Neutral Citation [2012] IEHC 454

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 800 J.R.]

BETWEEN

LUBIKA MADELINE BONDO

APPLICANT

AND

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

RESPONDENT

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 9th day of November 2012

1. The issue in this case is whether the respondent minister acted irrationally by finding that protection from serious harm was available to the applicant in her horne country notwithstanding overwhelmingly negative country of origin information concerning the Democratic Republic of Congo.

2. Ireland is required to provide protection to non-EU nationals where the person concerned would face a real risk of suffering serious harm if returned to his or her country of origin: see Council Directive 2004/83/EC ('The Qualification Directive') 2003 and S. I. 518 of 2006 ('The Protection Regulations').

3. Serious harm is defined in Article 15 of the Qualification Directive as:

> "(a) death penalty or execution; or
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> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
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> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

This definition is reproduced in Regulation 2 of The Protection Regulations. No claim in respect of Art 15 (c) was ever made by the applicant.

4. The ECJ has addressed the distinction between the types of harm in respect of which protection may be sought in Case C-465/07 on 17Th February, 2009, *Elgafaji v. Staatssecretaris van Justitie*. The Dutch referring court wished to know whether a person seeking protection within the meaning of Article 15(c) of the Directive was required to produce evidence that he or she was specifically targeted by reason of factors peculiar to his or her circumstances. The Court of Justice said as follows:

> "31. In order to reply to those questions, it is appropriate to compare the three types of 'serious harm' defined in Article 15 of the Directive, which constitute the qualification for subsidiary protection, where, in accordance with Article 2(e) of the Directive, substantial grounds have been shown for believing that the applicant faces 'a real risk of [such] harm' if returned to the relevant country.
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> 32. In that regard, it must be noted that the terms 'death penalty', 'execution' and 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin', used in Article 15(a) and (b) of the Directive, covers situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm.
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> 33. By contrast, the harm defined in Article 15(c) of the Directive as consisting of a 'serious and individual threat to [the applicant's] life or person' covers a more general risk of harm.
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> 34. Reference is made, more generally, to a 'threat ... to a civilian's life or person' rather than to specific acts of violence. Furthermore, that threat is inherent in a general situation of 'international or internal armed conflict'. Lastly, the violence in question which gives rise to that threat is described as 'indiscriminate', a term which implies that it may extend to people irrespective of their personal circumstances.
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> 35. In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, by the degree of indiscriminate violence characterising the armed conflict taking place - assessed by the competent national authorities before which an application for subsidiary protection is made, or by the court of a Member State to which a decision refusing such an application is referred - reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred to in Article 15(C) of the Directive."

5. The Court, at paragraph 38 of its judgment, noted that the harm defined in Article 15(a) and (b) "requires a clear degree of individualisation".

Article 2 (e) of the Qualification Directive prescribes eligibility for subsidiary protection. In addition to demonstrating a real risk of suffering serious harm (as defined in Article 15) the applicant must establish that he or she " is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country"

6. The Qualification Directive explains what is meant by the words "the protection of that country". Article 7, entitled 'Actors of Protection', says "Protection can be provided by (a) the State; or (b) parties or organisations controlling the State or a substantial part of the territory of the State". Article 7(2) provides that "Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection."

7. It seems to me that where an applicant for subsidiary protection fails to establish, for whatever reason, that he or she faces a real risk of serious harm, then no issue arises as to whether protection from the risk of serious harm is available in the home country. Thus for example where an applicant, invoking only Article 15(a) and (b), claims to be personally in fear of a powerful warlord in a country which has a deficient legal system and corrupt politics, it would not be enough for her to rely on general facts demonstrating that her country of origin is degraded, unless the level of degradation was at an appropriate level of intensity (see paragraph 11 below for relevant case law). If it transpires that she fabricated the story about the warlord, it would be lawful to declare her ineligible for subsidiary protection notwithstanding even serious deficiencies in her home country.

Background to Proceedings
8. The applicant arrived in Ireland in September 2007. Following consideration by the Refugee Applications Commissioner and by the Refugee Appeals Tribunal, her application for asylum was rejected. She subsequently applied for subsidiary protection pursuant to The Protection Regulations on 16th April, 2009. The respondent refused to grant the applicant protection on 7th July, 2011. These proceedings seek judicial review remedies in respect of that refusal.

9. Applicants for subsidiary protection are required to complete a form which poses questions and seeks to elicit information. Section 1.7 of the relevant form requires the applicant to "indicate the basis on which 'serious harm' as defined in the Regulations is being claimed". The applicant is then required to tick the relevant sort of harm and three options are offered, correlating precisely to Article 15 (a) and (b) and (c) of the Qualification Directive.

