Neutral Citation: [2014] IEHC 64

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2010/168JR

Between/

M.A.B.

Applicant

-and-

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

Respondents

Judgment of Ms. Justice Iseult O'Malley delivered the 13th January, 2014

Introduction

1. This telescoped hearing concerned the findings and negative recommendation of the first named respondent in respect of the applicant's claim for refugee status. The claim is based on the applicant's membership of the Zaghawa tribe from Sudan. It is accepted that this tribe has been subjected to human rights abuses in Sudan and targeted by government-backed militia forces there.

2. The applicant contends for the right to seek judicial review, in preference to pursuing in first instance his right to appeal to the third named respondent, on the grounds that certain errors committed by the first named respondent were of so fundamental a nature as to deprive him of jurisdiction. In particular, he alleges that that respondent applied the wrong test by requiring the applicant to show that he, as an individual, would be a target for persecution; failed to make a finding on the key question as to whether the applicant was indeed a member of the Zaghawa tribe; erred in law in finding that "*where an applicant's claim lacks credibility, the UNHCR [at paragraph 37 of the Handbook} advises us that it can be inferred that a well-founded fear of persecution has not been established by the applicant*"; was unreasonable in finding that an attack on the applicant's village in which members of his family were killed was "*due to the general unrest within Darfur*" and therefore not relevant to the question of future risk of persecution and failed to address the question of "future risk".

3. The respondents plead that the correct test was applied; that a finding was in fact made that the applicant had not established membership of the tribe and that the respondent was entitled to make the findings he did on credibility. It is further contended that all of the applicant's complaints are in fact matters more appropriately dealt with in an appeal.

4. An issue was also raised in written submissions (although not pleaded as such in the Statement of Opposition) as to the required extension of time within which to seek leave in circumstances where the decision of the first named respondent was communicated to the applicant by letter dated the 14th January, 2010 but the Notice of Motion was not filed until the 17th February, 2010. The applicant and his solicitor have averred that the former contacted the latter on the 18th January, that it was not possible by reason of the workload of the solicitor's office to have a consultation until the 28th January and that an appeal to the third named respondent was lodged on the 4th February. On the Friday 12th February Counsel's opinion was obtained to the effect that there were grounds for review. The applicant's instructions were given on Monday the 15th and, pleadings having been drafted, the proceedings were filed on the 17th.

5. On behalf of the respondents Ms. Sinead McGrath BL submits that this situation may not come within the grounds set out in the Act but, rightly in my view, does not press the point. There does not appear to have been any delay attributable to the applicant personally and his solicitor is a practitioner of experience in these matters, who cannot be said to have delayed unduly in taking the appropriate steps.

Background facts

6. It is accepted that the applicant is from Sudan and his date of birth is given as the 6th June, 1980 in Darfur. He says that he is a member of the Zaghawa tribe. He claims to have left Sudan because he feared persecution at the hands of the Sudanese government forces and/or the Janjaweed militia. He avers that in March 2004 his home village was attacked by the Janjaweed and his father, uncle and grandmother were killed. He relocated within Sudan for some time but left via Libya in May 2005 because of constant attacks on Zaghawa people.

7. It appears that the applicant sought asylum in Malta in June of2005 and was granted temporary humanitarian protection. The court has been told by counsel for the respondents that this is a discretionary status arising purely under domestic Maltese law. Documentation indicates that the latest extension of that status was to expire in May 2008. However, in 2007 the applicant travelled to the Netherlands and applied for asylum there. His application was refused and he was returned to Malta.

8. It further appears that the applicant came to Ireland from Malta in June, 2007, using a travel document issued to him by the Maltese authorities. An application for refugee status was not however made in this State until the 9th October, 2007. The applicant's explanation for the delay was that he was sick and needed medical treatment. He claimed to have been in Beaumont Hospital for the period in question but no medical evidence was submitted by him to either the respondents or to the court. It is noted that, accordinto the respondents, the applicant was questioned by a Garda on the 8th October, 2007 and told to report to the Garda National Immigration Bureau on the 12th of that month. The applicant denies this and said that he went to the Office of the Refugee Applications Commissioner before the encounter with the Garda.

9. The applicant was interviewed on two dates in 2008 and received a negative decision, which was subsequently set aside by consent in the High Court. The matter was remitted for further consideration.

10. The applicant was again interviewed on behalf of the first named respondent on the 28th April, 2009. He said that he had left Malta because he had been detained in a camp or prison for over a year.

11. Questioned about events in Sudan, the applicant described the attack on his village. He said that he and others from his family went to a refugee camp. He left this camp after 10 days because of the lack of security, although his family remained there. He went to another area for some months but left the country in May, 2005.

