

**THE HIGH COURT
JUDICIAL REVIEW**

2006 No. 1159 J.R.

BETWEEN**F. O. S.****APPLICANT****AND**

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

Judgment of Mr. Justice McMahon delivered on the 11th day of July, 2008

1 The applicant in these proceedings seeks leave to bring judicial review proceedings to quash the decision of the Refugee Applications Commissioner (hereafter "the Commissioner") dated the 15th August, 2006, that the applicant failed to establish a well founded fear of persecution as defined in s. 2 of the Refugee Act 1996 (as amended) and a recommendation that the applicant should not be declared a refugee.

2. The applicant has also without prejudice to these proceedings lodged an appeal to the Refugee Appeals Tribunal. This means that the applicant, in the event of leave being refused, will be entitled to a full oral hearing of her case where all the issues she complains of can be fully ventilated by her legal team at such hearing. Moreover, her ability to argue her case will be strengthened by the fact that she and her legal team will, in such an eventuality, have prior notice of the issues identified by the Commissioner (and further ventilated in this court) and will be better able to address them on that occasion. The availability of this alternative remedy is an important consideration which this court may take in account in determining whether judicial review is an appropriate remedy in the circumstances.

3. I have read all of the papers including the legal submissions and I have listened carefully to the oral arguments submitted by both sides.

4. In cases such as this it is important to remember that this court is not here to substitute its view of the facts for that of the Commissioner. If the applicant's complaint is concerned only with the outcome or the decision of the Commissioner she must confine herself to the appeal process. It is only if the challenge to the Commissioner's decision goes to jurisdiction (i.e. if it is illegal or contrary to legislation) or a failure to apply fair procedures that judicial review might be available. In judicial review proceedings the court focuses on the process of the investigation and provided this was carried out properly and with due regard to fair procedures the court will not interfere. Specifically, the court will not substitute its view for that of the Commissioner who is appointed as an expert and who has conducted the interview. To succeed at the leave stage in judicial review the applicant must prove to the court that there are substantial grounds why such leave should be granted in this case.

Factual Background

5. The applicant is a Nigerian national who left her country of origin on the 9th May, 2006 and arrived in the State on the 10th May, 2006. She entered the State illegally, and she had not applied for asylum anywhere else en route to this State. She applied for asylum on the 11th May, 2006. She completed a questionnaire on the 16th May, 2006.

6. The applicant is a 29 year old woman, she is a Muslim and a member of the Yoruba tribe. She was married by religious rite on the 16th December, 2005. Her husband came with her to Ireland. Her parents are still alive, and they and her three siblings still live in Nigeria. The applicant attended University and has a BA in History which she completed in September, 2001.

7. At question 22 of the questionnaire, the applicant stated that she was claiming asylum because of religion. At question 21, she stated that her problem began on the 14th February, 2000, when she first introduced her husband to her parents as the man she wanted to marry and they rejected him because they had already promised her to a chief priest. She stated that she did not report the matter to the police and that she had lived in a different part of Nigeria for seven months before travelling to this State. She did not have to pay for her trip to this State because she said it was arranged by the Mosque where she had sought help.

8. The applicant's interview under s. 11 of the Refugee Act 1996 (as amended) took place on the 8th August, 2006, and the interview was conducted in English. The applicant was informed by letter dated the 15th September, 2006 that she had been unsuccessful in her application.

The Commissioner's report pursuant to s. 13(1) of the Refugee Act 1996 (as amended)

9. The Commissioner identifies that the applicant's case is based on a stated fear of persecution in Nigeria because her parents insisted that she marry the chief oracle priest. In his conclusion the Commissioner states:-

"I am of the opinion that the applicant's claim lacks credibility. Therefore the benefit of the doubt cannot be offered in her case. On consideration of the facts of the case, taken with available country of origin information and the applicant's testimony, I conclude that the applicant does not have a well founded fear of persecution in Nigeria."

10. Accordingly he recommended that the applicant should not be declared a refugee under the legislation.

11. The twelve grounds upon which relief is sought are set out in the statement required to ground an application for judicial review but can be summarised under three headings as the applicant has done in the written submissions filed with the court:

1. Want of fair procedures;
2. Want of basis for recommendation;
3. Absence of reasons.

1. Want of Fair Procedures

12. The applicant in particular alleges that the Commissioner did not put all relevant matters to the applicant and relies on observations of Clarke J. in *I. (v.) v. Minister for Justice, Equality and Law Reform & Anor* [2005] IEHC 150 wherein he states that

even in inquisitorial bodies, persons who may be effected by a decision of such bodies must be afforded a reasonable opportunity to know the matters which may be likely to effect the judgment of that body against an interest.

