

**THE HIGH COURT
JUDICIAL REVIEW**

[2010 No. 214 J.R.]

BETWEEN

F. F.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 17th day of April, 2015

1. The applicant seeks an order of *certiorari* quashing the decision of the respondent refusing his application for subsidiary protection dated 10th December, 2009, and an order quashing the respondent's decision to issue a deportation order against the applicant dated 28th January, 2010. The case was heard on a telescoped basis.

Background

2. The applicant is a 49 year old national of Cameroon. He claims to have been a journalist for the *Cameroonian Times* and Director of Communications and Foreign Affairs with the *Cameroonian Aid Action Association*, an NGO for the underprivileged. As a result of his work and membership of the *Southern Cameroon National Council (SCNC)* he claims to have experienced persecution. He said that he was arrested, detained and tortured in Cameroon before fleeing to Nigeria in 1999, where he was recognised as a refugee in 2001. He claimed that he was threatened in Nigeria by the *Cameroonian Ambassador*, and an attempt was made on his life when a car driven by a *Cameroonian diplomat* deliberately tried to knock him down. He fled to Ghana in 2002 where he intended to apply for refugee status: however, the office was closed. He then moved to Mali where he claimed refugee status which was granted in 2003. He started to work in Mali as a human rights activist exposing corruption in Cameroon. He also became involved in the exposure of corruption in non-governmental organisations in Mali and, in particular, the misrepresentation of the prevalence of Female Genital Mutilation. He claimed that he was asked to give a presentation in Strasburg on human rights abuses, but that his application for a visa was refused. He contends that the Malian authorities refused to sign his UNHCR travel documents unless he paid a bribe. He paid the bribe and was thereby enabled to travel. He reported this to the police in Mali but was accused of making false accusations. When he attempted to leave Mali for Strasburg, he was initially prevented from doing so and had equipment and documentation confiscated, but was ultimately permitted to leave. The content of his presentation included material concerning widespread corruption, human rights abuses and the NGO's acceptance of bribes and suppression of information that FGM was widespread in Mali. He claims to have received death threats in Mali. He now claims in these proceedings that he has no right of residence in either Nigeria or Mali and cannot return to either country. It is impossible for him to return to Cameroon having regard to the persecution which he suffered there.

3. The applicant arrived in Ireland on 1st September, 2005, and applied for refugee status the following day. He received negative recommendations from both the office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal. He applied for subsidiary protection on 22nd June, 2006, which was refused on 9th December, 2009.

Application for Refugee Status

4. The applicant's application for refugee status states that his country of birth and country of origin is Cameroon, but in respect of "nationality" indicates that he is "stateless". The address provided initially was Malian. He completed another form on 2nd September, 2005, in which his nationality is stated as (stateless) (Cameroonian) and his country of birth is again given as Cameroon and address "in own country" is stated to be "Malian".

5. In his application he states that he left Cameroon on 5th February, 1998, and travelled to Mali where he was granted refugee status under the terms of the Geneva Convention. The applicant's claim for refugee status in Ireland was based upon a number of events said to have happened in Mali, as outlined above.

6. The applicant claimed that when he attempted to claim travel documents in accordance with his status as a refugee to attend the Thirty Six Session of the Rights of Women and Children in Strasburg organised by the International Institute of Human Rights, the immigration police demanded money before providing the necessary travel documents. The applicant paid the bribe and the travel documents were provided. He then complained about this to a friend who conveyed the complaint to the Ministry of Police Affairs.

7. On 27th July, 2005, while attempting to leave Mali, the applicant was arrested at the airport by the immigration police concerning a complaint that he had unlawfully defamed the police and the *Commission National Chargé des Réfugiés (CNCR)*. His belongings were searched and a number of videos concerning his investigation into FGM in Mali were confiscated. He was then allowed to proceed to Strasburg.

8. The applicant somehow retained one of the videos concerning this investigation which he presented at the Conference and as a result of which he claimed to have been threatened by the Malian authorities by email and phone.

9. As a result the applicant believed that he had "problems" with the immigration police, the Refugee Board in Mali (CNCR) and "some high Malian authorities".

10. The other reasons which he offered for seeking asylum in Ireland were that Ireland is an English speaking country where his

children could continue their education, he wished to register at Trinity College Dublin at the Department of Theology under a master's student programme and he had relatives in Ireland.

