Neutral Citation Number: [2006] IEHC 203

THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 520 JR]

BETWEEN

KAYODE OGUNYEMI

APPLICANT

AND
THE REFUGEE APPEALS TRIBUNAL AND
THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENTS

Judgment of Mr. Justice McGovern delivered on the 30th day of June, 2006

1. This is an application for leave to apply for judicial review for the reliefs set out in the notice of motion herein dated 19th May, 2005. The Applicants seeks *inter alia* an order quashing the decision of the first named Respondent dated the 27th April, 2005, that the Applicants appeal against the recommendation of the Refugee Applications Commissioner be refused. The Applicant also seeks further ancillary orders arising out of that decision.

2. The Applicant was born on 16th June, 1967 and formally lived in Nigeria. He came to Ireland and applied for asylum in the State in January 2005. He was interviewed by an officer of the Refugee Applications Commissioner on the 21st February, 2005 and following the interview the Refugee Applications Commissioner made a report and a recommendation that the Applicant be refused recognition as a refugee. This recommendation was dated 16th March, 2005. The Applicant appealed the recommendation by notice of appeal dated 7th April, 2005 and on the 27th April, 2005, the Applicants appeal was dismissed by the Refugee Applications Commissioner. He received the decision by post on or about the 29th April, 2005. Section 5 of the Illegal Immigrants (Trafficking) Act, 2000, sets out the manner in which such a decision may be challenged. The challenge has to be by way of application for leave to apply for judicial review and the application must be made within fourteen days commencing on the date on which the person was notified of the decision. In this case the plaintiff was out of time but not by very many days. He says in his grounding affidavit that due to difficulties that his legal advisors had in contacting him, he was unable to swear the affidavit grounding the application for a number of days after it had been drafted. He seeks an extension of time for bringing the application. I am satisfied that in all the circumstances the delay was minimal in this case and having regard to what is deposed in the Applicants affidavit of 19th May, 2005, I consider there is good and sufficient reason for extended the period within which the application can be made and I make that order.

3. Section 5(2)(b) of the Illegal Immigrants (Trafficking) Act, 2000 states that in applications for leave to apply for judicial review in cases such as this leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed.

4. In this case the Applicant claims that he applied for asylum on the grounds of religious persecution and membership of a social group and also on the basis that he was employed in the oil industry in Nigeria and while working there was kidnapped and released subsequently due to the intervention of his employers. He says in his affidavit that if he returns to Nigeria he will be subject to a strong likelihood of kidnapping again and that he did not approach the Nigerian State Security Services due to the fact that they would not be able to offer him any effective protection against persecution.

5. One of the complaints made by the Applicant is that because he was not granted an oral hearing on his appeal he was not able to address all the issues affecting his application and thereby have his claim for asylum determined in accordance with the requirements of constitutional and natural justice. It is clear in this case that the Refugee Applications Commissioner held that the application showed either no basis or a minimal basis for the contention that the Applicant was a refugee. Once that finding was included in the report of the Commissioner the Respondent was entitled to determine the appeal without an oral hearing. See s. 13 of the Refugee Act, 1996 as amended.

6. A major issue in the determination of the Applicants claim before the Refugee Appeals Tribunal was the issue of his credibility. This had also been an issue before the Refugee Applicants Commissioner. It is not for the High Court to substitute its own view on the credibility issue for that of the Refugee Appeals Tribunal. But the court must be satisfied that the matter was properly considered by the Tribunal. Mr. Christopher B.L. on behalf of the Applicants submits that there was an error of law on the face of the report of the Refugee Appeals Tribunal. He refers to page 10 of the report (page 125 in the book of documents) where it is stated: "…the Applicant made no mention whatsoever of any fears concerning his safety if he returned to work in the oil industry." This is a matter that is also referred to in the statement required to ground an application for judicial review. He argues that the first named Respondent failed to consider the country of origin material submitted on behalf of the Applicant in his written notice of appeal. Although Mr. Christopher indicated to the court that the Applicant was not relying on the document entitled "the lingering crisis in the Niger Delta field work report by Akpobibibo Onduku he relies on other documentation referred to in the course of the hearing. On behalf of the Respondent Ms. Harnett-O'Connor B.L. states that this is a mis-characterisation of the statement made in the Refugee Appeals Tribunal Report and that the sentence concerned was taken totally out of context by the Applicant. I agree with the submission of the Respondent on this issue because when you read the entire paragraph it was quite clear that the Tribunal placed significance on the fact that:

> "…when asked what he feared if he returned to Nigeria, the Applicant made no mention whatsoever of any fears concerning his safety if he resumed work in the oil industry. This is particularly noteworthy as he was asked the question immediately after approximately 20 questions on the issue of the alleged kidnapping. Accordingly I do not find the Applicants evidence consistent with a subjective fear of persecution."

7. It is clear that when considered properly and in context the Refugee Applications Commissioner and the Refugee Appeals Tribunal considered the Applicants claim concerning the issue of kidnapping but found it to be incredible for the reasons set out in the report. These matters are dealt with in the analysis of the Applicants' case at pages 9 and 10 of the Refugee Appeals Tribunal Report.

