THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 310 J.R.]

BETWEEN

A. W.

APPLICANT

AND

THE OFFICE OF THE REFUGEE APPLICATIONS COMMISSIONER, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 19th day of February 2013

1. This is an application for leave to seek judicial review where the central complaint advanced is that s. 13 of the Refugee Act 1996 (as amended) will unlawfully deprive the applicant of an oral hearing when he appeals to the Refugee Appeals Tribunal.

2. The applicant, a married man with children, is a national of Pakistan who claims persecution at the hands of the Taliban. He arrived in Ireland on 30th December 2009 and almost immediately claimed asylum. He was interviewed by the Office of the Refugee Applications Commissioner. It became apparent that the applicant possessed a visa for the United Kingdom. When a transfer order was made requiring him to pursue his asylum application in the United Kingdom, this was challenged unsuccessfully in the High Court. Thereafter, the applicant evaded transfer to the UK. On the expiry of the time limits to affect that transfer, the applicant again sought asylum in Ireland.

3. The essential elements of the applicant's persecution/serious harm claim relate to an attempt by the Taliban to extract money from him accompanied by threats to his life if he did not comply.

4. Negative credibility findings were made against the applicant at first instance.

5. The Office of the Refugee Applications Commissioner ("ORAC") noted that the applicant did not leave Pakistan until six to eight weeks after the Taliban came to his house and threatened him. The evidence had been that the Taliban gave him a few days to organise money. The Office of the Refugee Applications Commissioner decided that "it is not credible that he would remain living in his home safely with his family for a further six to eight weeks if his life had been threatened by the Taliban. Therefore, this assertion that that the Taliban were threatening to kill him is not considered credible".

6. It was noted that the applicant's passport indicated that he left Pakistan on 4th November 2008, remained in the UK for four months, and arrived back in Pakistan on 22nd April. His daughter was born in January 2009 and the applicant claimed that he was present at her birth. The ORAC concluded as follows:

> "The applicant's testimony was internally inconsistent with regard to his travel to the UK in 2008/2009. His testimony was inconsistent with documents that he submitted to this office (*i.e.* copy passport pages). Therefore, the applicant's statements in this regard are not accepted. This raises serious and legitimate credibility concerns regarding the applicant's testimony as a whole."

7. The applicant has significant family connections in the United Kingdom and has visited the United Kingdom on two occasions. ORAC notes that he failed to give a reasonable explanation why he evaded transfer to the United Kingdom, having regard to his family connections in that country. The conclusions reached by ORAC on this matter are as follows:

> "If the applicant was genuinely afraid for his safety in Pakistan it should not matter to him which safe country assesses his asylum claim. The applicant was supposed to be transferred to the UK under the Dublin II Regulation, a country where the applicant had travelled to before and where he has a sister and very supportive uncle living. The fact that the applicant purposefully avoided his transfer to the UK for a specific period of time suggests that he is not genuinely in fear of his life in Pakistan. This serves to undermine the credibility of the basis of his asylum claim."

8. In an exchange with ORAC officers as to what his intentions were when he left Pakistan for Ireland, he said, "I didn't know what asylum was but the agent told me to go here and claim asylum. If I had known, I would have got a business visa, but now I'm caught here so that's why I applied". The s. 13 report concludes on this element of the evidence as follows:

> "The applicant maintains he would have preferred to have gotten a business visa for Ireland as opposed to seeking asylum here if he had 'known what asylum was'. He asserts he applied for asylum because he was 'caught here'. This suggests that his motivation for coming to and staying in Ireland is not predominantly about seeking protection. This serves to question the credibility of his asylum claim."

9. His inability, despite being a well travelled man, to state what countries he travelled through (after Turkey before reaching Ireland) were found to count against his credibility.

10. Another aspect of the credibility findings in this case by ORAC relate to discrepancies between his first and his second s. 11 interview. The reason there were two interviews is because he re-entered the asylum system following the unsuccessful Dublin II transfer attempt. In his second interview he said that the Taliban wanted the applicant to join them and that he had no wish so to

do. The applicant did not mention the extortion of money during this second interview. In the questionnaire of 11th January 2010, the applicant did not mention being asked to join the Taliban but did mention the extortion effort.

