Neutral Citation: [2013] IEHC 355

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 351 J.R.]

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000, SECTION 5

AND

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED)

BETWEEN

A. A.

APPLICANT

AND

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

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 18th day of July 2013

1. This is a 'telescoped' application for leave to seek judicial review of the decision of the first named respondent not to grant subsidiary protection to the applicant and of his decision to make a deportation order. Simply stated, the Minister's decisions are based on a finding that the applicant is a national of Tanzania and not of Somalia, as he claims. The grounds upon which the applicant challenges the validity of the decisions are that the first named respondent did not have regard to language reports which the applicant claims establishes his Somali identity and that the first named respondent failed to give the applicant an opportunity to address the allegation that he was a Tanzanian national.

2. The impugned decisions are the latest decisions taken in respect of the applicant's claims for international protection in Ireland and it is necessary to briefly survey previous decisions before examining the relevant facts and legal principles in this case.

3. An application was made for refugee status dated 25th January, 2005. In accordance with s. 11 of the Refugee Act 1996 an interview was conducted with the assistance of an interpreter and a report pursuant to s. 13 of the Act was prepared. A negative recommendation was made in September, 2005. Underpinning this recommendation was a language analysis report dated 24th May 2005, prepared by the Immigration and Naturalisation Service of the Ministry of Justice of the Netherlands. Section 4 of the report is entitled '*Applicant's Language(s)/Dialect(s)*' and concludes that:-

> *"The applicant only speaks Swahili. He has no knowledge whatsoever of Somali, which is the national language of Somalia. Phonology, lexicon and syntax when analysed indicate either north eastern coast Swahili or standard Swahili. The conclusion of the report is that the applicant "can definitely not be placed within the speech community of Somalia. The applicant can most likely be placed within the speech community of the northern coast of Kenya or Zanzibar. " (The language analysis report is not referred to in the s. 13 report for the Refugee Applications Commissioner) "*

4. On 6th July 2005, two months or so prior to the first instance decision, the Refugee Legal Service made complaint to the Refugee Applications Commissioner that the language analysis was fundamentally flawed and should not be relied upon. The applicant insisted through his solicitor that the interview was conducted in Bajuni and that the person conducting the language analysis did not speak Bajuni.

5. The negative decision of the Refugee Applications Commissioner was appealed to the Refugee Appeals Tribunal and a hearing was conducted on 18th June, 2007, where the applicant was again assisted by a Kibajuni interpreter. A negative decision of the Refugee Appeals Tribunal issued on 31st July, 2007. Judicial review was sought and two new language reports seeking to condemn the Dutch language analysis test were exhibited in support of the proceedings but these were deemed inadmissible as they had not been before the decision makers. Following the refusal of leave to seek judicial review by Ryan J., an application was made to the Minister pursuant to s. 17(7) of the Refugee Act 1996, for consent to re-enter the asylum system which was refused on 20th May 2011, and appealed by letter dated 19th July 2011.

6. The principal ground advanced for reconsideration of the applicant's claim for refugee status was the evidence as to nationality contained in the two new language reports. The report of Professor Derek Nurse is dated 30th September, 2009. Professor Nurse is an academic linguist specialising in African languages and has a specialist knowledge of Banjuni language and people. Professor Nurse says in his conclusions that:-

> *"His speech would best be viewed as a Swahili framework with Bajuni add-ons."*

At s. 6 of the report Professor Nurse concludes that his language could be described as Swahili with a Banjuni accent. Professor Nurse continues:-

"Two questions need to be answered Is this compatible with being a young Bajuni from Somalia, specifically Koyama? Could the applicant have learnt this material, that is, is he non-Bajuni who has simply learnt what he needed for the interview, or could he have come acquired it in some other way [?] [sic] The answer to the first question- is this performance compatible with being a young Bajuni from Somalia is yes ...the simplest explanation is that he is a young Somali from Somalia. "

Professor Nurse also concludes that it is highly implausible that he learnt Bajuni language skills for the purposes of rehearsing the interview.

