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THE HIGH COURT

JUDICIAL REVIEW

2010 180 JR

BETWEEN

E.C. AND N.O.C. (A MINOR)

APPLICANTS

AND

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

RESPONDENTS

AND

2010 181 JR

BETWEEN

B.B.N.

APPLICANT

AND

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

RESPONDENTS

AND

REFUGEE APPEALS TRIBUNAL

NOTICE PARTY

JUDGMENT of Mr. Justice Cooke delivered the 23rd day of July, 2010.

1. In these two cases the primary issue raised is whether the grounds for which leave was granted to seek to quash the s. 13 reports of the Commissioner come within the category of exceptions which have been suggested in the settled case law of the Court for which the Court will exercise its discretion to review a s. 13 Report rather than require the applicant to pursue appeals before the Refugee Applications Tribunal prior to any intervention in the asylum examination process by way of judicial review.

2. By order of 11th February, 2010, in case 2008 No. 181 JR, (that is the wife's case,) leave was granted on this ground:

> " That the second named respondent erred in fact and in law and acted in excess of and/or without jurisdiction and in breach of the principles of fair procedures natural and constitutional justice and further, failed refused and/or neglected to take into account relevant considerations and acted in breach of its statutory obligations in that essential information in relation to the asylum claims in these joint cases was not considered as to this family namely, the allegations of persecution made by the applicant prior to 2006 and the file from Belgium on whatever application she had made claiming international protection in that country and was not taken up and considered pursuant to Council Regulation EC 343/2003."

In case 2008 No. 180, that is the case of the husband and son, the ground is in similar terms in an order made on the same day.

3. This issue arises in the following circumstances. The applicants are from the Democratic Republic of Congo. They applied for asylum here in April 2007. The husband claims to have been in the army in the DRC since 1998 and to have been arrested in 2005 and held for six months because he refused to shoot people at a demonstration. In the search by government forces for the husband the wife claims that she was arrested and beaten for three days. On release she fled to Belgium and made an asylum claim. She subsequently abandoned that claim and claims to have returned to the DRC when she heard that her husband had been released. They claim that the husband was again targeted in March 2007 when soldiers of President Kabila abducted him and accused him of being involved in a plot to kill the President. He said that he was beaten and warned to leave the DRC or that he and his family would be killed. His father paid for them to be brought to Ireland via France by an agent. The husband's claim for asylum although referring to the incident of the wife's arrest and mistreatment in 2005 was made primarily by reference to the events of 23rd March, 2007, in the following days. The wife's claim was also based on those events but she claimed to fear persecution on that occasion because she feared she would be made to pay for the trouble her husband was in as she had paid in 2005. Her claim was therefore made on the basis of there being a connection between what she experienced in 2005 and in 2007 which contributed to the well founded fear of persecution in 2007 and since.

4. These claims were considered by the same two authorised officers of the Commissioner and negative recommendations were made in each instance in reports of the same date, 8th December, 2007. In each case the negative recommendation turns upon a finding of lack of credibility in the account given of the events alleged to have taken place in 2007. In the case of the wife, however, there is an express exclusion from consideration of the events she claimed happened in 2005 and which she says formed the basis of her claim

to asylum in Belgium in 2005. The report in her case states:

> "The applicant claimed asylum in Belgium in June 2005, she returned voluntarily to the DRC in May 2006 and the applicant has had an opportunity to have her case heard by the Belgian authorities and chose not to. This report will only assess the applicant's fear based on the events that occurred to her since she returned to the DRC in 2006. The applicant was not targeted between May 2006 and April 2007."

5. The Court is satisfied that this refusal on the part of the authorised officer to consider the events of 2005 when assessing the claim to a fear of persecution was mistaken. Quite apart from the fact of the subjective element in a fear of persecution in 2007 might well be aggravated by previous events of persecution from the same source, Regulation 5, para. 2 of the European Communities (Eligibility for Protection) Regulations 2006 expressly recognises that previous persecution or previous serious harm may constitute an indication of a well founded fear or of a real risk of suffering future serious harm. The authorised officers were of the view that the voluntary return to the DRC in May 2006 rendered it implausible "that the applicant would choose to return if she truly believed that her life was in danger". This ignores the basis of the claim of fear namely, the fact that she was targeted because of her husband's army problems and, as it were, the attempts of the authorities to get at him through her. When she heard he was released and that the problem was over; and when he is said to have asked her to come back, she then no longer believed that her life was in danger. Her claim was, in effect, that when the new events occurred in March 2007 her earlier fear was reaffirmed and her previous mistreatment gave her greater reason to believe that she was again in danger.