13. The Commissioner in his report indicated that there were a number of credibility and plausibility issues which undermined the applicant's case. He specifically referred to the fact that the applicant stated that neither she nor her husband reported their problem to the Nigerian police and that they had made no attempt to avail of the protection of the authorities because, the applicant claimed, the police worked in favour of the chief priest who was a powerful man. He concluded that the applicant failed to submit any evidence to support this belief and failed to credibly show that the authorities in Nigeria would not have provided her and her husband with suitable protection or that the authorities would not have attempted to satisfactorily investigate serious threats to her life and her husband's life had they been informed. The Commissioner also found it implausible that the applicant's husband remained in the area until October, 2005 even though he knew of the threat from the chief oracle priest in February, 2000. The Commissioner found it difficult to accept that the applicant would not report to or seek assistance from the police, especially because of the applicant's allegation that she was forced to have an abortion in 2002 and that her husband's father was killed and his house partially burned down and that he (her husband) was severely beaten and hospitalised for three weeks in July, 2002. The Commissioner rejected as implausible the evidence given that the Imam at the Mosque where she took refuge before fleeing the country would have the resources to provide food and accommodation for her and her husband for seven months and eventually pay for the flights for both to Ireland. Moreover, the Commissioner found that the applicant did not submit any credible evidence to support her claim that the chief oracle priest had influential connections with the police.

14. It is my view that the Commissioner had sufficient grounds to come to the conclusions that he came to on the credibility issues. The one issue that gives me cause for some concern is the rejection by the Commissioner on implausibility grounds of the applicant's allegation that the Imam in the Mosque supported her and her husband for seven months and provided all the expenses in relation to travel and flights for them to come to Ireland. Perhaps the Commissioner should have put his doubts on this matter to the applicant to enable her to elaborate or provide corroboration of her statement in this regard. In view of the other reasons, however, given by the Commissioner doubting her account the failure by him in this specific instance does not materially disturb or undermine his overall conclusion on her credibility.

15. With regard to the allegation that these specific matters were not put to the applicant at the hearing one must bear in mind the nature of the process set out in the Refugee Act 1996. When the applicant presents herself to the authorities seeking asylum it is clear that the applicant has to make out her case and that the onus of proof is on the applicant in the first instance in this regard. It is only the applicant who can tell the factual story and she must appreciate that it is important for her to provide whatever collaborative evidence she can muster. It is true that in some cases the applicant may present in such circumstances that specific collaboration may be difficult to come by and the benefit of the doubt will be extended in such circumstances. Nevertheless at the end of the day the Commissioner must make an assessment on the credibility of the applicant and the plausibility of the applicant's account and it is not necessary for the Commissioner to emphasise the obvious at every stage of the process. In carrying out this exercise the Commissioner will take many factors into account including the applicant's demeanour, any inherent contradictions in her story and the availability of information from other recognised sources as well as knowledge which the Commissioner has from his experience or because he is an expert in the area. In making his assessment and in reaching his conclusions, which will not be done until he makes a full and comprehensive review of the interview and the documentation available to him, the Commissioner must take all matters in account.

16. In making complaint on this issue the applicant relies on the dictum of Clarke J. in the *I. (v.)* case which reads in part as follows:-

"In those circumstances it seems to me that whatever process or procedures may be engaged in by an inquisitorial body, they must be such as afford any person who may be affected by the decision of such body a reasonable opportunity to know the matters which may be likely to affect the judgment of that body against their interest. In the course of argument in this case it was suggested on behalf of the RAT that it would be inappropriate for the Tribunal either to direct the line of questioning which should be adopted on behalf of the Commissioner or to engage in questioning itself (on the grounds that such questioning might give rise to an appearance of bias). I am afraid I cannot agree.

If a matter is likely to be important to the determination of the RAT then that matter must be fairly put to the applicant so that the applicant will have an opportunity to answer it. If that means the matter being put by the Tribunal itself then an obligation so to do rests upon the Tribunal. Even if, subsequent to a hearing, while the Tribunal member is considering his or her determination an issue which was not raised, or raised to any significant extent, or sufficient at the hearing appears to the Tribunal member to be of significant importance to the determination of the Tribunal then there remains an obligation on the part of the Tribunal to bring that matter to the attention of the applicant so as to afford the applicant an opportunity to deal with it. This remains a case whether the issue is one concerning facts given in evidence by the applicant, questions concerning country of origin information which might be addressed either by the applicant or by the applicant's advisors or, indeed, legal issues which might be likely only to be addressed by the applicant's advisors."