11. In his s. 11 interview the applicant claimed that he was stateless, but that he had been born in Cameroon. He was a graduate of the University of Lagos and worked as a teacher and journalist in Cameroon. From 2000 he was Director of Communications and Foreign Affairs for Cameroon Aid Action (an NGO). In the interview he outlined how he fled Cameroon and obtained asylum in Nigeria. He was subsequently granted asylum in Mali where he lived for three years from 2002 prior to travelling to France for the Conference and on to Ireland on his Malian 1951 Geneva Convention travel documents. He maintained that he faced two difficulties in Mali, firstly, a problem with the police arising out of his allegation and secondly, a problem with the authorities because of his exposure of FGM.

Section 13(1) Report

12. ORAC regarded his claim as one based on allegations of persecution in Mali for political opinions. Mali was regarded by the applicant as his country of habitual residence. It was noted that the applicant was not claiming that he was persecuted in Mali, but that he would be on his return. The credibility of his claim was analysed and rejected.

Notice of Appeal

13. In his notice of appeal the applicant claimed that his country of habitual residence was Mali.

Tribunal Decision

14. At the hearing before the Tribunal the applicant's nationality was recognised as Cameroonian, but that he had refugee status and habitual residence in Mali. In the course of the evidence the applicant acknowledged that he had not experienced any difficulties whilst in Mali. The Tribunal's analysis of the applicant's claim states:-

"This applicant accepts that he did not have any difficulties in Mali while he was living there. However, he claims that he would be persecuted if he returned to Mali on account of the fact that he published that Female Genital Mutilation was practised in Mali. He made this presentation to a Human Rights Conference in Strasburg. He made that presentation in his capacity as a journalist and a human rights activist. He now claims he would be killed if he returned to Mali on account of being involved in publicising the fact that Female Genital Mutilation was widespread in Mali."

The claim was considered against country of origin information which indicated that though there was government control of television and one of more than 125 radio stations, the broadcasting media presented a wide range of views including those critical of the government. The law regulated the press and provided for substantial criminal penalties, including imprisonment for libel and for public injury to the Head of State, other officials and foreign diplomats. However, the government had never prosecuted journalists on criminal libel charges. His claim was found not to be credible or well founded.

15. These determinations were not challenged by way of judicial review.

Application for Subsidiary Protection

16. An application for subsidiary protection was made on 22nd June, 2007. The applicant claimed that his nationality was "stateless". He claimed that he was at risk of serious harm and execution in all countries of former habitual residence, namely Cameroon, Nigeria and Mali. In particular it was claimed:-

"The applicant does not have access to any protection in Cameroon, Nigeria or Mali as he is stateless, as was accepted by the Office of the Refugee Applications Commissioner. It was accepted by the presenting officer and the s. 13 report that the applicant's place of habitual residence was Mali. I refer to para. 104 of the UNHCR Guidelines acknowledges that the appellant can fear more than one place or formal (sic) habitual residence as is the current position. The applicant has abandoned Cameroon, Nigeria and Mali as he cannot avail of any protection in these countries and cannot as a result return to any one of them.

It is the state authorities he fears in Cameroon and Mali and the UNHCR and police in Nigeria are unable to protect him and he does not believe that he would be accepted back in either Cameroon, Nigeria or Mali in any event."

17. The respondent was not satisfied that the applicant had demonstrated that he was without protection in Mali or Nigeria and did not find any substantial grounds for believing that he would be at risk of serious harm by "death penalty or execution" or "torture or inhuman or degrading treatment" as alleged in Mali or Nigeria if returned to either country. It was acknowledged by the applicant that Nigeria and Mali accepted that he feared some form of persecution in Cameroon and that he was granted international protection in the form of refugee status as a result.

18. The application for leave to remain was considered under s. 3(6) of the Immigration Act 1999 (as amended) and s. 5 of the Refugee Act 1996. Refoulement was not found to be an issue in either Nigeria or Mali. The case was also considered under s. 4 of the Criminal Justice (United Nations Convention against Torture) Act 2000, and based on the information provided at that time, a deportation order was made.