12. In this interview, as in the previous ones, the applicant was asked why he had claimed in his application to be married and have children. His explanation was that his married brother had died and that he was supposed to take responsibility for his children.

13. The report pursuant to s.13(1) of the Refugee Act, 1996 (as amended) notes the relevant Country of Origin information and accepts that the Zaghawa tribe was among the groups targeted by Sudanese government militia forces. It also accepts that the applicant is from Sudan.

14. The authorised officer then sets out the applicant's claim as follows:

> *"The applicant claims the following:*
>
> *• He is a member of the Zaghawa tribe and he has lived in Garach, ten minutes from Zalingi in Darfur from birth until 2004. There was an attack on his village by the Janjaweed in March of that year, his father and brother were killed, the village was burned and the family fled the area and went to AI Hasahasa camp.*
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> *• He moved from the camp after 10 days, due to the lack of security there. He went to stay in Ambrow for a few months, however due to the daily attacks by the Janjaweed in the area, he made arrangements to leave Sudan in May 2005.*
>
> *• He has no political affiliations and has no involvement in any group i.e. rebels which are in direct conflict with the Sudanese Government.*
>
> *• He did not experience any personal discrimination or problems in Sudan. He did not sustain any physical torture in Darfur but he was affected by the death of his father according to his F 1 interview.*
>
> *• Although he was given temporary humanitarian protection in Malta, he was kept in prison, he became sick there and he is looking for a cure for his ailment.*
>
> *• According to the applicant's s.8 interview in Malta he was detained without a solicitor, given no provisions and was unable to pursue his studies."*

15. The report goes on:

> *"It is impossible, either for me or the applicant, to verify these allegations, except for the documented/act that he was afforded humanitarian protection in Malta. In its Procedures Handbook (paragraphs 203 and 204), the UNHCR advises us that it will be necessary to apply the benefit of the doubt to those elements of a claim which are not susceptible to proof provided that the applicant makes a reasonable effort to present a coherent and plausible account which does not run counter to generally known facts. "*

16. The writer goes on to refer to the frequent necessity to give applicants the benefit of the doubt but adds that applicants are required to "earn" the benefit of the doubt by making the "reasonable effort" mentioned. She refers to paragraph 37 of the UNHCR Handbook, which says that

> *"Determination of refugee status will ... primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin"*

and to paragraph 41, where it is advised that

> *"Due to the importance that the definition (of a refugee) attaches to the subjective element (of a well-foundedfear), an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. "*

17. Five findings are then made with respect to the applicant's credibility.

> 1. The officer considered that the fact that the applicant had an entitlement to humanitarian protection in Malta made it reasonable to infer that that protection and sanctuary from persecution in Sudan was not uppermost in his mind when he left Malta. Section 11A(b) of the Refugee Act, 1996 as amended provides that an applicant shall be presumed not to be a refugee unless he or she shows reasonable grounds for the contention that he or she is a refugee if it appears that the applicant had lodged a prior application for asylum in another state party to the Geneva Convention.
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> 2. The applicant had given contradictory accounts of aspects of his personal history such as his marital status. He had failed to explain these discrepancies satisfactorily.
>
> 3. No medical evidence had been submitted regarding his claim to have been admitted to Beaumont despite the fact that the applicant had been given an opportunity to do so.
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> 4. The officer did not accept that illness had prevented the applicant from claiming asylum earlier. She considered that he had only made the application when his presence in the country had been detected by the Gardaí. She therefore considered that s. 11B(d) of the Act was applicable. She also stated that it was not unreasonable to infer that the applicant's real reason for coming to Ireland was to seek work or to avail of medical treatment, since he already had protection in Malta.
>
> 5. In a statement relied upon heavily in this application the writer said:

> *"The applicant has not provided any convincing reason as to why he, as an individual, would be a target for persecution by anyone in Sudan if he were to return there now. The alleged attack on his village appears to be due to the general unrest within Darfur. "*

18. The report went on to state that

> *"The cumulative effect of these issues undermine the credibility of the applicant's account. When an applicant's claim lacks credibility, the UNHCR advises us that it can be inferred that a well-founded fear of persecution has not been established by the applicant. "*

19. The conclusion was that the applicant had failed to establish that he had a well-founded fear of being persecuted under any of the Convention grounds.

20. The decision of the first name respondent was made on the 11th December, 2009.

Submissions on the appropriateness of judicial review

21. In this application Counsel for the applicant, Mr. Anthony O'Hanrahan BL, has accepted that certain of the matters pleaded in the Statement of Grounds go, in reality, to the quality of the decision in issue and are more appropriately dealt with by way of appeal.

