Neutral Citation Number: [2012] IEHC 341

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 588 J.R.]

BETWEEN

V. P. F. [Cabinda/Angola]

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 31st day of July 2012

1. By order of the Court of the 18th July, 2011, the applicant was granted leave to apply to the Court by way of application for judicial review of a decision of the first named respondent which refused her application for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006, as notified to her by letter dated the 7th April, 2011.

Leave Grounds

2. Leave was granted on the basis of the grounds set forth in the statement of grounds as follows:

> (1) The first respondent acted in breach of Article 4(1) of Council Directive 2004/83/EC and/or acted in breach of fair procedures and natural justice by failing to put the applicant on notice that the first named respondent intended reaching a different conclusion concerning the issue of risk to FLEC members to that reached by the Refugee Appeals Tribunal and by the first named respondent in the determination of the applicant's refugee status application so that the said matter could be addressed by the applicant prior to the determination being made refusing her subsidiary protection application;
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> (2) The first respondent failed to consider relevant matters by adopting the finding of the Tribunal that the applicant's evidence concerning the attack in 2006 was implausible without have regard to the submissions made concerning this finding in the letter of the 25th March, 2010, sent to the first respondent by the applicant's solicitors;
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> (3) In adopting the finding of the Refugee Appeals Tribunal that the applicant's evidence concerning the attack in 2006 was implausible the first respondent adopted and relied on an error of fact as it is not the case that "at one point in her application she stated she was attacked because she was in FLEC" because in fact the applicant only ever stated that she had a belief it must have been due to her FLEC activities and that at all times qualified that belief by indicating that she could not know with any degree of certainty this was the reason for the attack;
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> (4) In adopting the finding of the Refugee Appeals Tribunal that it is reasonable to assume that when the applicant was discharged from hospital and resumed her teaching she would have contacted her friends who had been attacked with her and in holding against the applicant the fact that she does not have any knowledge of what happened to these friends, the first respondent failed to take into account the applicant's account that these individuals had been disappeared and the respondent failed to take into account relevant submissions made concerning this finding in the letter of the 25th March, 2010, sent to the respondent by the applicant's solicitors;
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> (5) The lack of an appeal mechanism including an oral hearing against the decision herein to refuse subsidiary protection is a breach of the principle of equivalence under EU law as the applicant's subsidiary protection application, based on EU law, has been subjected to rules that are less favourable than those applied to a refugee status application, such a case being based on national law.

Asylum process

3. The background to these issues is that the applicant is a national of Angola who claims to come from the exclave of Cabinda and to have been a member of the Front for the Liberation of Cabinda (FLEC) a group fighting for its independence from Angola. She claimed that in 2006, with other members of that organisation she was arrested, detained and subjected to torture and rape. She arrived in the State in April 2007, and applied for asylum. In support of her application she presented a national identity card from Cabinda and her FLEC membership card. She was interviewed under s. 11 of the Refugee Act 1996, in June 2007, and a report under s13 of that Act, was given on behalf of the Commissioner dated the 6th July, 2007, in which a negative recommendation was made essentially upon the basis of a conclusion that due to her lack of detailed knowledge of the FLEC organisation, it was doubted that the two incidents which she described, her suspension from her job in 2007 and an alleged assault in 2006, were related to her membership of that political organisation.

4. The report of the Commissioner was appealed to the Refugee Appeals Tribunal and country of origin information was submitted in support of the appeal. Previous Tribunal decisions were also presented as was a SPIRASI medical report on the applicant. The appeal hearing took place on the 10th September, 2009, and a decision of the Tribunal member dated the 7th December, 2009, was issued to the applicant on the 25th January, 2010. Subsequently an application for subsidiary protection was made on behalf of the applicant on the 19th March, 2010, with representations for leave to remain under s. 3 of the Immigration Act 1999. These were supplemented by further submissions and representations on the 25th March, 2010. The application for subsidiary protection was refused by letter of the 7th April, 2011. Enclosed with the letter was a memorandum entitled "Determination of Application" which set out the examination and assessment of the application for subsidiary protection, including the grounds upon which the determination to refuse

had been reached.

5. Before considering the basis upon which the refusal for subsidiary protection was decided in the light of the grounds for which leave was granted, it is necessary to recall first the basis upon which the claim for asylum had originally been made and then the grounds upon which it had been finally rejected by the Tribunal.