The Challenge

19. The applicant claims that the refusal to grant subsidiary protection was unlawful because no assessment was made of the risk faced by the applicant in his country of origin, Cameroon. Though the applicant was recognised in the deliberation prepared by the officials prior to the making of the decision as a national of Cameroon, it also expressly stated that the risk faced by the applicant in Cameroon was not under consideration. It is submitted that this was in breach of the decision maker's statutory duty and consequently, the decision to refuse subsidiary protection must be quashed. Furthermore, it was submitted that the focus on issues concerning Nigeria and Mali was wrongly based on the assumption that the applicant could reside in either country in the absence of evidence that he had a right of residence in either country and without proper regard to his case that he was obliged to leave both countries and had no right to reside there. It was further submitted that even if the applicant had a right to reside in either country, the respondent was obliged to determine whether he could "assert citizenship" in either country in accordance with Regulation 5(1)(e) of the European Communities (Eligibility for Protection) Regulations 2006. It was submitted that the failure to make that assessment rendered the decision unlawful.

20. In the determination of the subsidiary protection application, the officials noted that the applicant's nationality was "Cameroon (has refugee status in Mali and in Nigeria)". It was also noted that the applicant claimed fear of serious harm in Cameroon because of the potential imposition of the "death penalty or execution" and "torture or inhuman or degrading treatment or punishment of an applicant in the country of origin". The determination sets out the main issues to be examined in the application, including:-

"Would the applicant face a threat of serious harm by way of death penalty or execution and/or torture or inhuman and degrading treatment or punishment, if returned to Cameroon?"

Under the heading "fear of serious harm...if returned to Cameroon", it states:-

"The applicant claims that if he is returned to Cameroon, he is at risk of being subjected to torture or inhuman and degrading treatment. However, it is noted from the applicant's own account that he was granted formal refugee status in both Nigeria, and later in Mali. There is no evidence to suggest that the applicant's refugee status in either jurisdiction has been revoked. In light of this, it is acknowledged that both jurisdictions accepted that the applicant feared some form of persecution in Cameroon and accepted that he had protection needs in respect of his country of origin, Cameroon, and both jurisdictions duly granted him protection status in the form of refugee status.

In the light of the above, I will not be examining the applicant's claim of serious harm in respect of his fears of being returned to Cameroon."

The Regulations

21. The following provisions of the European Community (Eligibility for Protection) Regulations 2006, which give effect to Council Directive 2004/83/EC (the Qualification Directive) are relevant:-

"2 (1) "country of origin" means the country or countries of nationality or, for stateless persons, of former habitual residence...

"person eligible for subsidiary protection" means a person—

(a) who is not a national of a Member State,

(b) who does not qualify as a refugee,

(c) in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, would face a real risk of suffering serious harm as defined in these regulations,

...

(e) is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country...

"protection against persecution or serious harm" shall be regarded as being generally provided where reasonable steps are taken by a state or parties or organisations, including international organisations, controlling a state or a substantial part of the territory of that state to prevent the 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, where the applicant has access to such protection...

"serious harm" consists of—

(a) death penalty or execution,

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or

(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.

4(3) In determining whether a person is eligible for subsidiary protection, the Minister—

(a) shall take into consideration, in addition to matters mentioned in Regulation 5, any particulars furnished by the applicant under paragraph (1)(b); and

(b) may take into consideration—

(i) the information or documentation taken into consideration in relation to the determination of the applicant's application for a declaration, and

(ii) such other information relevant to the application as is within the Minister's knowledge...

5(1) The following matters shall be taken into account by a protection decision-maker for the purposes of making a protection decision:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the protection applicant including information on whether he or she has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the protection applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the protection applicant's activities since leaving his or her country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for protection as a refugee or a person eligible for subsidiary protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he or she could assert citizenship."

22. It was noted in the determination in respect of the "applicant's actual or potential citizenship" under Regulation 5(1)(e) that:-

"The applicant claims to have been granted full refugee status in Mali. A Malian 1951 Convention travel document and a refugee identity card No. 95-A006553 had been submitted in respect of the applicant. The applicant also claims to have been granted refugee status in Nigeria but no documentation has been submitted to support this assertion."

23. The applicant seeks international protection in Ireland by way of subsidiary protection on the basis that he does not have adequate international protection, notwithstanding the granting of refugee status to him in Mali and Nigeria and because as acknowledged by Nigeria, Mali and the respondent, he was properly in need of international protection having fled Cameroon of which he was a national. His application for a declaration of refugee status in this country was based on the proposition that he was a "stateless" person and was so regarded. Regulation 2(1) provides that the "country of origin" is the country for stateless persons of former habitual residence.