7. The second expert report relied on in support of the s. 17(7) application for reconsideration of refugee status is that produced by Brian Allen, a graduate of UCD in 1963 with 20 years experience in East Africa who, since 2002, has been working as an expert witness and interpreter in Swahili and Bajuni languages with the Home Office in the United Kingdom. Mr. Allen conducted a three hour interview with the applicant in the Kibajuni dialect of the Swahili language. Mr. Allen's conclusions were as follows:-

"1. Mr. A. speaks the Kibajuni dialect, and has a Somali Bajuni accent.

2. He was describing things he had seen and experienced This was very obvious during the interview. He was not just conveying information. This is very important in nationality testing.

3. He had some accurate knowledge of Koyama e.g. he knew the name of the local elder Mzee Mote.

4. His descriptions of customs were very much in line with traditional Somali Bajuni customs, e.g. Soriyo tradition, marriage custom.

5. The food names he used are in line with Somali Bajuni tradition rather than Kenyan Bajuni.

6. His description of his father's work as fisherman was in line with many descriptions I have heard from Somali Bajuni fishermen.

7. The clothing he described was more in line with Somali Bajuni practice rather than Kenyan or Tanzanian.

8. The Madras class he described was more in line with Somali Bajuni practice rather than Kenyan or Tanzanian practice where most children attend primary school and so the times of Madras are different.

9. He described the Bajuni origins and the names given to them.

10. He had some accurate knowledge of the local currency.

11. The clans he listed are Somali Bajuni clans.

12. He has Bajuni features and speaks with a Somali Bajuni accent.

13. He had some accurate knowledge of the Somali Islands.

14. His descriptions of the attacks on his family by the Somali given in his interview for refugee status were consistent with the many descriptions of these attacks that I heard.

15. He had some accurate knowledge of Kismayu.

Each of the above is significant. Taken together they provide very strong evidence of nationality. By the end of the interview I was completely convinced that Mr. A. is indeed a Bajuni from the Island of Koyama as he claims. He gave me no reasons to doubt this. During the three hour interview he gave no indication that he might have come from a Swahili speaking country other than where he claims. I was looking for such signs e.g. accent, events, descriptions of places etc. As I have lived in Kenya for eleven years and Tanzania for ten years, I am very familiar with the features and Swahili accents of these countries."

8. By letter of 23rd August, 2011, the application pursuant to s. 17(7) of the Refugee Act 1996 was refused.

9. Accompanying the refusal letter was a three-page document entitled '*Examination of Application for Re-Admittance to the Asylum Process under Section 17(7) of the Refugee Act 1996* '. The examination is co-authored by an Executive Officer and a Higher Executive Officer of the Irish Naturalisation and Immigration Service (INIS). The officials agree that Dr. Nurse is a qualified expert and they accept that the applicant speaks Bajuni.

10. The officials' conclusions are summarised as follows:

"In view of the fact that the applicant has only provided two reports (albeit from noted linguistic and traditions experts) to verify his nationality, has not provided any identity or travel documentation or a reasonable explanation for the lack of same, has not provided information to address the credibility issues raised by the Tribunal Member, has not demonstrated any possible persecutory risk should he be returned to his home country and has not provided any new evidence to the contrary, there appear to be no grounds for the applicant to be granted the Minister's consent for readmission to the asylum process ...

No new convincing evidence has been supplied to indicate that a favourable view might be taken if A. A. was re-admitted to the process.

Therefore, I recommend that his application for readmission under section 17(7) of the Refugee Act 1996, be refused. "

11. The officials were of the view that the experts' reports did establish the applicant's ability to speak Bajuni, but they indicate that this is not "*conclusive that the applicant is Bajuni nationality*". (In respect of this finding the applicant submits that there is such thing as 'Bajuni nationality'.)