11. Apart from the credibility findings which are made against the applicant, ORAC decided that even if the core of the applicant's case or account was correct, he had not established a Convention reason for the harm he suffered or for the harm he feared should he return to Pakistan, and therefore he was not a refugee. The matter is expressed thus by the ORAC:

> "The applicant states the Taliban, who are non-State agents, attempted to extort money from him and states they threatened to kill him if he did not give them the money. The applicant's legal representative confirmed that the applicant instructed them he was extorted on account of being a successful businessman.
>
> According to the applicant's statements, the alleged threatened actions by the Taliban were motivated by financial gain and were criminal in nature as opposed to persecutory. The applicant was not allegedly targeted because of his race, religion, nationality, membership of a particular social group or political opinion. Therefore, there is no nexus to section 2 grounds in this case."

12. The final part of the ORAC recommendation is entitled 'Section 13(6) Findings' and is in the following terms:

> "There is no nexus to section 2 grounds in this case. The applicant's claim has been deemed as not credible. It is asserted that internal relocation is a viable option for the applicant. The applicant has not proven that there is a lack of State protection for him in Pakistan.
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> Having regard to all of the above, section 13(6)(a) of the Refugee Act 1996 (as amended) applies to this application; *'that the application showed either no basis or a minimal basis for the contention that the application is a refugee'."*

13. It is the effect of a s.13(6)(a) finding that was centrally at issue in this application. Section 13(5)(a) of the Act provides that where a s. 13(6)(a) finding is made, the applicant may appeal to the Tribunal but that any such appeal will be determined without an oral hearing.

14. Before analysing the complaint made, I should remark on the ORAC findings. Significant credibility issues are identified. These credibility failings are not based upon the demeanour of the applicant. They are based on inconsistency (the difference between the 2010 and 2012 interview; claiming fear of persecution but evading transfer to the UK where he has family) and/or implausibility (staying in the family home notwithstanding extortion and death threats; not knowing what countries he traversed) and/or impossibility (being at his daughter's birth in Pakistan when his passport indicated his presence in the UK).

15. In addition to the credibility findings, ORAC's decision must be interpreted as saying that even if the applicant's story is true and that the Taliban extorted money from him and threatened to kill him, that alone does not establish a basis under s. 2 of the Refugee Act 1996 for him to be declared a refugee. This finding is separate from the credibility findings and is not dependent on them. On this analysis, even if every element of the applicant's story was believed, the applicant cannot, according to ORAC, be declared a refugee as he has not described a well founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion and has not established that he cannot avail of protection in Pakistan.

16. In support of the contention that there is an entitlement to an oral hearing at an appeal, the applicant refers to the decision of Cooke J. in *Nkosi v. the Refugee Applications Commissioner* (Unreported, High Court, 30th March 2012). The decision in *Nkosi* addressed the absence of an oral hearing upon an appeal to the Refugee Appeals Tribunal following a s. 13 report and recommendation of ORAC based upon s. 13(6)(e) of the 1996 Act. (A finding under s. 13(6)(e) is a so-called 'safe country' finding and deals with an ORAC decision that "the applicant is a national of or has a right of residence in a safe country of origin …….. Such a finding will deprive its addressee of an oral hearing on appeal.)

17. Cooke J. referred to the decision of the Supreme Court in *V.Z. v. Minister for Justice* [2002] 2 I.R. 135, where McGuinness J. said:

> "I would accept the submission on behalf of the respondents that there is no authority to establish that an oral hearing on appeal is necessary in all cases."

18. Cooke J. noted that the personal credibility of the applicant had not been a material issue in that case and that the issue as to whether there could be an effective remedy in a credibility case without personal testimony did not arise for consideration. Reference was also made by Cooke J. to decisions of the High Court in *A.D. v. the Refugee Applications Commissioner* [2009] IEHC 77, and *X.L.C. v. Minister for Justice* [2010] IEHC 148, to the effect that an oral hearing is not necessarily an essential ingredient of an appeal. Cooke J notes that in *X. L. C.*, the court had noted that "The absence of an oral hearing is only a disadvantage where the contested issues of fact depend upon an appreciation of the personal truthfulness of an applicant"

19. Cooke observed:

> "40. Where, as in the present case, a claim for asylum has been rejected in a s. 13 report upon the basis that the applicant has been found not to be telling the truth, the issue of personal credibility is clearly fundamental to the appeal and, accordingly, to the character of the appeal procedure as providing a remedy which is effective to rectify the basis upon which the claim has been rejected. Where, as here, the events and facts described by an applicant are of a kind that could have taken place . . . but had been rejected purely because the applicant has been disbelieved when recounting them, it is, in the judgment of the court, clear that the effectiveness of the appeal remedy as a matter of law is dependent upon the availability to the applicant of an opportunity of persuading the deciding authority on the appeal that he or she is personally credible in the matter."

