

THE HIGH COURT

JUDICIAL REVIEW

[No. 2009/1240/J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED), IN THE MATTER OF THE IMMIGRATION ACT 1999 AND IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003 SECTION 3(1)

BETWEEN

N.J.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, ATTORNEY GENERAL, IRELAND

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

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

1. This is a 'telescoped' application for judicial review of a decision of the Minister to make a deportation order in respect of the applicant dated 18th November 2009.

2. The applicant is a Nigerian national born on 15th February 1979 in Benin City, Nigeria. She arrived in the State on 12th February 2005 and claimed asylum two days later. Her asylum claim was based on the fact that her father was a political activist in the Niger Delta. The applicant alleged that when the State Security Service came looking for him she was kidnapped by its members along with her mother. She claims she was held in captivity and repeatedly raped. She states that she was eventually freed and that a friend of her father assisted her escape from Nigeria. ORAC notified the applicant of its decision on 3rd March 2005, refusing her a recommendation of refugee status primarily on credibility grounds. The applicant appealed this decision to the Refugee Appeals Tribunal which upheld the recommendation of ORAC on the basis that it was open to the applicant to internally relocate and because state protection was available to her in her home country. The applicant was subsequently refused subsidiary protection and temporary leave to remain in the State by the Minister.

3. A deportation order was made in respect of the applicant following an 'Examination of file under section 3 of the Immigration Act 1999, as amended'. The Examination of file was compiled by Suzanne M. Ryan, an Executive Officer in the Repatriation Unit on 12th October 2009 and approved by Ben Ryan, an Assistant Principal Officer, on 10th November 2009. The applicant was notified of the decision of the Minister to issue a deportation order on 28th November 2009 and it is that decision which is sought to be impugned in these proceedings.

4. These proceedings came on for hearing on the 25th July 2013 and Mr. de Blacam S.C., for the applicant, challenged the decision primarily on the grounds that the Minister failed to consider a medical report compiled by Dr. Eileen Keane dated 6th July 2009. The application for leave to remain is dated 15th June 2009 and her solicitors furnished the report of Dr. Keane to the Minister for consideration in October 2009 in a supplemental submission.

5. Counsel for the applicant took issue with the affidavit of Mr. Ben Ryan sworn on 22nd July 2013 on behalf of the respondents and which was furnished to the applicant's legal advisors three days before the case came on for hearing. The affidavit referred to certain handwritten annotations made by Mr. Ryan in the course of his review of the 'Examination of File'. In particular, the applicant raised concerns about averments contained in Mr. Ryan's affidavit saying that he had considered the report of Dr. Keane. He applied to cross-examine Mr. Ryan on the basis of a conflict of evidence arising on the affidavits. Counsel for the respondent resisted the application on the basis that Mr. Ryan noted on the Examination of file that all of the documentation submitted was considered by him before making his recommendation to the Minister. The respondent cited the dicta of Hardiman J. in *G.K v. Minister for Justice* [2002] 2 I.R. 418 in this regard. The court gave a preliminary ruling allowing cross examination.

6. The case was adjourned until the 17th October 2013 when Mr. Ryan was cross examined in relation to the content of his affidavit.

7. As noted above, the applicant applied for subsidiary protection and leave to remain in the State on 15th June 2009. The Minister's consideration of an application for leave to remain in the State is carried out in accordance with s. 3 of the Immigration Act 1999. Officials in the Department of Justice and Equality carry out an examination of the file and give written advice and make a recommendation on whether or not a person should be deported.

8. On 12th October 2009, Suzanne M. Ryan signed document which recommended a refusal of the applicant's application for subsidiary protection. On the same day, Ms. Ryan also signed a separate recommendation that the Minister make a deportation order in respect of the applicant.

9. About a week later, by letter of 21st October 2009, the applicant's solicitor, unaware that an official had completed consideration of the file and had already recommended deportation, made a supplemental submission on the application for leave to remain which referred to the applicant's fragile mental state and enclosed a copy of a medical report from Dr. Eileen Keane, an examining physician

at the SPIRASI organisation which assists persons who say they are victims of torture, *inter alia*. The letter requested that receipt of this report be acknowledged. No evidence was adduced that receipt was acknowledged.