12. By letter of 9th September 2011, the applicant's solicitors sought a review of the s. 17(7) readmission refusal. The essence of the appeal against the s. 17(7) refusal was that as the ORAC and RAT decisions were based on the applicant's lack of credibility as to his Bajuni ethnicity, the fact that the Minister now accepted that he was Bajuni required the applicant's refugee status to be reconsidered.

13. By letter of 2ih September 2011, the appeal against the s. 17(7) refusal of readmission was also turned down. Accompanying the appeal refusal letter was a two page analysis of the appeal signed by the Ministerial Decisions Unit.

14. The official who analysed Mr. Allen's report did not give any weight to Mr. Allen's conclusion that he was "*completely convinced that [the applicant] is indeed a Bajuni from the island of Koyama ...* " The official also reviewed the report of Dr. Nurse and notes that Dr. Nurse's conclusions do not "*carry any great conviction*". He notes that Dr. Nurse refers to the applicant "*as a young man*" and that "*the prevalent attitude among young Bajuni people today is that they prefer Swahili. However, the applicant is 48 years old and it seems more likely that if he left Koyama in December 2002 (aged 39) without having travelled anywhere else, including the Somalian mainland, he would speak Bajuni with, perhaps some Swahili add-ons*". The official concludes, having reviewed Dr. Nurse's and Mr. Allen's reports, that he was not convinced "*that there is enough new evidence provided to grant readmission under section 17(7) of the Refugee Act 1996*".

The Subsidiary Protection Application
15. The application which led to the first of the decisions sought to be impugned in these proceedings is dated Monday, 181h July 2011. The date is significant because it was the day before application was made for readmission to the asylum system. The basis of the claim was the persecution suffered by the applicant in Somalia arising from his membership of a Bajuni ethnic group. Detailed country of origin information is referred to with a view to establishing the persecution of the Bajuni in Somalia.

16. The application for subsidiary protection did not refer to, much less attach or submit, the language reports of Mr. Allen and Dr. Nurse.

The Tanzania Allegation
17. The Irish Naturalisation and Immigration Service wrote to the applicant on 2nd February 2012, in the context of his subsidiary protection application and referred to the claim (made in the original application for asylum) that the applicant is a Somali who had never travelled outside Somalia before entering Ireland, had never been issued with a passport and had never had a visa to enter any other country. The letter says that the UK Border Agency had checked the applicant's fingerprints and found a match connected with two visa applications in the name of one A. A. K. A. born on 13th March 1962, a national of Tanzania. The applications were made in 2001 and 2004 and on each occasion the visas were granted. The letter says, "*As part of this visa application, you provided a Tanzanian passport (Passport Number A0300824).*" In addition, the letter says that the Minister intends to process the application "*taking into account the information submitted by you on your original application for asylum in the State and the details supplied by the UK Border Agency*". In the clearest terms, the Minister invites the applicant, within 15 days, to make a submission "*addressing the discrepancies between the information you supplied to both the Irish State and the UK authorities*". For good measure, the letter attaches a copy of the details supplied by the UK Border Agency.

18. The applicant has consistently stated his date of birth to be 13th March 1963. The date of birth recorded on the UK Border Agency document referable to A. A. K. A. is 13th March 1962.

19. One of the visas issued to Mr. A.K. was from 30th July 2004 to 1st January 2005. The applicant appears to have entered Ireland (with his family) on 23rd January 2005, applying for asylum on 25th January 2005.