17. (This passage has since been repeated by Clarke J. in *Moyosola v. Refugee Applications Commissioner* [2005] IEHC 218 and approved by Finlay Geoghegan J. in *Olatunji v. Refugee Appeals Tribunal* [2006] IEHC 113.) I have no difficulty in accepting this as an accurate statement of the law. Further, it must be acknowledged as it is by Clarke J., that the obligation on the relevant body is an obligation to give "a reasonable opportunity" to the applicant and that the obligation arises only where the relevant matter is "important to the determination" so that the applicant will have the opportunity to respond. Not every matter, however, must be put to the applicant or to his advisors. It is not incumbent on the Commissioner, after every question is answered, to say to the applicant:-

"I am not sure I believe your answer. It may be when I assess the matter fully and examine the evidence in its totality that I will reject your answer to this question. What do you say to that?"

18. It is quite clear to all who participate in this exercise, especially where the applicant is a university graduate and is assisted by legal advisors, that the application will be at risk if the applicant is not believed, and that the general onus of proof lies on the applicant who is in appropriate cases to be given the benefit of the doubt. The dicta of Clarke J. is of particular relevance where the applicant's version is challenged by reference to a specific fact which the Commissioner learns of from another source and which clearly challenges the applicants version of events. If, for example, the applicant alleges that Ireland is the first State where she has made an application for refugee status and it comes to the knowledge of the Commissioner that the applicant has in fact previously applied for this status in the United Kingdom under a false name, such a significant matter will of course have to be put to the applicant in an open and clear manner. Whether a matter assumes such significance in any given case depends on the circumstances and in considering this issue one must look at the overall picture and the investigation process in the round.

19. It is particularly significant in our case that the Commissioner in his determination puts particular reliance on s.11B (c) of the Refugee Act 1996 which requires as a matter of particular concern "whether the applicant has provided a full and true explanation of how he or she travelled to and arrived in the State".

20. In specifying this it is clear that the Oireachtas has elevated the applicant's account of the arrival in the State to a particular status where special scrutiny is warranted. The section clearly alerts the applicant and her legal advisers to the importance of providing an accurate and credible account of her arrival in the State. It clearly signals that corroboration should be provided where possible and that there is a great risk for the applicant if she fails to provide a credible and accurate account. Where the legislature itself emphasises this there is much less of a requirement on the Commissioner to repeat specifically to the applicant the importance of bringing forward what proofs she can muster. The Commissioner was quite entitled, in view of the strict security now in place at all international airports since the 9/11 attacks on New York, to have serious reservations about the applicant's story, first, when she said that she never had the passport itself and second, when she alleged that the agent who travelled with her at all times held the documents when she passed through airport immigration. It would be highly unusual for an adult arriving in the State on an international flight not to personally present documents to the immigration officers. If the applicant was asserting that that was the position, she must appreciate that such an unusual account would require full explanation and elaboration if she expected to be believed. In such circumstances, she or her legal advisors hardly required a specific reminder from the Commissioner that a bald statement without more was unlikely to convince.

21. From this perspective I am satisfied that the officer reached his recommendation in good faith based on inferences drawn from the evidence he heard and from inconsistencies in the applicant's story itself. I repeat it is not for this court to substitute its view of the facts for that of the Commissioner's which, as I say, were arrived at after reasonable deliberation and having observed the required due process in the circumstances.

22. It is also significant to note that other reasons given by the Commissioner for reaching the conclusion he came to were:-

1. That the applicant failed to credibly show that the authorities in Nigeria would not have provided her with suitable protection and similarly failed to show that they would not have attempted to satisfactorily investigate serious allegations and threats if an effort had been made to inform the authorities;
2. That given the large relative size of the country of Nigeria, internal relocation is a possible option in a case such as this where non state agents are the alleged source of persecution.

23. In relation to the first point, the applicant alleged that in coming to his decision the Commissioner stated that "the applicant failed to submit any evidence to support the belief that the police worked in favour of the chief priest who was a powerful man". It is true that the Commissioner made this remark at para. 4.6 but this must read in light of his finding at para. 4.7 where he says:-

"The applicant had provided a number of documents which I attached to the file. All documents have been taken into consideration during the analysis of the applicant's claim".