10. In accordance with standard practice, the subsidiary protection recommendation and the deportation recommendation were reviewed by Ms. Ryan's superior, Mr. Ben Ryan, on 10th November 2009. He agreed with the original recommendations against subsidiary protection and in favour of deportation.

11. Mr. Ryan made no changes to the subsidiary protection report. He made two minor handwritten changes to the typed text of the leave to remain 'Examination of File'. The 'Examination of File' is a 17 page document. On pages 11 and 14, the document said, in its unamended version, that :

"The applicant has submitted letters from Dr. T.E.G. Stewart, of the Medical Centre, Mosney, Dr. Jaseem Siddiqui and Siobhan Breen (psychotherapist) from the Centre for the Care of Survivors of Torture.

According to those reports submitted on behalf of Ms. John, she has received treatment in the State for symptoms of Post Traumatic Stress Disorder. Dr. Stewart states 'N. does have a psychiatric history and did attend the psychiatry services here giving a history of trauma following some events in her own country. She has always compliant with her medication and attended her appointments on a regular basis'. [sic]"

13. The handwritten change made by Mr. Ryan inserted the words "dated June 2007" so that the first sentence of the passage in the forgoing paragraph now reads:

"The applicant has submitted letters **dated June 2007** from Dr. T.E.G. Stewart, of the Medical Centre, Mosney Dr. Jaseem Siddiqui and Siobhan Breen (psychotherapist) from the Centre for the Care of Survivors of Torture."

(The same change is made to the same passage which is repeated at p. 14 of the document.)

14. It is agreed by the parties that the 'Examination of File' as amended by Mr. Ryan makes no express mention of the report of Dr. Keane. Mr. Ryan nonetheless insists that the Keane report was considered by him before he signed off on the recommendation in favour of deportation.

15. He has given a number of explanations as to why, though he says he considered the report, the amended document does not expressly refer to Dr. Keane's report, .At paragraph. 6 of his affidavit (sworn on 22nd July 2013), Mr. Ryan says:

"I did consider the report of Dr. Eileen Keane dated 6th July 2009, but as it is clear therefrom, insofar as the applicant's mental health had changed, it had improved. In particular, I noted that the applicant did not attend SPIRASI for over a year prior to the report of 6th July 2009 being written, and that the applicant had presented in a well manner and that she had become more socially active. As noted in the said report, the applicant had applied for work in a Dublin hospital. As the report dated 6th July 2009 showed an improvement in the applicant's situation, it did not warrant any amendment in the recommendation of the Executive Officer [Susan Ryan] to proceed to make a deportation order. As a result I did not make any handwritten notes regarding that report, but I did consider it necessary to highlight the fact that the report which had been quoted from was the earlier report."

16. An elaboration of the affidavit evidence was given by Mr. Ryan *viva voce*. In response to questions as to why he had wished to emphasise the content of the SPIRASI reports from 2007, Mr. Ryan said:

"I felt we gave the applicant the benefit of the doubt [by omitting mention of the Keane report] because the earlier SPIRASI reports showed her in a much more negative light in terms of her mental health. The 2009 report showed she had improved significantly and I felt the latter report, because it showed the applicant in a more positive state of mental health, did not alter the initial recommendation. The initial recommendation was taken on the applicant's strongest case if you want to put it like that. And yet the decision still was to make a deportation. That is why I wanted to emphasise the SPIRASI reports referenced there were the early reports which show the applicant in the weaker state, and yet on balance, we still felt the deportation order was the correct outcome."

17. Mr. Ryan, when asked further questions as to why there was no express reference to the Keane report, said:

"The reason why there isn't an explicit reference to it is all the points which showed the applicant's mental state were all made in the early reports and were made in more harrowing and more graphic terms and were all explicitly considered, not quoted but considered, and referred to in the section 3 consideration and the subsequent report didn't alter those, and the subsequent report, as I stated, does paint a more positive picture and that is why it wasn't explicitly referenced."

18. It appears that Mr Ryan offers two reasons for not mentioning the Keane report. In the first place he says that there was no need to refer to it because its content did not have the effect of causing an alteration to the original recommendation that the applicant be deported. In my view, the fact that the Keane report would not have the effect of altering the original recommendation to deport does not provide a believable explanation for not having referred to it. It strikes me that if the Keane report strengthened the case for deportation, it is likely that the report, rather than being omitted, would be expressly mentioned.