22. It is further accepted that the application for asylum may not have been made until after the applicant was arrested; that no medical evidence had been submitted and that contradictory accounts had been given as to whether or not the applicant had a wife and children.

23. The debate in the hearing therefore concentrated on the issues listed in paragraph 2 above. The fundamental errors claimed to have been committed are that there was no finding as to whether or not the applicant was a member of the Zaghawa tribe (since if he is, that would, it is contended, rebut the presumption against him set out in s.11); the implied placing of an onus on the applicant to show that "*he as an individual*" would suffer persecution and the failure to consider the question of future risk.

24. On the assumption that the applicant succeeds in demonstrating that the first named respondent did err in the manner claimed, it is contended that the applicant is entitled to seek judicial review rather than pursuing his appeal. It is accepted that the courts have in a number of cases stressed that a grant of certiorari of a first instance decision, where there is a statutory right of appeal, should be the exception rather than the rule. It is noted that in the case of *BNN v MJELR* [2009] 1 IR 719, Hedigan J. said at p. 733

> *"It is clear in the light of this series of recent decisions that it is only in very rare and limited circumstances indeed that judicial review is available in respect of an ORAC decision. The investigative procedure with which ORAC is tasked must be properly conducted but the flaw in that procedure that entitles an applicant to judicial review of an ORAC decision must be so fundamental as to deprive ORAC of jurisdiction. "*

25. At p.734 he went on to say that the applicant must

> *"demonstrate a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal to the Refugee Appeals Tribunal".*

26. By way of example of the kind of flaw that could not be remedied on appeal, Hedigan J. instanced a case where findings of the Commissioner are based on one or more of the grounds set out in s.13(6)(h) of the Refugee Act, 1996 as inserted by s.7(h) of the Immigration Act, 2003. By virtue of s.13(5) an appeal in such a case must be determined without an oral hearing, thus significantly limiting the scope for the correction of errors.

27. Counsel submits that this last observation is capable of being construed too narrowly, in circumstances where the appeal in this case would be a full *de novo* hearing, and urges the court to adopt the formulation set out in *O(F) v RAC* [2009] IEHC 300. In that case Cooke J. held that the court should intervene

> *"only in the rare and exceptional cases where it is necessary to do so in order to rectify a material illegality in the report which is incapable of or unsuitable for rectification by appeal; which will have continuing adverse consequences for the applicant independently of the appeal; or is such that if sought to be cured by the appeal, will have the effect that the issue or that some wrongly excluded evidence involved, will not be reheard but will be examined only for the first time on the appeal. "*

28. Again, in *JM (Mhlanga) v RAC*, Cooke J referred to the possibility of a flaw or illegality being such that a rehearing

> *"would result in a material issue not being reheard but being heard for the first time upon the appeal. "*

29. It is submitted on behalf of the applicant that in the instant case, the failure to address the "core" of his case by making a finding as to his membership of the Zaghawa tribe, constitutes such a flaw or illegality.

30. On behalf of the respondents Ms. McGrath referred to *A.D. v MJELR* [2009] IEHC 77, also a decision of Cooke J. Having reviewed the authorities on the issue (including judgments dealing with non-asylum related issues such as *State (Abenglen Properties Ltd) v Dublin Corporation* [1984] I.R. 381) he set out the following summary of the principles arising therefrom:

> A. Where the legislature has put in place an administrative and quasi judicial scheme postulating only limited recourse to the courts, *certiorari* should not issue if that statutory procedure is adequate and more suitable to meet the complaints upon which the application for judicial review is based.
>
> B. The fact that an appeal against the impugned decision or measure is available to an applicant is not of itself a bar to the issue of *certiorari* by the High Court.
>
> C. The Court should not exercise its discretion to refuse *certiorari* to quash a bad decision if its continued existence may produce damaging legal effects.
>
> D. For the High Court to intervene in a statutory two-stage procedure such as is involved in planning and asylum matters, it is not sufficient to point to an error within jurisdiction on the part of the decision-maker at first instance. Some extra

flaw in the decision must be shown such as to indicate that the decision-maker has acted out of jurisdiction and in disregard of one of the principles of natural or constitutional justice.

E. The essential question is whether the available remedy by appeal is the more appropriate remedy.

F. A variety of factors fall to be considered in assessing the appropriateness of the remedies including: the nature and scope of the appeal and the stage in the statutory scheme at which it arises; whether it [includes] an oral hearing; the type of error sought to be challenged in the decision and whether it can be remedied on appeal.

