, the Court ought now to dismiss the proceedings as devoid of purpose.

7. The events to which this submission relates are as follows. The Tribunal appeal decision was apparently notified to the applicant and his then solicitors, the Refugee Legal Service, by letter of the 9th June, 2008. The judicial review proceeding was issued out of the Central Office of the High Court on the 20th June, 2008, but was not served upon the respondents until the 3rd July, 2008. In the interim, on the 30th June, 2008, after the expiry of the statutory period of fourteen days allowed for introducing a challenge by way of judicial review to a Tribunal decision, the Minister sent the applicant the standard "three options letter" under s. 3 of the Immigration Act 1999. At that point the first named respondent was unaware that the judicial review proceedings had been commenced.

8. No immediate response was apparently made by or on behalf of the applicant to the "three options" letter within the fifteen day period allowed, but on the 20th November, 2009, that is, over a year later, the applicant through a different solicitor purported to make representations seeking leave to remain temporarily in the State under s. 3 of that Act. This application was based upon the fact that in the interim the applicant had formed "a long-term relationship" with an Irish citizen with whom he was living and a daughter was born to them on the 17th June, 2009, and was accordingly, an Irish citizen. Although living together the applicant and his partner had not yet married as the latter was awaiting the outcome of divorce proceedings in respect of a previous marriage. (In March 2011, the partner consented to an order being made in the District Court under s. 6A the Guardianship of Infants Act 1964 appointing the applicant joint guardian of that child).

9. The Minister did not make any direct response to the representations and on the 31st March, 2011, the solicitor in question wrote on behalf of the applicant notifying him of the joint guardianship and referring to the judgment of the Court of Justice of the European Union in case C34/09 *Ruiz Zambrano*. The letter effectively claimed an entitlement on the part of the applicant to be permitted to remain and to be granted a work permit on the basis of that judgment.

10. By letter of the 28th November, 2011, that application was accepted by the Minister and temporary permission to remain was granted until the 28th November, 2014 subject to a series of conditions. As a result, the applicant is not only entitled but obliged to "continuously reside" in the State during the currency of that permission and does not face the deportation that the Minister had proposed in the "three options" letter.

11. It is in these circumstances that it is submitted that the applicant is not a refugee and has no need of international protection such that, in effect, the current judicial review is moot and the applicant has no "vested interest" - as it was put – in its pursuit. In addition, it is argued that by making representations for leave to remain following receipt of the "three options" letter, the applicant has effectively acknowledged that he is not a refugee. It was pointed out that where the addressee of such a letter makes an application for subsidiary protection (one of the three options), the Minister is entitled to assume that any challenge to the outcome of the asylum process is abandoned because it is a precondition of making an application for subsidiary protection that the individual concerned is not a refugee. It was argued that there would be "difficulties" for the Minister if the consequence of taking the option of making representations for temporary leave to remain was different from that of the subsidiary protection option.

12. Counsel for the applicant, on the other hand, argued that there was no legal incompatibility between the making of an application for leave to remain because of the intervention of the subsequent birth to the applicant of an Irish citizen child on the one hand and the pursuit to its conclusion of the asylum process. It is pointed out that the existing right of residence was purely temporary and subject to a series of conditions such that it would expire in 2014 and might be withdrawn before then. Furthermore, as a matter of the law, the status of refugee confers benefits distinct from those available to the applicant under the current temporary permission.

13. In the judgment of the Court, the applicant is not precluded in these circumstances from prosecuting to its conclusion the judicial review proceeding commenced in respect of the Tribunal decision and in respect of which leave has already been granted. The fact that he has been granted temporary permission to remain until 2014 on the basis of entirely new facts and intervening events does not, in the absence of any statutory provision to this effect, defeat his entitlement to seek to have his refugee status declared. A declared refugee might well marry an Irish citizen and become the parent of an Irish citizen child. The recognition of the individual's status in international law would not be altered by that fact. Furthermore a third country national may be present in the State on, say, a five-year visa or permission for study or employment and yet, because of some change of circumstances in the country of nationality, become a refugee *sur place* and entitled to a declaration to that effect. The fact that such an applicant for asylum has an existing permission cannot alter the effect of those circumstances on his or her status in international law under the Refugee Convention of 1951.

14. In the present case, the applicant is the subject of a statutory ruling by the Tribunal adverse to his interests. It is under challenge in the present proceeding and substantial grounds have been accepted as established by the Court as to why the decision may be flawed. For these reasons the Court considers that the objection raised is unfounded and if the applicant insists upon proceeding with the substantive hearing of the application the Court has no entitlement to refuse.