20. The applicant's solicitors replied to the INIS on 2nd March 2012, explaining the Tanzanian passport issue by admitting that, in respect of the 2004 visa, the applicant had indeed travelled to Tanzania for one day and applied for a visa to travel to the United Kingdom on a false passport. The letter does not explain or mention the earlier visa application made in 2001. Critically the letter refers to the reports of Dr. Nurse and Mr. Allen, urging the contents of those reports on the decision maker. This was a significant submission because the application for subsidiary protection and for leave to remain had never mentioned these reports and were not based upon or connected in any way with their assertions. Of equal importance, the references to these reports did not prompt any response from the officials. They did not write back to say 'what reports are you referring to?' It would not be unreasonable to infer that the officials dealing with subsidiary protection knew about these reports as they had been submitted with the application to be readmitted to the asylum system made one day after the application for subsidiary protection and leave to remain and these matters are considered in the same section of the Minister's Department. Indeed, as will be seen at paragraph 35 of this judgment, this coincidence is sought to be relied upon by the respondent.

21. The INIS wrote to the applicant on 15th March 2012, attaching the report and the Minister's determination based thereon that the applicant was not entitled to subsidiary protection.

22. The author of the report identifies the issue to be decided as "*whether substantial grounds have been shown for believing that A.A. aka A.A.K.A., if returned to Somalia, would face a risk of 'torture or inhuman or degrading treatment or punishment'*."

23. The author first deals with the question of the applicant's credibility in accordance with Regulation 5(3) of the EC (Eligibility for Protection) Regulations 2006 and quotes directly from the decision of the Refugee Appeals Tribunal on this issue.

24. Then, the author refers to the evidence that the applicant is from Tanzania and is not, as claimed, a Somali national. The author rejects the explanation provided by the applicant's solicitors and concludes that the applicant is believed to be the named person on the passport, a Tanzanian national, who twice applied for and obtained visas to travel to the United Kingdom. In other words, the author believed that the applicant was using an alias and lying about his nationality. The author indicates that the applicant makes no claim that if he is returned to Tanzania he will be at risk of serious harm.

25. The author also states that "*numerous documents have been submitted All documents submitted and referred to have been read and given consideration*".

26. No reference is made to the reports of Dr. Nurse and Mr. Allen as to the Bajuni language ability of the applicant and as to their views that the applicant is of Somali nationality.

The Deportation Order
27. A deportation order was made by the Minister for Justice and Equality on 27th March 2012, and attached thereto was a report comprising an examination of a file under s. 3 of the Immigration Act 1999. In that report, reference is made to the decision of the

Refugee Appeals Tribunal on the applicant's application for refugee status. In particular, reference is made to the Dutch language analysis report. No reference is made to the reports of Dr. Nurse and Mr. Allen.

The Pleadings and the Affidavits
28. The applicant swore an affidavit grounding the application for judicial review on 23rd April 2012. At para. 18 of his affidavit, he refers to the controversy surrounding the allegation that he is Tanzanian. The applicant refers to the letter sent by his solicitors on 2nd March 2012, in reply to this allegation, and he says, "*In the said letter, I informed the first respondent that I had applied for a visa in Tanzania, having travelled there from Lamu in Kenya where I previously resided*'. However, the letter from the INIS clearly refers to two visa applications in the name of *A.A.K.A.*. Attached to the letter from the INIS was correspondence from the UK Border Agency, indicating that a visa had issued to the said Mr. K., valid from 30th July 2004 to 30th January 2005, and in addition, a visa had issued to the same person, valid from 20th September 2001 to 20th October 2001. The letter in reply from the applicant's solicitors deals only with the visa granted in 2004. Essentially, the applicant explains, through his solicitors, that he travellled to Tanzania on a one-day trip and used a tampered passport containing his photograph to apply for a visa to go to the United Kingdom. He explains that in 2004, it was very easy to tamper with Tanzanian passports. The explanation fails to deal with how the applicant's fingerprints are associated with a visa granted from 20th September 2001 to 20th October 2001, to visit the United Kingdom.