20. Cooke J. concluded his judgment with the remarks:

> "48…….As already observed above, where the key issue in the appeal is the fact that an account of facts given personally at first instance has been disbelieved, the primary if not the exclusive possibility of successfully reversing that result lies in the appellant's prospect of persuading a second decision maker that he can and should be believed. To remove that possibility when it is not rationally necessary to do so, having regard to the fact that the appellant already faces the procedural disadvantage of the s. 11A(1)(a) presumption is to render the appeal procedure unfair in the sense of the constitutional guarantee."

21. I have no hesitation in accepting the logic of the propositions and analysis set out in *Nkosi* by Cooke J.

22. However, this decision does not aid the applicant. The applicant was disbelieved not because of prevarication, evasiveness, nervousness, shiftiness or any other aspect of demeanour or what Cooke J. refers to as "personal credibility".

23. I enquired of counsel what advantage the applicant sought to gain by presenting the evidence orally, given that the credibility findings were based on analysis of the tale as recounted rather than demeanour-type observations of the manner in which the evidence was presented. Counsel could not identify any particular advantage in presenting the evidence orally.

24. It seems to me to be of particular importance that Cooke J. in *Nkosi* found illegality where a s. 13(6) finding was based on personal credibility. The learned judge referred to events and facts being rejected "purely because the applicant is disbelieved when recounting them" (see para. 40 of the judgment).

25. Reliance was also placed by the applicant on the decision of Hogan J. in *Sen He v. The Minister for Justice, Equality and Law Reform* (7th October 2011). In that case, a finding was made pursuant to s. 13(6)(c) that an applicant for asylum failed to make an application as soon as reasonably possible after arrival in the State. The applicant in that case had waited three and a half years. Examining the question of whether there was an entitlement to an oral hearing on an appeal, Hogan J. poses the question as to whether an appellant to the RAT would be unduly hindered on an appeal without an oral hearing. Hogan J. went on to say, "the key point is that the applicant must be given a fair opportunity to make his case on appeal." The question posed by Hogan J. is most useful and fully reflects the decision of the Supreme Court in *V.Z. v. Minister for Justice* [2002] 2 I.R. 135,

26. The principle I discern from the authorities cited is that there is no right to an oral hearing at the RAT but where demeanour-type or personal credibility findings underpin the first instance decision, then the applicant may require the opportunity to give oral evidence again on appeal. For example, if ORAC refused protection because it disbelieved an applicant and did so exclusively on grounds of evasiveness, or memory failure or the manner in which evidence was uttered, then fairness would seem to require that such applicant be permitted to speak again. I have not been able to discern what possible advantage would accrue to the applicant by an oral hearing, assuming that he recounts the same evidence which was given to ORAC. I have read the judgment of Birmingham J. in *S. v. RAC* [2008] IEHC 399 where complaint was made about the absence of an oral appeal where credibility findings had been made. The learned trial judge examined each such finding and concluded that written submissions would suffice to express complaint about such findings. I have conducted a similar exercise in this case and reach the same conclusion.

27. An affidavit was sworn by Ms. Magellan Donoghue in July 2012 on behalf of the Office of the Refugee Applications Commissioner, and at para. 9, she says:

> "There is nothing in the proceedings to indicate what it is that the applicant claims he cannot adequately explain to the Refugee Appeals Tribunal. The within challenge claims that there has been some abridgement of his rights by not affording him an oral appeal. However, the proceedings cast no light on how he considers himself to be unfairly hindered on appeal. The fact is there is an adequate appeal and there is no limit on what can be raised by or on behalf of the applicant. It could not possibly be said to be disproportionate to decide not to grant an oral appeal hearing unless the applicant demonstrates that he is not being given a fair opportunity to make his claim on appeal. The applicant has already had the opportunity of giving oral evidence twice over two years to the Refugee Applications Commissioner. He was interviewed on the second occasion on 10th of January 2012 due to his own delay of the process by evading the lawful transfer to the UK. He also had a Section 8 interview on 8th January 2010. The mere absence of an oral appeal is not sufficient grounds for claiming that the procedures are adopted are thereby necessarily unfair or disproportionate."