8. The report points out inconsistence between his answer to questions at interview and his response to a questionnaire and deals with these issues in what appears to be a careful and reasoned manner. It was argued on behalf of the Respondent that even if the country of origin documentation establishes that there was kidnapping of workers in the oil industry the Refugee Appeals Tribunal was still entitled to disbelieve the Applicant. It was further pointed out by counsel for the Respondent that the evidence from the country of origin established that it was foreign workers and not Nigerians who were being kidnapped from time to time. I accept that there was country of origin evidence to that effect.

9. It is significant that when the Applicant had been asked at interview "what would be your fear if you were to return to Nigeria?" He replied "I will be killed. Her parents are Muslim fanatics and they don't forgive or forget." This was a reference to the parents of his Muslim wife who were unhappy that she was marrying the Applicant who was a Christian. It is clear that that issue had also been fully considered. See pages 239 and 10 of the Tribunal Report.

10. A number of authorities have been open by the parties in this case. The Applicant argues that the court must consider not only whether the State refuses adequate protection but whether it is able to offer adequate protection.

11. In the case of *Idiakheua v. Minister for Justice Equality and Law Reform and Anor.* (Unreported High Court 5th May, 2005). Clarke J. said:

> "It would appear that the true test is as to whether the country concerned provides reasonable protection in practical terms. N*oone v. The Secretary of State for the Home Department* (Unreported, CA 6th December, 2000). While the existence of a law outlawing the activity which amounts to persecution is a factor the true question is as to whether that law coupled with enforcement affords "reasonable protection" and practical terms".

12. In the case of *V.N.I. and Ors. v. The R.A.T. and Anor.* (Unreported High Court 24th June, 2005) Clarke J. stated:

> "Obviously different considerations apply to cases where the fear of prosecution stems either directly from the State or from persons whose activity is condoned or tolerated by the State concerned. On the basis on the country of origin information before the R.A.T. in this case, it could not, in my view, be suggested that the R.A.T. was required to hold that Nigeria condoned or tolerated F.G.M. However that is not the end of the matter. It is clear that fear of prosecution for a convention reason by non state agents will nonetheless qualify a claimant for refugee status where the State concerned either refuses or is unable to offer adequate protection. It was in that context that the comments quoted from above from *Idiakheua* were made."

13. In the case of *Muia v. O'Gorman and Ors.* judgment of Clarke J. 11th November, 2005, he stated (page 7 of judgment)

> "It is, of course, the case that in reaching a decision on the adequacy of State protection it is unnecessary to be satisfied that the State in question is in a position (which no State is) to provide absolute protection to its citizens. It is equally the case that it is necessary, in each case, to form a judgment on the basis of relevant country of origin information as to whether the degree of protection provided by the State is, in all the circumstances, sufficient to warrant a finding that the Applicant concerned does not qualify for refugee status."

14. In this case it is clear that the R.A.T. report considered these issues at page 11 of the report.

15. Counsel for the Respondent has referred me to the decision in the case of *Imafu v. the Minister for Justice, Equality and Law Reform and Ors.* judgment Peart J. 9th December, 2005. In that case the judge determined *inter alia* that there could be cases where the tribunal member can quite adequately and completely assess and reach a conclusion on the personal credibility of the Applicant in circumstances where there would be no possible benefit to be derived from seeing whether the Applicants story fits into a factual context in his/her country of origin. I accept that as an approach that can be taken in applications of this nature.

16. Counsel for the Applicant referred the court to the case of *V.I. v. The Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal,* judgment Clarke J. 10th May, 2005, in which he refers to his judgment in the *Gashi* case when he indicated that for the purpose of a leave application it was arguable that a higher degree of scrutiny was required than that set out in *O'Keeffe v. An Bord Pleanala* [1993] I.R. 39. In other words he was suggesting that the "anxious scrutiny test" applied. While there seems to be some divergence of judicial opinion on this subject I am inclined to agree with the view expressed by Clarke J. on this issue since applications for leave to apply for judicial review in asylum matters have been put on a statutory basis which is separate and distinct from other applications for judicial review where fundamental human rights issues may not be considered.

17. Even applying the "anxious scrutiny" test it seems to me that the Applicant has not, in this case, discharged the burden of proving that there are substantial grounds for contending that the decision by the first named Respondent is invalid or ought to be quashed. All of the issues which the Applicant has canvassed in the application before the court were canvassed before the Refugee Applications Commissioner and subsequently, on the documents, before the first named Respondent. The report of the first named Respondent weighs up all the issues and arguments and reaches conclusions which are, to a significant extent, determined by what is perceived to be a lack of credibility on the part of the Applicant on certain crucial issues. The court cannot substitute its own view on those issues for that of the Tribunal.

18. Since I have already held that the first named Respondent was entitled to proceed with the appeal without an oral hearing it follows that I do not accept the Applicants argument based on the principal of *audi alteram partem.* For the reasons I have already outlined I am not satisfied that the Applicant has established substantial grounds for contending that the position of the first named Respondent is invalid or ought to be quashed and I refuse leave to apply for judicial review and for the other reliefs sought in the notice of motion.