G. The fact that the appeal does not provide for an oral hearing, while relevant, is not itself a ground for granting relief. An oral hearing is not always an essential ingredient of a fair appeal.

31. Cooke J. considered that it followed that leave to apply for judicial review in order to quash a report and recommendation of the Commissioner should only be granted in exceptional cases, where it is demonstrated that there is

> *"some fundamental flaw or illegality in the Commissioner's report such that a hearing upon appeal before the Tribunal will be inadequate to remedy it. "*

32. As an example of such a case he cited *Stefan v The Minister for Justice* [2001] 4 IR 203. In that case (which dealt with a two-stage process in operation before the enactment of the Refugee Act, 1996), Denham J. quashed a first instance decision made in the absence of a translation of a material document. Denham J. did not consider that the availability of an appeal was a sufficient remedy, on the basis that

> *"A fair appeal does not cure an unfair hearing. "*

33. However, Cooke J. was cautious about adopting the terminology of "fairness", on the basis that an applicant might consider it unfair that he or she had not been believed. It was stressed that the unfairness had to amount to a clear infringement of the right to fair procedures. He referred to *Gill v Conellan* [1987] IR 541, where Lynch J., describing the defects of a District Court hearing, remarked that the appeal would not in a real sense be a rehearing.

34. Counsel argues that the issues raised in these proceedings are identical to those included in the notice of appeal against the decision of the first named respondent and that none of them are more appropriate to judicial review than to the appeal.

The issue of tribal membership

35. In the Statement of Opposition it is denied that the first named respondent failed to make a finding as to the applicant's membership of the tribe.

> *"It is submitted that the Respondent had regard to his evidence that he is a member of the Zaghawa Tribe and determined that it was 'impossible to verify these allegations'. It is therefore submitted that a finding was in fact made in this regard and it was open to the Applicant to address the same on appeal to the Refugee Appeals Tribunal. "*

36. In written submissions filed before the hearing the following argument was made on this issue:

> *"The Authorised Officer referred to the relevant country of origin iriformation in relation to this tribe and the general unrest in Darfur. She noted his evidence that he is inter alia a member of the Zaghawa Tribe and that it is 'impossible to verify these allegations'. Therefore she makes a finding in this regard. She then referred to the benefit of doubt provisions and in particular his personal credibility which she found wanting. Therefore, his alleged tribal membership is tied up with credibility. It was open to the applicant to address this issue on appeal ... "*

37. However, in the course of the hearing the argument on this issue was developed in what was, in my view, a significant fashion. It was contended that in fact the "finding" was that it was impossible to verify the claim. It could, therefore, be taken that there was "no adverse finding" on the issue. The sentence "*Therefore his alleged tribal membership is tied up with credibility*" was expressly withdrawn. The result, according to counsel, was that the applicant could deal with his appeal on the basis that there was no such finding. In this regard she referred to the judgment of Cooke J. in *HPO v MJELR* [2011] IEHC 97.

38. That case concerned an applicant who claimed to be a practising Buddhist in Malaysia and at risk of persecution from the majority Islamic community there. For a number of reasons the Refugee Appeals Commissioner determined that he was seriously lacking in credibility and that he had made out no well-founded fear of persecution. The main argument made on his behalf in the judicial review proceedings was that the Commissioner had failed to make any determination as to whether he was in fact a practising Buddhist and accordingly his "core" claim had not been considered.

39. At paragraph 8 of the judgment Cooke J. said

> *"In the judgment of the court no substantial ground is made out in this regard. The report notes at the outset the applicant's claim that he is a Buddhist and that his fear of persecution was based on the attacks and threats by the Islamic majority. What is significant in construing the effect of the report is that the officers make no finding that he is not a Buddhist. In the absence of such finding the report must be read as accepting that the applicant is indeed a practitioner in that religion.*
>
> *The fallacy that lies behind this ground is the proposition that, if it is accepted that an asylum seeker is a member of a particular minority group, the claim will be well-founded if country of origin information demonstrates that such persons are likely to be threatened or attacked by some other group in the country of origin. "*