6. The immediate issue for the Court in the wife's case therefore is whether this mistake is such as warrants the exercise of the Court's discretion to quash the report rather than require the full evidence to be re-examined by a Tribunal member on appeal. As has been pointed out by counsel for the applicant, the relevant exception in the case law on this issue has been expressed in terms that the intervention of the Court may be appropriate in a case where, if the mistake is sought to be cured on appeal, some wrongly excluded evidence will only be heard for the first time. Strictly speaking this is not an instance such as in the *Stefan* case where evidence was not received at all because it was not translated. Here the wife described the 2005 events both in her application and questionnaire and in the section 11 interview. Her evidence was in fact heard but the authorised officers did not take it into account in evaluating credibility.

7. If there were no more to the issue it might be difficult to justify departing from the principle that the credibility issue should be left in the first instance to the administrative decision makers especially as there will be an oral hearing if the wife so wishes. It is simply a matter of asking the Tribunal member to reassess credibility taking into account the full extent of the evidence already given. There is, however, the additional element in this case of the Belgian application for asylum. After the receipt of the s. 13 report the wife's solicitors asked that the Belgian file be obtained by the Commissioner. This was refused by letter of 24th January, 2008, on the basis that such information could only be obtained from the Belgian authorities under the Dublin II Regulation for the purpose of establishing which Member State was responsible for the examination of the application and as this had already been resolved a request for further information "is not necessary or relevant". Insofar as this reply is based upon an interpretation of the Dublin II Regulation and Article 21 in particular, the Court is satisfied that it is mistaken. In the judgment of the Court the responsible Member State is entitled but not obliged to seek information from another Member State which is "appropriate, relevant and non-excessive for the purpose 'of examining an application for asylum'". (See Article 21, para. 1). Moreover, Article 21, para. 3 provides explicitly that "the Member State responsible may request another Member State to let it know on what grounds the asylum seeker bases his application and where applicable the grounds for any decisions taken concerning the applicant".

8. As the wife in this case now explicitly claims to ground her present claim upon the same grounds as were claimed in 2005 for which the Belgian authorities were the responsible Member State there does not appear to be any reason why Article 21 should not cover a request made now by this Member State for that information. Belgium is entitled in certain circumstances to refuse but that is another matter. The Irish authorities are entitled to ask although they cannot be compelled to do so. This issue is material to the present application for *certiorari* because if it had been raised before the s. 13 report had been finalised and the Commissioner had realised that a request was possible, the information might well have been sought. The contents of the Belgian asylum application might have lent credibility to the wife's account. On the other hand, the file might also have the opposite effect particularly having regard to the fact that the Belgium asylum claim was apparently made by the wife under a different name. It is also to be noted that she first denied ever having been in Belgium and never produced any evidence that she did in fact return to the DRC.

In these circumstances the Court considers it appropriate to exercise its discretion to quash the s. 13 report in this case on the basis of the mistaken exclusion from consideration of the evidence as to the 2005 events but also in order to allow the Commissioner an opportunity of considering the desirability of requesting access to the Belgian file. He is entitled to do so but is under no obligation to. It is true that the Tribunal member would also be entitled to request the information under s. 16 (6) of the Act of 1996 but in that event the information on the Belgian file would only be considered then for the first time.

9. The application for judicial review of the s. 13 reports on the husband in the son's applications is materially different. Although separate applications were made and separate reports given, the father spoke for the son and the claim of the son is largely dependent on that of the father. The son was born in the DRC on 7th April, 2005. The mother claims to have fled to Belgium in June, 2005. According to the son's asylum questionnaire he was taken to Belgium with her and returned with her to the DRC. In their s. 13 report there is no express refusal to consider the information given by the father as to the mistreatment of the wife in 2005. It is recorded in para. 5.4.1 and it is the basis of one of the series of implausibilities identified in the claim: "It is difficult to believe that the applicant would choose to return to work for the army when they had treated him and his wife in this manner". In the judgment of the Court this is not a case in which there is any justification for quashing the distinct s. 13 report. The husband's evidence has been considered and a series of specific reasons given for not finding it credible. If a different view of the veracity of that account is to be taken it can only be done within the asylum examination process by the Tribunal. It may be procedurally inconvenient that the husband and son should be required to proceed to appeal while the wife's case is re-examined by the Commissioner but they, (that is the applicants and the Commissioner,) have the option of asking that the appeal be delayed until the new s. 13 report in the wife's case is forthcoming.

10. The Court will therefore quash the s. 13 report in the wife's case but not in the cases of the husband and son. The Commissioner may well consider such a delay in processing the appeal in the husband's case prudent because if it should transpire that there are material discrepancies between the claim made in the wife's case then and now, a different light may be cast upon the bona fides of all of the present applications. Accordingly there will be an order of *certiorari* in respect of the application in the wife's case, 2008 No. 181.