15. It is necessary to return therefore to the basis upon which the Tribunal decision affirmed the negative recommendation of the Commissioner.

16. As already indicated above, the s. 13 Report based its negative recommendations upon at least three elements namely, doubts as to the veracity of the account given as the basis of the claim to a fear of persecution; a specific finding that it had not been established that state protection in Nigeria was unavailable to the applicant; and a finding that protection would have been available to him by internal relocation.

17. In Part six of the Tribunal decision, the Tribunal member refers briefly to the background to the claim and the personal history given by the applicant and it is true that some of the language used could be read as indicating a degree of scepticism on the part of the Tribunal member. He says, for example, "It seems extraordinary the applicant did not take his partner from what he perceived to be the upcoming destruction of his livelihood on the grounds that he did not believe that they would interfere with a woman". He also says that whilst "the question of travel was not terminal to his application, the applicant's explanations in that regard were less than plausible and credible".

18. The position remains, however, - and counsel for the respondents did not take issue with this - that the decision contains no actual findings of disbelief or lack of truth on the part of the applicant. Nor does it contain any discussion of, or finding upon, the question of the availability of state protection except insofar as the failure of the applicant to report the attack on the house to the police is noted in the summary of the background in Part two of the decision.

19. Clearly, the Tribunal decision can only be read as basing its affirmation of the negative recommendation upon the single explicit finding in respect of the issue of internal relocation. It is contained in four short paragraphs as follows:-

> "On the question of relocation the applicant stated he believed he would be found and killed no matter where he went in Nigeria. There is little to support him in the country of origin information from Nigeria in this regard.
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> It appears to the Tribunal the alleged dispute related to the village in which the applicant lived. In the circumstances it is quite unbelievable that the applicant could not have remained in Lagos rather than having to take a plane from Lagos to Dublin. Indeed in advance of departing Nigeria the applicant could have relocated to another part of Nigeria.
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> He was effectively the chief priest or chieftain of his village and it stretches credibility he would be recognised in other

> parts of Nigeria including Lagos. Lagos has a population of 12 million people and the country of Nigeria itself has a population in excess of 139 million plus.... Altogether it is the opinion of the Tribunal member the applicant could easily have relocated in Lagos or some other part of Nigeria having regard to the fact that he was a business man and presented himself as an educated person."

20. The challenge contained in the first of the grounds for which leave was allowed is based upon the proposition that this is an inadequate or incoherent response to Ground 7 in the notice of appeal. In that ground it was maintained that"... it would not be possible for him to internally relocate in Nigeria. The appellant moved first to Ife and then to Lagos. He states that the ethnic groups would be able to trace him in Lagos". This assertion was supported by an extract annexed to the Notice of Appeal from an Accord/UNHCR Country Report from Nigeria of 2002 quoted as follows:

> "When considering the possibility of an internal relocation alternative, one should recall the pervasive social network Nigerians rely on. It is extremely difficult to make a living in Nigeria without the support of the extended family or another social network (such as associations, secret societies etc.). If a person relocates within Nigeria, he or she will usually seek to find shelter with a relative or a member of his or her own community of origin. This means, however, that the same network which accord protection can become a source of persecution if somebody has run afoul of his or her community. Informal communications networks function very well in Nigeria, and it is not too difficult to find a person one is looking for. (Emphasis added). This is true also for so-called big cities whose neighbourhoods are structured along village and community lines. It is not possible for someone to hide with another than one's own community."

21. It is submitted on behalf of the applicant that this was specific and relevant country of origin information demonstrating that social structures and conditions in Nigeria were such that it was indeed credible that an individual might find it difficult to avoid being traced or followed even when relocating to a major city such as Lagos. The applicant, as the decision itself acknowledged, had claimed that he would be found and killed no matter where he went in Nigeria. The comment "There is little to support him in the country of origin information from Nigeria in this regard" is submitted to be a wholly inadequate assessment of the issue having regard to the explicit content and citation in Ground 7 of the appeal.