28. That affidavit was sworn in support of an application to strike out the proceedings on the basis that they were frivolous and/or vexatious and/or doomed to fail and are an abuse of process. No replying affidavit was ever delivered The applicant has been on notice for almost seven months of the argument that he would need to demonstrate what advantage he sought to achieve by an oral hearing. The applicant has declined the opportunity to reply to the averments of Ms. O'Donoghue and the applicant's counsel was not able to persuade me that the applicant required an oral hearing at appeal stage.

29. The written submissions are also silent on the point. The matter is addressed as follows in the written submissions:

> **"Substantive Errors in the Decision which cannot be corrected by way of Non-oral Appeal (Grounds 6 to 11)**
> 33. The Applicant accepts at all times that an appeal, specifically an oral appeal, is the correct manner of addressing his concerns in relation to the substantive aspects of his claim. As can be seen from his recent affidavit, the Applicant has a considerable claim in respect of what happened to him in Pakistan and the manner in which it was brought out and assessed by the First Named Respondent does not do it justice. He does not seek that this Honourable Court adjudicate on the merits of such an appeal, but for the purposes of completeness it is proposed to go through a number of issues which he raises in respect of the First Named Respondent's decision.
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> 34. The First Named Respondent held that "the applicant has not supplied this office with any evidence that he had problems with the Taliban in Pakistan" and that he did not submit "any evidence to show that his father was kidnapped such as a police report or a newspaper article". It is respectfully submitted that the First Named Respondent thus treated the concept of evidence as meaning supporting documents to the exclusion of the Applicant's oral evidence in the interview and, in effect, disregarded the evidential value of the Applicant's oral evidence in its entirety. It appears that the credibility issues were also decided on the basis of a lack of supporting documentation."

30. Nothing in this passage comprises an argument in favour of the need to repeat the evidence given at first instance orally. The complaint made here is as to the manner in which the first instance decision maker treated his oral evidence. No demeanour issues arose nor could one describe the quoted findings as findings based on "personal credibility" as Cooke J. uses that phrase in *Nkosi* and *X.L.C*. The written submissions go on as follows:

> "35. Although supporting documents are important in substantiating a person's claim, they are not determinative of it. Certainly, they are not the only kind of evidence that the First Named Respondent has to deal with. It would appear from the language used that the First Named Respondent was clearly dismissing any oral evidence being given as something other than evidence. This, it is submitted, is the only reasonable interpretation of the phrase "any evidence". It is respectfully submitted that the primary basis upon which asylum claims are assessed is the oral evidence and the failure to recognise or assess the Applicant's evidence in respect of the kidnapping of his father was irrational."

30. Nothing in this passage advances an argument in favour of the need to give the same evidence again, orally, at the RAT.

31. The next passage from the written submissions says:

> "36. The First Named Respondent did not consider the reason put forward by the Applicant as to why he did not approach the State Authorities in Pakistan. He gave evidence that reporting such issues would be of no use and the police do not have any control over the area. Specifically, he said "in practice they don't do much against the terrorists". By reason thereof, the First Named Respondent was irrational, *ultra vires* and in breach of fair procedures."

The complaint addressed by the applicant in this paragraph is centred on the irrationality of the rejection of the applicant's explanation for why he did not seek the assistance of the State authorities in Pakistan. The quoted paragraph does not address in any way why an oral hearing is needed to repeat what he has already said to the first instance decision maker.

32. At paragraph 37, the submissions say:

> "37. Further, or in the alternative, the First Named Respondent applied the incorrect burden of proof in determining that the Applicant "has not proven that there is a lack of State protection for him in Pakistan". As set out above, Articles 4 and 5 of the Eligibility for Protection Regulations, 2006 impose a shared burden upon both an Applicant and the Member State to assess the availability of protection."

Nothing in this passage is related in any way to need for an oral hearing.

33. The final passage advanced by the applicant in written submissions in support of an oral hearing is as follows:

> "38. The First Named Respondent also determined that internal relocation was an option available to the Applicant but not specify any region or area of Pakistan that the First Named Respondent considered as a viable option for internal relocation (see *W.M.M. v. Refugee Appeals Tribunal* [2009] I.E.H.C. 492."

This text is unrelated to any argument in favour of an oral hearing.

34. It appears to me that the applicant's insistence on an oral hearing in this case is misconceived. In an appropriate case an applicant might persuade the High Court that an oral hearing is necessary so that the Refugee Appeals Tribunal could be persuaded that a person is a refugee. This is not such a case. Substantial grounds not having been made out in favour of the complaint advanced and I refuse leave to seek judicial review.