The Asylum Claim
6. As indicated, the applicant claimed to be a native of the Cabinda exclave of Angola; to have had twelve years education and then to have become a teacher. She had a son who is now an adult, as a single mother. She became a sympathiser of the FLEC movement. She described one particular incident when she was walking home from work with three friends and was attacked and raped by police. As a result, she spent time in hospital. She did not claim that she had been thus attacked and raped because the police knew of her association with FLEC. She did not report the incident to the authorities because she felt that if they found out she was in FLEC she would be in trouble. She claimed that as a result of her refusal on the grounds of FLEC sympathy to participate in "Youth Commemoration Day" activities and to distribute T-shirts to her school students, she was suspended from her teaching post. She claimed her house was ransacked. She says she was advised by a local FLEC coordinator to leave the country and he organised her departure along with other FLEC members.

7. In essence, the applicant's claim to asylum was rejected both by the Commissioner and on appeal by the Tribunal on grounds of disbelief of the personal history the applicant had given. In particular, the Tribunal member found that many of her answers to specific questions as to the history she gave were vague and uncertain on points on which she could have been expected to be specific. Moreover, the Tribunal member expressed considerable doubt in relation to the lack of knowledge on the part of the applicant of the languages used by the people of Cabinda to distinguish themselves from Congolese and other Angolans. Notwithstanding the fact that the applicant claimed to be a teacher in Cabinda, it was found difficult to accept that the applicant spoke neither of the two native languages of that region. The Tribunal member also expressed considerable doubt about the account given in which the applicant claimed to have been raped in the company of three friends because she did not appear to have known what happened to her friends thereafter.

Subsidiary Protection Application
8. The application for subsidiary protection was made by letter of the 19th March, 2010, enclosing the form CP/01 and indicating that it was based upon serious harm in the form of torture or inhuman or degrading treatment or punishment in the country of origin. No details were given and the form was completed with the indication "submissions to follow". These submissions were furnished by letter of the 25th March 2010.

9. The basis of the claim to be a risk of serious harm was given as arising from:

- Her association with and support for FLEC and/or perceived association with and support for FLEC;
- Her gender and/or status as a victim of sexual assault;
- Her Cabindan race/ethnicity;
- The previous serious harm suffered by her in Angola including sexual assault;
- Her status as a failed asylum seeker;
- The accumulation of the above.

10. In the body of letter it was submitted that the ruling Angolan regime engaged in targeting not just known members of FLEC but also engaged in harassment, targeting, discrimination, violence and threats against persons who are suspected members of FLEC and/or the political opposition. Active membership or even membership per se is not a prerequisite to being at risk of serious harm. It was said that even if the applicant was to cease political activity she would still be at risk of serious harm. A series of extracts from various reports on conditions in Angola and Cabinda were then quoted.

11. It was submitted that the decision already made by the Commissioner and the Tribunal "are not reliable assessments of the applicants protection needs". It was submitted that those decisions failed to have regard to the forward-looking risk to the applicant simply as a Cabindan. It was submitted "the Tribunal decision refers to the applicant stating that she was attacked because she was in FLEC and elsewhere stating that she did not know if she was attacked because she in FLEC. The applicant has made clear in her application that while she cannot state for certain the reason she was attacked she believed that her association with FLEC was a reason for the attack. There is nothing implausible about the applicant holding this belief and at the same time not knowing for certain the reason for the attack". The Minister was referred to the applicant's interview at page 18.

12. The findings in the Tribunal decision in relation to her not having contacted her three friends following the attack was also addressed. "The position is that the applicant has no knowledge of what happened to her friends and they have in effect disappeared. Given the ongoing conflict in Cabinda and targeting of FLEC members it is entirely plausible and credible that the applicant's friends should have disappeared. The Tribunal suggests that the applicant did not bother to enquire about her friends but there is no basis for this suggestion. The applicant has been unable to find out what happened to her friends".

13. Issue was also taken with the description of the applicant as being vague, hesitant and unsure as to how she ended up in hospital. It was said that the applicant at the hearing had stated: "I asked the nurse what I was doing here. The nurse said I had been brought in. I asked was I alone. Were there other women brought in with me. And the nurse said no".