19. The second reason offered for not mentioning the Keane Report was that its omission assisted the applicant. Mr. Ryan suggested that omitting a quotation from, or a reference to, the Keane report (which he says demonstrated an improvement in the applicant's mental health) was in line with a general approach adopted by officials when compiling an 'Examination of File' under s. 3 of the 1999 Act. That approach was to downplay matters which did not assist persons seeking leave to remain. Mr. Ryan was thus suggesting that a second reason existed for omitting mention of the Keane report which was that it assisted the applicant not to mention it and to emphasise instead the earlier SPIRASI reports which showed her in a more fragile condition and that such an approach was in keeping with a general approach to present the 'Examination of file' on a best case scenario basis for an applicant. It is suggested therefor that the omission was deliberate.

20. Three medical reports and one psychotherapy report were submitted in support of the applicant's leave to remain application. The only quotation included from any of them is from Dr. Stewart which is set out at para. 12 above. It is not helpful to the case the applicant sought to make which is that she was unwell. It records that the applicant had a psychiatric history and that she took her medication dutifully and attended her appointments on a regular basis. If, as Mr. Ryan suggests, officials tend to refer to or quote or emphasise medical/psychotherapeutic reports which tend to assist an applicant or which least harms them, one wonders why in this

case that did not happen. In a report of 1st June 2007, Ms. Bereen, a. psychotherapist, records that the applicant has "many of the symptoms of Post Traumatic Stress Disorder ... these include disassociation, difficulty in breathing when trying to talk and constriction in her throat, intrusive memories, severe sleep disturbance and feelings of losing control ... she is in a constant state of fear and confusion". This was not used in the examination of file document as a quotation though it is more helpful to the applicant than the quote from Dr Stewart.

21. Dr. Suddiqui, in his report of 1st June 2007, said:

"On mental state examination, the symptoms and signs were highly consistent with Post Traumatic Stress Disorder and with further complications like development of impulse control. She was also found to be depressed and had expressed feelings of hopelessness and sees no future for herself. I feel, though she is not actively suicidal at present, that should this continue on, I would have serious concerns about her safety."

This was not used in the examination of file document as a quotation though it is more helpful to the applicant than the quote from Dr Stewart.

22. The report of Dr. Keane does record an improvement in the applicant but it also says:

"I met with N. today to review. She has not attended for over a year. She presented in a well manner. She spoke of how she continues to struggle at times, however feels stronger in herself. She continues to experience huge grief and loss. N., although at times withdrawn, has become more socially active. She visits friends regularly and has worked voluntarily with children and the elderly. She has recently applied to continue with this work in a hospital in Dublin. She has hopes of developing this to become a nurse. In view of all of these efforts which have been made for her and the fact that her condition is still very fragile, I strongly recommend that she be allowed to be given subsidiary protection in the State so that she can continue therapy."

This was not used in the examination of file document as a quotation though it is more helpful to the applicant than the quote from Dr Stewart.

23. Any of these quotations would have been more helpful to the applicant than the innocuous quotation from Dr. Stewart which ended up in the examination of file document. Far from selecting the medical report which most assisted the applicant, my view is that the officials in this case chose the most innocuous and least helpful quotation from the medical evidence. I do not criticise the officials for this course of action nor do I say that they did this deliberately but I cannot accept that the manner in which this s. 3 document was compiled evinces a "most favourable status" approach to the presentation of the applicant's case. As it is most unlikely that any such policy was in operation, the application of the alleged policy cannot explain the absence of a reference to the Keane report by Mr. Ryan. In addition if Mr Ryan had made a deliberate decision to omit mention of the report because it did not assist the applicant it is surprising that such a memorable decision was not a central part of his evidence.

The Handwritten Notes

24. Mr. Ryan says that the presence of the handwritten notes on the original typed document which he reviewed and altered proves that he actively considered the Keane report. He seems to say that the handwritten notes indirectly drew attention to the existence of the Keane report. I regret to say that I am at a loss to understand how adding the handwritten words somehow drew attention to or signalled the existence of an unmentioned medical report.