10. In this case, the applicant ticked one line relating to "death penalty or execution" and another line relating to "torture of [sic] inhuman and degrading treatment or punishment of an applicant in the country of origin". The third line (relating to "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict") was not ticked. Thus, in order for the applicant to have succeeded, she would have been required to establish that she was personally exposed to a real risk of the particular sort of harm identified on the form by reason of her own personal circumstances rather than by reference to the general situation in the Democratic Republic of the Congo. (I should add that guidance on the meaning of Article 15 of the Qualification Directive is available from the case law of the European Court of Human Rights as paragraph (a) is derived from Sixth and Thirteenth Protocols to the European Convention on Human Rights and paragraph (b) is derived from Article 3 thereof. In *NA v United Kingdom* (25904/07; 17 July, 2008) the ECHR, at paras. 114-7, said that in extreme circumstances the risk of harm could arise from general as well as particular circumstances. The Court stated at paragraph 115,

> "From the foregoing survey of its case law, it follows that the Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it will necessarily breach Article 3 of the Convention. Nevertheless, the court would adopt such an approach only in the most extreme cases of general violence, where there was real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return."

No such case was sought to be made for Mrs Bondo.)

11. The personal circumstances advanced by her in support of her claim were as follows. The applicant was born in 1948 and moved to distant Kinshasa in 1966 when she was a young woman. She is now a widow and mother of two surviving children. In 2006, she returned to the city of her birth in the South-Eastern region of the country, where she opened a restaurant. It is not clear why she left Kinshasa, where her children lived, in favour of Lubumbashi. It is in connection with the restaurant that the first of her complaints grounding her request for protection arises. She says that she was arrested by military forces, detained for five days, and subjected to physical assaults because political opponents of the military had eaten at her restaurant. The second incident she relies on in support of her application for protection is said to have occurred on about 21st July, 2007, when she was arrested while standing at a taxi rank along with other persons who were distributing leaflets expressing opposition to President Kabila. She says that she was detained by the police for two to three weeks and suffered severe conditions. Following the payment of a bribe (or possibly a fine), she was released on 41h August, 2007. Following these events, on the advice of her daughter, she left the Democratic Republic of the Congo and made her way to Ireland where she sought refugee status immediately upon her arrival in this State.

12. In support of her application for subsidiary protection, the applicant indicated that her entire asylum form should be considered. It is clear that this information was considered by the official concerned.

13. Having set out the basis for the claim for protection, the official sets out what she regards as the issues which are to be decided. She put the matter as follows:

> "The issues to be considered here are:
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> Whether the applicant is at a risk of 'death penalty or execution' from the authorities in DR Congo.
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> Whether the applicant is at risk of torture or inhuman or degrading treatment or punishment from the authorities in DR Congo.
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> Whether the applicant would be able to avail of State protection for the above threats.
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> The question to be answered is whether substantial grounds have been shown for believing that Lubika Madeline Bondo, if returned to DR Congo, would face a risk of death penalty or execution, torture or inhuman or degrading treatment or punishment, and critically, whether protection is available to and accessible by the applicant."

14. In my opinion, this formulation of the issues though not incorrect was somewhat unfortunate. The words "and critically, whether protection is available to and accessible by the applicant" suggest that this was a central issue required to be decided in this case. Such a question would only be critical if the decision maker decided that the applicant had established substantial grounds for showing that she would face the identified harm if she returned. If that is made out, the decision maker must then consider whether there is protection available from that harm or the risk of that harm in the country of origin. The formulation of the issues probably led

to the manner in which the conclusion of the assessment was expressed. And ultimately, it is the manner in which this assessment is expressed that has given rise to these proceedings. The conclusion was expressed as follows by the decision maker:

> "Overall, and having regard to country of origin information, credibility and all facts on file, I am not satisfied that the applicant has demonstrated that she is without protection in DR Congo and I do not find that there are substantial grounds for believing that the applicant would be at risk of serious harm by 'death penalty of execution [sic], torture or inhuman or degrading treatment' in DR Congo if she is returned there."

It appears to me that this formulation of the conclusion derives from the manner in which the decision maker set out the issues with which she was faced. This has led to an infelicity of expression and a possible interpretation of the conclusion which at first glance seems entirely at odds with the country of origin information.

15. Detailed country of origin information was submitted in the applicant's asylum application and again, in the applicant's subsidiary protection application, and appears to have been added to by the decision maker. That information paints a negative picture of the Democratic Republic of the Congo, revealing a bleak situation where there is little or no respect for the rule of law, prevalence of corruption at all levels of the State and society, arbitrary arrests and detention by State security forces, murder of human rights activists, and challenges caused by unrest and armed hostilities in the Eastern provinces of the country. It is the juxtaposition of this negative information with the conclusion which states that the applicant will not be without protection on her return which gives rise to the plea of irrationality.