14. On the question of the spoken language, it was submitted that Portuguese is much the dominant language in Cabinda and that in that context it was entirely plausible that the applicant did not speak Fiote or Ibinda. It was also submitted that the SPIRASI report was supportive of the applicant's claim to be at risk of serious harm, because it indicated experience of past serious harm.

The Determination
15. The analysis of the application for protection and its determination are set out in the memorandum in the usual form. After summarising the basis upon which the application has been made and the serious harm claimed, the analysis assesses the facts and circumstances according to the subheadings set out in Regulation 5 of the European Communities (Eligibility for Protection) Regulations 2006.

16. In the judgment of the Court, the summary of the basis upon which the claim was made is accurate and sufficiently detailed. It quotes specifically the headings given in the submission of the 25th March, 2010, as quoted in para. 9 above.

17. The assessment looks first at the applicant's status as a supporter or perceived supporter of FLEC and considers over four pages extensive extracts from reports of government and human rights organisations including the US Department of State Country Report on Angola of the 11th March, 2010, and the Human Rights Watch report of the 22"d June, 2009, which had been relied upon in the application.

18. The conclusion drawn by the authors of the memorandum is as follows: "The above information states that the FLEC members and supporters do have difficulties with Angolan authorities. However, as outlined above, the security situation has improved in recent years. In 2006, a peace agreement was signed between the Angola government and Cabinda and efforts have been made to resolve the conflict. Country of origin information shows that Angola does have a functioning judicial system as well as a national police force under the interior ministry which is responsible for internal security and law enforcement. As can be seen from the extracts of the country of origin information, in recent years there has been relative stability throughout Angola other than rare isolated incidents such as the attack on the Togolese football team. While the Angolan authorities arrest and bring to trial suspected active members of FLEC factions, nearly all former members of FLEC "between 80 and 90% of FLEC fighters have reportedly either joined the army or demobilised". It is considered that these former fighters have integrated into civilian population and are not sought by the Angolan authorities. Based on the information, it is considered that the general situation in Cabinda has improved since the applicant states that she left Cabinda and there is no evidence submitted to show that the Angolan authorities would be seeking her.

19. It is clear, accordingly, that in addressing the application insofar as it was based upon the applicant's claim to be at risk because of her association or perceived association with FLEC, the Determination does not dispute that the Angolan authorities had previously been targeting FLEC as a secessionist organisation but concludes that since the applicant left the country the position has stabilised to the extent that a very high proportion of FLEC activists have ceased fighting, such that a non-fighting sympathiser of the kind the applicant claims to have been will not now be at any risk. In the judgment of the Court, that was a conclusion which was open to the respondent to reach upon the basis of the material consulted.

Ground (1)
20. The complaint made as the basis of the first ground for which leave was granted is not that this appraisal is unfounded as such, but that before the Minister was entitled to reach it, he had an obligation to raise the matter with the applicant so as to provide an opportunity for comment or rebuttal because the conclusion is said to be different from that reached by the Tribunal in the appeal decision.

21. In the judgment of the Court, this argument is based upon a misreading of the Tribunal decision. It is submitted that the Tribunal was reaching a conclusion in the passage at p. 14 of the decision as follows:

> "According to the UK operation guidance notes, members of FLEC have been responsible for serious human rights abuses, some otherwise which may amount to war crimes and crimes against humanity. However, those who claimed to be active members of the organisation and have provided sufficient information and knowledge regarding the organisation and activities do face a real risk by the Angolan authorities."

22. In the judgment of the Court, this cannot be read as a conclusion reached by the Tribunal member in relation to the applicant. The applicant never claimed to be actively involved in FLEC to the extent described in that quotation. The quoted passage forms part of a paragraph in which the Tribunal member is describing the evolved position of FLEC since its establishment in 1963, and the signing of the peace accord in 2006. He says "however the peace process did not make a serious effort to get everybody on board and some FLEC members do not abide by it". This closely reflects the sources quoted by the Minister in the Determination to the effect that while 80 to 90% of the activists had either joined the army or demobilised, there remained a minority of secessionists who continue to fight the authorities.

23. The Tribunal member does not come to any conclusion as to whether the situation has changed in the way the Determination does. The Tribunal member went on to consider the plausibility of the history given by the applicant and rejects her claim essentially on the basis that he did not believe she had been a supporter or sympathiser of FLEC.