25. Mr. Ryan has given conflicting evidence about why he added the handwritten words "dated June 2007" to the typed document. In his affidavit he says:

"I inserted the words 'dated 2007' at pages 11 and 14 of the said document as the medical report being referred to and quoted from was the report of Dr. T.E.G. Stewart dated 2007."

26. The problem with this evidence is that Dr. Stewart's report is dated June 2009. Adding the (wrong) date did not assist with identifying the author of the quote because the author is identified by name in any event. At the end of paragraph 6 of his affidavit, Mr. Ryan says that the handwritten notes had the effect of highlighting the fact that the report which had been quoted from was an earlier report. This evidence is difficult to understand. The quotation Mr. Ryan says he wished to draw attention to was not from one of the earlier reports, it was from a later report dated in 2009. The reasons given on affidavit for having added the handwritten words do not withstand scrutiny.

27. A different version of this evidence was given *viva voce* when Mr. Ryan said the reason he made the handwritten notes was "to distinguish the SPIRASI reports referred to in this paragraph from the subsequent SPIRA.SI report [the Keane report] I had received before I made my recommendation to the Minister". This evidence is said to be corroborated by a memorandum written by Mr. Ryan about three months after he made the handwritten notes. In that memorandum he says:

"The reason for my handwritten note of the earlier SPIRASI report (June 2007) was to indicate that it was that earlier SPIRASI report (as opposed to the July 2009 report) which was being quoted."

28. The problem with this explanation is that the only material quoted in this part of the examination of file document was from 2009 and not 2007 and was not from a SPIRASI source so there was no need to distinguish the quoted text taken from a non-SPIRASI source created in 2009 from earlier SPIRASI material created in 2007. The source of the quote is clearly indicated and adding the words "dated June 2007" did not in any way assist with identifying the source of the quote. Adjusting his evidence again, Mr. Ryan accepted that what he intended to say was the reason he inserted the date was to indicate that it was the earlier SPIRASI reports which were referred to as opposed to quoted from. Mr. Ryan accepted that his affidavit evidence was in error for this reason also.

29. The court is asked to accept the explanation he has offered *viva voce* as the correct explanation for why the handwritten notes were made. If this evidence were accepted, it would establish that Mr. Ryan actively considered Dr. Keane's report and wished, by the handwritten notes, to draw attention to the early SPIRASI reports rather than Dr. Keane's later SPIRASI report. My difficulty with this evidence is that adding the words "dated June 2007" does not have the effect contended for. These words do not establish a distinction between 2007 reports and 2009 Keane Report. The words do not add information which would otherwise prevent the distinction being drawn. The words do not indicate or suggest in any way that there are reports from 2007 and in addition another report from 2009. The fact that the original 'Examination of File' was based only on the two SPIRASI reports of 2007 and the later 2009 report of Dr. Stewart, is evident on the face of the document because the author of each report is identified. Adding the words

"dated June 2007" does not act to distinguish between the reports which are being referred to and the later report of Dr. Keane which is not mentioned. I cannot accept that the addition of the handwritten words would send a message to a reader of the 'Examination of file' document that there was a later report in existence which was being considered though not expressly mentioned.

30. Having regard to the two different explanations given as to why the words were added to the document and the implausible explanations as to how the addition of the words distinguished the 2007 reports from the later Keane report and thereby establish that the Keane report was considered, I find that Mr. Ryan's evidence does not assist with the respondent's attempts to prove that Mr. Ryan considered the Keane report.

31. Having rejected the explanation for why the Keane report was not expressly mentioned in the examination of file as amended by Mr. Ryan and having rejected the explanation for the appearance of the handwritten words on the typed document, I accept that the applicant has established on the balance of probabilities that the Keane report was not considered by the official with responsibility for compiling the final written advices to the Minister as to whether a deportation order should be made.

32. In those circumstances, the applicant has successfully made out her complaint that a failure to consider the Keane report breached the provisions of s. 3 (6) of the 1999 Act. It is not part of the court's function to forgive the failure to consider the medical report on the basis that its consideration would have made no difference to the outcome. The law requires that certain matters be considered before the drastic step of deportation is taken and where those matters are not attended to then the resulting deportation order is *ultra vires* and must be set aside.

Therefore, I grant leave and make a final order of certiorari quashing the deportation order.