16. The decision maker on the application for subsidiary protection had regard to the full asylum file, up to and including the decision of the Refugee Appeals Tribunal. The Refugee Appeals Tribunal rejected the applicant's claim for refugee status on the basis of findings of lack of credibility of the applicant. The Tribunal found that it was difficult to accept that the authorities regarded her restaurant as a place where people plotted against the Government and found that it was not plausible that the applicant was singled out simply on the basis that she provided food for all politicians. In relation to the second alleged arrest, the Tribunal found that it was not plausible "allowing for country of origin information, that she was merely waiting for a taxi and the authorities accused her of handing out material critical of President Kabila". The Tribunal found that it was not plausible "that the authorities would have the time or inclination to look for the applicant should she return to Kinshasa where she spent forty years. It is not possible that she would be persecuted simply because members of the opposition parties ate in a restaurant when government ministers also ate there". In addition, the Tribunal found that it was not "likely that the authorities would seek to persecute the applicant if she were to return to DR Congo simply by having been in the vicinity of an anti-government leafleting campaign. Further, the applicant is a 60- year old grandmother with strong family connections in Kinshasa, a place in which she had no difficulty with the security forces during her lifetime. The Tribunal is satisfied that she could safely locate there as she has family connections and property".

17. All of the findings of lack of credibility were - quite properly - available to the decision maker in this case and some of them are quoted in the assessment of the applicant's application for subsidiary protection. The personal circumstances and characteristics of the applicant were weighed by the decision maker in accordance with Regulation 5(1)(c) of the Protection Regulations. Noting that the applicant had a son and daughter living in Kinshasa and six siblings in the Democratic Republic of the Congo, that she completed primary and secondary school and attended college where she studied and completed a course in data processing and that she had worked for 21 years as a secretary and phone operator, a typist and a data operator, the decision maker concludes that there is nothing that would prevent the applicant from seeking protection from the authorities in the Democratic Republic of the Congo. (That conclusion does not seem related to the personal circumstances and characteristics of the applicant and seems to misconstrue the assessment required under Regulation 5(1)(c) though no complaint is made in relation thereto in these proceedings)

18. Regulation 5(2) requires the decision maker to consider history of persecution or serious harm for the purpose of assessing whether there is a fear on the part of the applicant of suffering serious harm in the future. In this regard, and central to the finding in this case, the applicant's credibility with respect to the events which she says caused her to flee have been found by the Tribunal not to have been credible and the decision maker concludes by saying:

> "I have considered this information [i.e. the history of past persecution] in conjunction with the information raised above and I am not satisfied that there are substantial grounds for believing that the applicant would be at risk of serious harm by 'death penalty of execution' [sic], torture or inhuman or degrading treatment' in DR Congo if she is returned there."

19. In this case, leave was granted to challenge the decision on subsidiary protection on a very narrow ground as follows:

> "In arriving at the decision refusing to grant the applicant subsidiary protection ... the first named respondent erred in law and or in fact of its assessment of the facts and circumstances relating to the country of origin, including the availability of 'protection against serious harm' as defined in Regulation 2(1) (of the European Communities) (Eligibility for Protection) Regulations, 2006 S.I. 518 of 2006, in its finding on page 24 of the decision which states as follows:
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> > 'Overall, and having regard to country or origin information, credibility and all facts on file, I am not satisfied that the applicant has demonstrated that she is without protection in DR Congo and I do not find that there are substantial grounds for believing that the applicant would be at risk of serious harm by death penalty or execution, torture or inhuman and degrading treatment in DR Congo if she returned there'."

20. The illegality alleged against the finding of the decision maker in this case is that the conclusion was irrational. It is argued that a finding that the applicant would not be without protection contradicts the country of origin information which was overwhelmingly negative in its description of the police, the legal system and the respect for the rule of law.

21. This complaint might find sympathy with the court if the real question concerning the applicant was whether or not protection from serious harm was available for the applicant in the DR of Congo. Such however was not the real issue at stake.

22. The "conclusion" in respect of which irrationality is claimed is no more than one statement amongst many findings in a complex decision-making process. Irrationality is not alleged against the main conclusion of the decision maker which is that substantial grounds have not been shown for believing that the applicant would face a real risk of suffering serious harm if she returned to the Democratic Republic of the Congo. In my view this finding is rationally connected to the finding that the applicant's account of past suffering was not believed by the Tribunal.