40. The judgment continues at paragraph 11 as follows:

> *"It has been submitted on behalf of the applicant that in the absence of a specific finding in the report on the issue as to whether the applicant's claim to be a practising Buddhist is accepted or not, the applicant is unable to pursue a full appeal given that there is not [an] oral hearing in this case. In the judgment of the court, this cannot be so. The applicant is entitled to proceed on the basis that, having asserted his claim to be a member of that religion, he can treat that element in the claim as accepted in the absence of any contradictory finding in that regard in the s.13 report. On that basis any issue before the Tribunal as to credibility will be whether there still exists a real possibility that, if*

repatriated to Malaysia, the applicant will face a risk of the persecution claimed. The fact that the applicant has been disbelieved in respect of the attempts he made to claim particular incidents of persecution in the past, does not preclude his seeking to persuade the Tribunal by reference to appropriate and up to date country of origin information that the persecution of Buddhists by the Islamic community has now become so pervasive as to raise the inevitability of his being attacked if he is returned. "

41. It will be noted that this was a case where the applicant would not have been afforded an oral hearing on appeal.

The "individual persecution" issue and future risk
42. Although these issues were argued under separate headings it seems to me that they flow from the same line of analysis in the s.13 report.

43. The applicant argues that the first named respondent erred in imposing upon the applicant the burden of showing that he "as an individual" would be a target for persecution.

44. The respondents do not contend that such a test would be correct and there is therefore no need to set out the authorities on this area. They do maintain that the applicant is misreading the decision. It is said that the Commissioner was making a factual finding, not a legal one, which the applicant is now attempting to portray as a legal error. The finding was made in a context where the applicant had given evidence that his village was attacked by the Janjaweed. He and remaining members of his family went to a refugee camp where there was general, ongoing insecurity. He did not claim to have been a member of any rebel group or to have any political affiliation. In the circumstances the authorised officer was simply noting that there was no reason to suppose that he as an individual would be a target, and that the alleged attack on his village appeared to be due to the general unrest in Darfur. Reference is made to paragraph 164 of the UNHCR Handbook, which states that

"Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol."

45. The applicant complains that it is irrational to dismiss the attack on his village as being simply due to general unrest and not relevant to the issue of future risk of persecution. Even where findings adverse to an applicant's credibility are made the decision-maker must, it is submitted, apply a forward-looking test to consider whether there is such a risk. In this regard he refers to *MAMA v. RAT* [2011] 2 IR 729, *MMA v. RAT* (High Court, MacEochaidh J., ex temp., 13th February, 2013) and *MLTT (Cameroon) v MJELR* [2012] IEHC 568.

46. Counsel for the respondents says that this submission fails to recognise the impact of the overall decision as regards his personal credibility. In any event the finding must be read in the context of the finding that the applicant did not himself belong to any group in direct conflict with the Sudanese government.

Discussion and conclusions
47. In my view there are two serious problems with the decision of the first named respondent.

48. The first is the failure to state whether or not it was accepted that the applicant was a member of the Zaghawa tribe. This was indeed a core part of the applicant's claim- if it was not believed, then it would appear that he had no case at all. If it was believed, that did not necessarily determine the issue of his status but it would provide a significant substratum of accepted fact.

49. The original reading of the respondents' legal representatives seems to me to have been that the report embodied a negative finding on this issue - hence the points made in the Statement of Opposition and the written submissions. However, I consider that the stance taken at the hearing was different and arose, presumably, on the basis of instructions to the effect that no such finding had been intended. The respondents now rely instead upon the decision in *HPO* and say that the applicant can proceed with his appeal on the basis that no adverse finding was made against him on this issue.

50. I do not consider that this would constitute a satisfactory resolution in this case. *HPO* involved a case where the appeal was on paper only and it was open to the applicant to argue, and indeed to the Court to find, that his claim as to his religion must be taken to have been accepted, there being no explicit rejection of it. In the instant case, there has been no formal concession as to the question by the respondents, simply a statement that there has as yet been no negative answer to it. The appeal would be a full oral hearing before the Refugee Appeal Tribunal, which is independent of the other respondents. In such a hearing the Tribunal would not be bound by the Commissioner's findings in any respect and would be free to conduct a fresh assessment. That means that the question would be determined for the first time at the appeal - in other words, that there would not in the true sense be a rehearing on an issue that is central to the applicant's claim.

51. I also consider that the first named respondent fell into fundamental error in applying the wrong test. In my view, the phrasing of the sentence

"The applicant has not provided any convincing reason as to why he, as an individual, would be a target ... "

can only be read as conveying a view on the part of the writer that it was incumbent upon the applicant to provide such "convincing reasons". It would be quite different to say, for example, that the applicant did not "claim" to be such a target, in circumstances where his case was based on membership of a persecuted group.

52. It seems likely to me that the combination of these two errors explains the lack of any forward-looking assessment of future risk, since on the Commissioner's analysis that exercise would not have been relevant.

53. For these reasons I propose to quash the decision and recommendation of the first named respondent, and remit the matter for reconsideration.