24. It is clear that the purpose of the 2006 Regulations and the Directive is to provide international protection of a complementary kind within the European Union. This was considered by Cooke J. in *W.A. (DRC) v. Minister for Justice, Equality and Law Reform* [2012] IEHC 251 at para. 34:-

"International protection is accorded only where national protection in the country of origin is not. The point is expressed in the following way by McAdam in *Complementary Protection in International Refugee Law*" (Oxford University Press 2007, p. 20):

'The need for international protection is predicated on the breakdown of national protection – a lack of basic guarantees which states normally extend to their citizens.'

The same point is made by Hathaway:

'Because refugee law is intended to meet the needs of only those who have no alternative to seeking international protection, primary recourse should always be had to one's own state.' (*The Law of Refugee Status*: Butterworth's 1991, p. 133)."

25. It is in accordance with the scheme and purpose of the Regulations and the Directive that the true nature of the international protection sought falls to be examined by the decision maker. There was no evidence at the time of the application that the applicant's refugee status in Mali or Nigeria had been revoked. Though the applicant's affidavit states that he is no longer entitled to reside in Mali or Nigeria, that submission was not made as part of the application for subsidiary protection or leave to remain in the state under section 3. The sole basis of the application was a fear of serious harm if returned to Mali or Nigeria.

26. The respondent dealt with the applicant as a "stateless" person who had been habitually resident in Mali prior to his coming to Ireland and Nigeria before going to Mali. He had been granted refugee status in both countries, but had not succeeded in establishing substantial grounds for believing that he would, if returned to Mali or Nigeria, face a real risk of suffering serious harm.

27. A similar situation was considered in the context of an application for a declaration of refugee status in *K (T.B.) v. Refugee Appeals Tribunal and Minister for Justice* [2010] IEHC 438. A question arose as to whether the applicant ought to be considered as a refugee who had fled persecution in Bhutan, his country of nationality, or as the Tribunal concluded, as a stateless person who was outside the last country of his habitual residence, namely Nepal, and who had failed to establish any basis for fearing persecution if returned to Nepal. It was alleged that the Tribunal acted in breach of the Regulations by failing to engage with the claim that he was a Bhutanese national as opposed to being stateless. The Tribunal assessed the claim on the basis of his former habitual residence in Nepal. The court rejected the submission that the Tribunal's conclusion that the applicant was stateless was irrational. Cooke J. stated:-

"That finding is not inconsistent with the case that was made to the Tribunal member at the appeal hearing, because precisely those possibilities were canvassed in the "several different approaches" put forward in the written additional submissions. Having regard to the fact that the Contested Decision also refers expressly in its title to the applicant's nationality as being "Bhutanese" and the country as being "Bhutan" as well as clearly recording that the applicant was born in Bhutan of Bhutanese parents and lived there for 23 years, the finding that he was stateless is necessarily a finding which rejects the proposition that he had retained the nationality of Bhutan since leaving it in 1992. Furthermore, that finding was clearly open to the Tribunal member on the evidence before him. As already indicated above, the applicant had testified that his family had been unable to provide the proofs of residency required by the changed nationality laws, thereby becoming treated as illegal immigrants. However questionable the policy of the Bhutanese authorities might be in international law, there is no doubt that the intention and practical effect was to deprive the applicant and his family of citizenship of that country. It follows, accordingly, that even if, notwithstanding the terms of the Notice of Appeal, the memorandum of "Additional Submissions" as well as the oral submissions made at the hearing are taken as maintaining a claim based upon Bhutanese nationality, the Contested Decision did not fail to "engage" a claim but made an explicit finding which can only be interpreted as a rejection of it."

28. It is clear that the subsidiary protection decision in this case followed a series of applications made by the applicant claiming that he was a stateless person. The approach adopted by the respondent in the determination is entirely in accordance with the applicant's consistently claimed status. The reality is that he had fled Cameroon for reasons which were acknowledged by the applicant and accepted by the governments of Mali and Nigeria. At the time of the subsidiary protection application the preponderance of the evidence was that the applicant was a "stateless" person for the purpose of the Convention.