23. In *Tabi v. The Refugee Appeals Tribunal* (Unreported, High Court, Peart J., 27th July, 2007), Peart J. said:

> "It is not desirable that a decision be parsed and analysed word for word in order to discern some possible infelicity in the

> choice of words or phrases used, and to hold that a finding of credibility adverse to the applicant is invalid, unless the matters relied upon had been clearly misunderstood or misstated by the decision maker. The whole of the decision must be read and considered in order to reach a view as to whether, when the decision is read in its entirety and considered as a whole, there was no reasonable basis for the decision maker reaching that conclusion." [emphasis added]

24. I agree with the learned Judge and in particular I follow his view that the whole of the Tribunal's decision must be read to review its rationality.

25. On a very simplistic level, one could interpret the decision in this case as a positive finding that it was safe for the applicant to return to the Democratic Republic of the Congo there being no difficulties with rule of law or access to courts or other such matters in that country. But that would be to read the decision with blinkers. The decision was significantly more complex than that. In essence, the decision was one which was based on the lack of credibility of the applicant with respect to the matters which she said caused her to fear serious harm and caused her to seek the protection of the Irish State. From the earlier part of this judgment, it will be recalled that her application for protection was based exclusively on her personal circumstances, embedded as they were said to be in the difficult situation which pertains in the Democratic Republic of the Congo. In circumstances where the serious harm from which she seeks protection relates only to the matters at Article 15(a) and (b) of the Directive and where her personal story is not believed, it seems to me that such a finding represents the true rationality and the simple logic of the decision in this case. I therefore refuse to quash the decision on this first ground.

26. I should add that even if I agreed that the passage from the Tribunal's decision regarding the availability of protection in the Democratic Republic of Congo was irrational, I would not quash the decision in suit. Given the discretionary nature of judicial review remedies I would be minded to say that such irrationality only tainted an irrelevant part of the Tribunal's conclusion. The Tribunal's decision means that the applicant has not demonstrated circumstances from which she will require protection in her home country thus the issue of the availability of protection is moot.

27. The second ground upon which leave was granted to challenge the decision in this case is as follows:

> "In arriving at the decision, the first named respondent erred in law and/or fact in its assessment of the facts and circumstances relating to the country of origin, including the availability of 'protection against serious harm' as defined at Regulation 2(1) of the European Communities (Eligibility for Protection) Regulations 2006, S.I. 518 of 2006, in failing to draw any conclusions regarding the availability of police protection from the country of origin information considered."

28. As is apparent from the first part of this judgement, the decision maker did not believe that the applicant required protection. Thus quality of the assessment of the availability of protection could not undermine the legality of the decision,

29. The serious harm from which the applicant sought protection was identified on her behalf as (a) death penalty or execution and (b) torture or inhuman or degrading treatment or punishment. The applicant's case rested upon alleged incidents of mistreatment. Where she was not believed about these incidents, it appears to me that any criticism or alleged failing in the assessment of the availability of State protection cannot infect the legality of the final decision taken.

30. In the written submissions filed in support of the second ground, one paragraph only is advanced by way of argument as follows:

> "It is evident that this ground speaks for itself. All of the information furnished supports the applicant's contentions. The availability of protection was clearly non-existent from any reading of the information purported to have been considered. Furthermore, it is not clear from the decision as to what precise meaning the first respondent attributed to the term 'serious harm'."

31. The applicant's contentions regarding her historic persecution were found implausible, and thus it is incorrect to say that "all the information furnished supported her contentions".

32. Whatever the purpose of submitting the country of origin information, the applicant was not attempting to say that it was unsafe to return to her country of origin. Such a claim could have been advanced, though one would expect it to be based on Article 15(c) of the Directive. The applicant did not pursue such a claim. In any event, a high threshold of proof is required to attract subsidiary protection based on general as opposed to personal circumstances. In the *Eljafaji* decision (*supra*), the ECJ noted, in respect of an Article 15 (c) claim, as follows:

> "35. In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place.....reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country .....would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred to in Article 15(c) of the Directive."

33. No attempt was made at any stage of the applications for asylum or for subsidiary protection, to establish that the mere presence of the applicant on the territory of the Democratic Republic of the Congo would cause her to face a serious and individual threat to her life or to her person.

34. The assertion by the decision maker that the applicant would not be without protection must be understood in the light of the conclusion that there were no conditions from which she needed protection. Indeed the decision maker notes that the applicant confirmed that she had lived for 40 years in Kinshasa without coming to the attention of the Police.

35. For the sake of completeness I repeat what I said in the discussion on the first ground regarding the exercise of discretion in judicial review. Even if I were to find that the decision maker had erred in law and/or in fact in assessing the country of origin information on the issue of the availability of protection such failing would not invalidate the decision in suit because this was not a case where protection was in issue.

36. For all of those reasons, I also reject the second ground advanced by the applicant.

37. I refuse the reliefs sought.