22. While it might well be said that this is a borderline case, the Court is satisfied that this first ground has been made out and that it is necessary in the particular circumstances of this decision to grant the order sought. Counsel for the respondents has argued forcefully that the Tribunal member's conclusion on the issue of internal relocation is clearly stated and the reasoning behind it is readily discernible. The suggested rationale is essentially as follows: "The applicant claimed to have fled from his village out of fear of violence from a small number of particular individuals involved in a land dispute. These were non state actors with a particular grievance against him. He had himself gone to Lagos and experienced no difficulty there albeit for only one week. The conclusion was eminently open to the Tribunal member because of the information contained in the report referred to above as attached to the s. 13 Report, namely that internal relocation in Nigeria was invariably an option. The information quoted in the Report mentioned in ground 7 of the appeal related only to individuals fleeing where they had been turned on by their own community. The applicant was a person of authority and education such that difficulties of accommodation, survival and making a living in Lagos did not arise."

23. While it may well be that this is an explanation for the thinking that lies behind the conclusion on this issue in the contested decision, it effectively involves constructing a hypothesis as to the Tribunal member's reasoning. The addressee of a Tribunal decision ought not to be required to construct a hypothesis in order to understand why an appeal has been rejected. As MacMenamin J. put the principle in *Clare Co. Council v. Kenny* [2009] 1 I.R. 22, " ... a court in judicial review proceedings cannot act on what must be at best a hypothesis as to the possible rationale for the decision, particularly so in the context of an array of possible reasons, some of which would go beyond jurisdiction... The situation required a decision so that all parties would be aware precisely of their positions. The reason or rationale for the decision as to jurisdiction unfortunately cannot be inferred from what was said by the respondent." Furthermore it is an elementary principle of administrative law both in this jurisdiction and at European Union level that the obligation on a decision maker to state clear and intelligible reasons for a decision affecting the rights and entitlements of its addressee is twofold. It ensures that the addressee has sufficient information to understand why the adverse decision has been made and to be satisfied that it is lawful and it enables the Court to review the validity of the decision in law in the exercise of its judicial review function. (See for example the judgments of Murray CJ in *Meadows v Minister for Justice* [2010] 2 I.R. 701 at paras 46 and 53: Murphy J in *O'Donoghue v. An Bord Pleanala* [1991] I.L.R.M 750 at p.757 and of the Court of Justice in *Delacre & Ors v Commission [1990] ECR I-395 at para. 15*.) Furthermore, this is a case in which a number of specific grounds had been raised in the notice of appeal against the clearly stated findings in the s. 13 Report. The Tribunal member has decided, as he was perfectly entitled to do, to consider only the issue of internal relocation and, having concluded as he did, to find it unnecessary then to address the arguments that had been advanced in relation to the questions of credibility and state protection. Having decided to base the rejection of the appeal exclusively upon this single issue, there was an obligation, in the view of the Court, to address directly the terms upon which the internal relocation finding in the s. 13 Report had been challenged. Having regard to the fact that the s. 13 Report supported its conclusion by reference to the information at paras. 7.06 and 7.07 of the annexed country of origin report referred to at paragraph four above and that in Ground 7 the applicant had countered this by the passage quoted from the ACCORD/UNHCR report, the single observation "There is little to support him in the country of origin information from Nigeria in this regard", is in the judgment of the Court a response which is inadequate because the basis for it is by no means obvious. The phrase used concedes that there is some support even though it is only "little". But what is that support? Is it the ACCORD/UNHCR report or some other source researched by the Tribunal member, or both? The applicant had said he would be found and killed no matter where he went and ground 7 gave information as to why this should be so and ought to be accepted. Simply to say by way of reply that there "is little support" for his contention is, in the judgment of the Court, a failure of rational adjudication on an appeal ground. It may be that the Tribunal member considered that the picture of extended family support and social networks given in the Ground 7 quotation would have no application in the case of a mature male adult who had carried on a business and had occupied the position of village chief. The difficulty is that the explanation for impliedly rejecting the ground has not been stated. It follows that the applicant is entitled to have the decision quashed on that basis.

24. While, strictly speaking, it is not then necessary to rule upon the second and third grounds for which leave was granted, the Court will, for the sake of completeness, indicate that it could not consider either of those grounds as having been established. As already indicated above, the Tribunal decision is clearly based upon a single finding in relation to internal relocation. In the absence of an explicit finding of disbelief, the decision must be read as constituting an acceptance on the part of the Tribunal member that at least some of the events relied on by the applicant had occurred such that he had some need of the protection that would be found by internal relocation. Any possible ambiguity or lack of clarity on the issue of credibility was, accordingly, irrelevant to the basis for the Tribunal member's essential conclusion. Similarly, ground 6 of the notice of appeal was not addressed by the Tribunal member because it was unnecessary for him to do so having regard to his finding on internal relocation.

25. An order of *certiorari* will accordingly, issue to quash the Tribunal decision of 17th April 2008.