24. From this I accept that the Commissioner took into account the newspaper report, copies of which were handed in by the applicant, when reaching his decision. This newspaper report dated the 10th of July, 2006, purported to show the power and influence of the High Chief Adleke Oyenuga while reciting the atrocities that were visited on the S family as narrated by the applicant. It is sufficient to note that para. 4.7 of the Commissioner's report states that it was one of the documents which he took into account. It is not for this court to second-guess the weight the Commissioner placed on this report; it is sufficient for me to note that contrary to what the applicant says, it was consulted.

25. On the second matter, the Commissioner states:-

"Latest country of origin information suggests that 'the Nigerian constitution provides for the right to travel within the country and the government respects those rights', and concludes 'internal relocation to escape any ill treatment from non state agents is almost always an option'". (At para. 4.6, citing United Kingdom Home Office "Operational Guidance Note - Nigeria", December, 2005 - Appendix B).

26. Given the Commissioner's expertise and bearing in mind that the Commissioner also relied on paras. 37, 41 and 42 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, I am not prepared to accept the applicant's argument that reliance on this United Kingdom Home Office (Operational Guidance Note) document was inappropriate in the circumstances. Similar information is recorded in the Home Office Country of Origin Information Report on Nigeria, April 2006 at para. 6.116. Citing the British Danish FFM Report it states: "Women from the north who find themselves under pressure to marry against their own wish may take up residence in another state in the northern part of Nigeria or in the south, especially in Lagos. These women can seek legal assistance from a number of NGOs and some do so."

27. Many of the other objections raised by the applicant in this application are matters which can clearly be properly and adequately addressed at the full oral appeal hearing available to the applicant and for this reason it is not necessary, to do justice for the applicant, to grant leave in these proceedings.

2. Want of Basis for Recommendation

28. It is difficult to understand what is meant by the applicant under this heading. The Commissioner had serious problems with much of the accounts and explanations given by the applicant. The basis of the Commissioner's decision is one of credibility. The Commissioner is unequivocal on that. He has clearly indicated that many of the applicant's explanations are implausible and the cumulative effect of this, in his mind, is that he concludes that the well-foundedness of the applicant's fear of persecution is not proved.

29. I also reject the argument advanced by the applicant that in reaching his decision the Commissioner did not subject the case to a rational analysis. In my view the decision maker considered all the evidence carefully and came to a conclusion which was not on the face of it unreasonable.

3. Absence of Reasons

30. Reading the Commissioner's report in its entirety I am also satisfied that the Commissioner has given sufficient reasons to justify his conclusion that the applicant's account lacks credibility. Moreover, as I have already said this is a matter which can be further tested when the matter comes on for hearing at the full oral appeal.

31. Whether the court should allow judicial review in circumstances where the applicant has available as an alternative remedy a full appeal, has been thoroughly examined by the Supreme Court in the *Stefan v. Minister for Justice* [2001] 4 I.R. 203 by the Supreme Court and in particular by Denham J. at p. 217:

"*Certiorari* may be granted where the decision maker acted in breach of fair procedures. Once it is determined that an order of *certiorari* may be granted, the court retains a discretion in all the circumstances of the case as to whether an order of *certiorari* should issue. In considering all the circumstances, matters including the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences for the applicant if an order of *certiorari* is not granted and the degree of fairness of the procedures, should be weighed by the court in determining whether *certiorari* is the appropriate remedy to attain a just result."

32. In *Stefan* part of the evidence was omitted from the translated interview considered by the authorised officer and there clearly was a breach of fair procedures in that case and *certiorari* was granted.

33. It is clear from *Stefan* that even if there is a breach of fair procedures it is still a matter in which the court retains discretion. Earlier in her judgment at p.215, Denham J. quoted from O'Higgins C.J. in the *State (Abenglen) v. Corporation of Dublin* [1984] I.R. 381.

"The question immediately arises as to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the court's discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which *certiorari* has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground for refusing relief. Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with errors in the application of the code in question. In such cases, while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate."

34. From this it is clear that even if the Commissioner in the present case failed to apply fair procedures the decision to grant an order for judicial review is still a discretionary matter for the court which may grant or refuse to secure a just result. As already mentioned the availability of an alternative remedy will be a significant factor in reaching such a decision.

35. For these reasons, I refuse to grant leave to bring judicial review proceedings in this case.