29. In addition, the applicant obtained a declaration of refugee status in Mali. If recognised as a refugee under the Geneva Convention by another contracting state, he could not obtain a declaration of refugee status in Ireland under s. 17(4) of the Refugee Act 1996 (as amended) unless the reason for leaving or not returning to that state or for seeking a declaration in Ireland related to a

fear of persecution in that state. His claim in respect of Mali was rejected. The basis upon which he could then apply for subsidiary protection was as a failed asylum seeker. Clearly, he could not have obtained a declaration of refugee status based upon a fear of persecution in Cameroon, because he already had refugee status in Nigeria and Mali and had based his application on that fact. I am not satisfied that the purpose of the Directive and the Regulations is served by an interpretation which requires the respondent to consider the applicant's position in Cameroon when determining this complementary form of international protection, when the evidence demonstrates that he has refugee status in Mali and Nigeria. It is entirely appropriate and logical that this complementary form of international protection should be considered in the context of his failed application for asylum in respect of Mali and Nigeria. The object of providing subsidiary protection is to meet the requirements of those who have no alternative to seeking international protection and cannot avail of the protection of their country of origin, which for a stateless person means their country of former habitual residence, in this case Mali or Nigeria. It is contrary to the purpose of the Regulations, the Directive, the Refugee Act 1996, as amended, and the Geneva Convention to provide a further form of international protection to a person who has the benefit of refugee status in another country. To adopt the applicant's submissions would be to permit the applicant to circumvent s. 17(4) and to avoid its clear meaning and purpose. It would allow him to disavow the factual and legal basis upon which his application for refugee status was considered and rejected in Ireland.

30. A reinvention of the applicant's claim is apparent from the affidavit grounding this application which invites the court to determine that he has no right to reside in Nigeria or Mali and/or no longer has the benefit of refugee status in either country. There is no affidavit of laws in support of this new case. In any event, none of this material was placed before the decision maker and could not result in the quashing of the decision. The applicant was bound to produce and advance all relevant material at the time of the making of the decision. I am satisfied that the court should not consider this material as offering a proper basis upon which to challenge the subsidiary protection or deportation decisions by way of judicial review.

31. For the above reasons, I am satisfied that the respondent in this case was not acting in breach of his statutory duty as claimed. It was lawful and appropriate for the decision maker, having regard to the history of the case and the reality of the applicant's circumstances, as advanced by him, to accept the alleged risk of harm to the applicant in Cameroon, and concentrate on his alleged fear of being returned to Nigeria or Mali where he had been granted refugee status. All relevant matters were considered in accordance with the Regulations.

32. Even if the applicant's submission were correct and the respondent should have considered whether if returned to Cameroon, he would face a real risk of serious harm, it is clear that this proposition was accepted for the purpose of the determination and that there was never any intention of returning him to Cameroon. I am not satisfied that any further consideration of this accepted risk could have advanced the applicant's case for subsidiary protection. The only relevant countries to which he could be returned were Mali and Nigeria, in both of which the applicant had refugee status and rights to reside. Thus, if the court considered that the applicant's grounds in this regard had any merit, I would exercise my discretion against granting any relief by way of *certiorari*. Therefore, I am satisfied that the applicant has not demonstrated any substantial grounds upon which to grant leave to apply for judicial review of the subsidiary protection decision or the deportation order.

Delay

33. These proceedings were issued on 25th February, 2010. The applicant was informed of the impugned decision on 28th January, 2010. Fourteen days had therefore elapsed from the date of notification of the decision of the Tribunal within which the applicant should have applied for leave to apply for judicial review pursuant to s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000. The limited timeframe was to ensure and encourage the early completion of judicial review proceedings. In this case, as in others, this was not possible for various practical reasons. In the circumstances, in particular having regard to the decisions of MacEochaidh J. in *M.B. v. Olive Brennan* (Unreported, High Court, 9th April, 2013) and *K.B. v. Minister for Justice* (Unreported, High Court, 12th April, 2013), concerning the extended period within which objection was not taken on the basis of delay in issuing the proceedings, I am satisfied that in exercising discretion as to whether there is good and sufficient reason to extend the time I should lean towards the applicant. I note also that the applicant's affidavits indicates that significant effort was made to have the proceedings issue within time, but this did not prove possible. However, I am also entitled to consider whether any injustice will be done to the applicant by refusing an extension of time. Having regard to the fact that I am not satisfied that substantial grounds exist for the granting of leave to apply for judicial review, I decline, in the exercise of my discretion, to extend the time (see *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418).

34. In the circumstances the challenge to the deportation order also fails and its execution is a matter for the respondent.