24. In these circumstances there was clearly no obligation upon the Minister to consult the applicant before reaching that conclusion as is claimed. In this part of the Determination the Minister is addressing directly the claim as it was made in the letter of the 25th March, 2010. The writer is effectively answering the arguments based upon the extensive country of origin information quotations set out at pp. 2 to 5 of that letter by referring to countervailing information obtained from some of the same sources as well as in additional reports. As already indicated above, the application had claimed that "active membership or even members per se of FLEC is not a prerequisite to being at risk of serious harm". That is the assertion that is being answered in the determination by the conclusion reached on the basis of the material consulted. This first ground is, accordingly, unfounded.

Grounds (2), (3) & (4)
25. Grounds 2, 3 and 4 for which leave has been granted are directed at different aspects of the question of credibility and in particular at the reliance placed in the determination upon the negative findings expressed in the decision of the Tribunal. In Ground 2, the complaint is made that the implausibility of the appellant's evidence about the attack in 2006 ought not to have been accepted without considering the submissions made on the point in the letter of the 25th March, 2010, as quoted in para. 11 above. Ground 3 alleges that the Tribunal decision on the same point was vitiated by an error of fact. Ground 4 similarly charges that the determination failed to take into account the applicant's explanation of the failure to contact her friends after leaving hospital. (See para. 12 above).

26. In the judgment of the Court none of these three grounds, even if made out, would be sufficient to justify an order quashing the Determination. The issues of personal credibility of the applicant on these points are not material to the substantive determination which the Minister made on the application for subsidiary protection. The issue before the Minister in such an application, as always, is whether the applicant as someone who is not a refugee and therefore not at risk of "persecution" (as defined) for a Convention reason, has nevertheless demonstrated a need for international protection on the basis of a genuine risk of facing serious harm under one of the headings of that term as defined in Regulation 2(1) of the 2006 Regulations.

27. In this case the applicant's essential claim was that she would be at risk of serious harm if returned to Angola because of her past association or perceived association with and sympathy for the separatist FLEC movement.

28. That fundamental claim has been dealt with in the Determination not on the basis that she was never a FLEC member, activist or

sympathiser but on the basis that if she had been, the political and security situation in Cabinda had now sufficiently changed so that the risk no longer existed. Elsewhere in the Determination the additional claims made by the applicant to be at risk of serious harm because of her gender; because she had been a victim of sexual assault in the past and by virtue of her status as a Cabindan, were all answered and have not been the subject of challenge in the grounds for which leave has been granted.

29. It is true that in dealing with the matters to be taken into consideration under the other subheadings of Regulation 5, including that of general credibility and the benefit of the doubt under para. (3), the Minister has looked at and has adopted some of the findings to be found in the appeal decision. However, having regard to the conclusion which the determination has reached on the core issue as to whether the applicant can now safely return to Angola, these matters are no longer relevant.

30. It is also important to bear in mind that the reference in Regulation 5(3) to the assessment of "general credibility of the applicant" does not constitute a pre condition or stand-alone requirement which, if satisfied, relieves an applicant of the burden of corroborating the statements upon which the claim to be at risk may be based. Paragraph (e) is one of a number of criteria which are applied in cases where some material aspects of the claim lack documentary or other corroborating evidence that might otherwise be required or expected.

31. Thus, while the Determination goes to the length of considering and dealing with all of the subheadings of "assessment of facts and circumstances" in Regulation 5, the mere identification of a possible error or flaw in one part of that assessment will not necessarily require that the Determination as a whole be quashed where the error or flaw is unrelated to the material conclusion upon which the claim to be at risk of serious harm has been rejected. That is what has happened here.

32. Finally, Ground 5 seeks to raise an issue which has been dealt with in a number of judgments of the High Court and does not need to be reconsidered here. It is argued that the absence of an appeal mechanism including an oral hearing when subsidiary protection is refused renders the refusal unlawful as a breach of the "principle of equivalence" in European Union Law. The issue is dealt with by this Court in its judgment in *BJSA (Sierra Leone) v. MJLER* (Unreported, High Court, 12th October, 2011). See in particular paras. 23 et seq. See further, *NO. v MJE* (Unreported, High Court, Ryan J. 14th December 2011) and *Okunade v MJE* (Unreported, High Court, Cross J. 30th March 2012).

33. For all of these reasons the Court is satisfied that the grounds for which leave was granted have not been made out and the application for judicial accordingly refused.