29. A replying affidavit was filed on behalf of the first named respondent by Mr. Pat Carey of the Legal Services Support Unit of the INIS. Mr. Carey notes that the applicant had previously applied for judicial review of the decision of the Refugee Appeals Tribunal and that Ryan J., in an *ex tempore* judgment, said that there were real doubts about whether the applicant came from Somalia at all, and that his story was unlikely. Mr. Carey avers that in the context of the applicant's application pursuant to s. 17(7) of the Refugee Act 1996, to re-enter the asylum process, the first named respondent "*had full and detailed regard to the reports of Dr. Nurse and Mr. Allen*". He notes the conclusion of the first named respondent that the reports did not establish conclusively the nationality of the applicant and that there were credibility issues in respect of this matter. Mr. Carey refers to the application for subsidiary protection and focuses upon the decision of the respondent and his officials that the applicant was Tanzanian based upon the information provided by the UK Border Agency. He notes that the applicant and his family entered the State on 23rd January 2005, just prior to the expiry of the UK visitor's visa which was valid until 30th January 2005. Finally, Mr. Carey says that the respondent Minister "*is not satisfied that the applicant is a Somali national and that he has displayed an egregious lack of candour, both during the asylum and immigration process and during the High Court proceedings*".

30. At no stage does Mr. Carey indicate that the expert reports of Dr. Nurse and Mr. Allen were considered by the respondent Minister and his officials in the context of the application for subsidiary protection and the deportation decision. This is in contrast to express reference to these reports being considered in the context of the application for re-entry to the asylum system under s. 17(7) of the Refugee Act 1996.

31. During the course of this hearing (on the 9th November 2012) it became apparent that certain issues raised by counsel for the applicant might be within the ambit of questions referred to the European Court of Justice ("ECJ") by Hogan J. in the case of *M.M. v. Minister for Justice, Equality and Law Reform* [2012] IEHC 547. The aspect of the case related to the *M.M.* issues was adjourned until the outcome of *M.M.* was known. Following the delivery of the judgment by the ECJ in Case C-277/11, the matter was adjourned again pending a decision by Hogan J. on the effect of the decision of the ECJ. Judgment was delivered on 23rd January 2013 in *M.M. v. Minister for Justice, Equality and Law Reform* [2013] IEHC 9 and this case resumed on the 9th May 2013.

32. Counsel for the applicant submitted that the decision by the Minister to treat the applicant as a Tanzanian national was reached in breach of the principle of *audi alteram partem*; no notice of the intention of the Minister to treat the applicant as Tanzanian was given to him; and no opportunity was given to the applicant to address the Minister on the issue. Further, it was submitted that the two language reports which were put before the Minister were not mentioned in his subsidiary protection decision and there was no indication they were taken into account in the Minister's reckoning. As such, counsel for the applicant contended that this was a clear breach of the applicant's right to be heard contrary to the decision of the ECJ in *M.M.* as interpreted by Hogan J.

33. The respondents say that the subsidiary protection examination carried out by the Minister in this case is distinct from that undertaken in *M.M.* and did not suffer from the same infirmities. While in *M.M.* the Minister relied on previously made adverse credibility findings, in this case he did not simply 'cut and paste' the previous decision of the Refugee Appeals Tribunal. The Minister had full regard to the separate and distinct nature of the subsidiary protection application in this case and explained why he was of the view that the applicant was a Tanzanian national. The respondent also submitted that the applicant had the opportunity to re-open the issue of nationality in his letter of 2nd March 2012 in response to the positive fingerprint match received by the Minister from the UK Border Agency. The respondent submitted that he failed to do so but now claims that his right to be heard has been breached. Finally, the respondent states that the Minister did have regard to the two expert reports supplied by the applicant and that such reports were considered in relation to the application to re-enter the asylum process made under s. 17(7) Refugee Act 1996 and further that the nationality of the applicant was, at all times, 'centre stage' in the Minister's assessment of his application.

Findings
34. In the view of the court, it would appear that the applicant's first contention that he was denied his 'right to be heard' as he was given no notice of the intention of the Minister to treat him as a Tanzanian or an opportunity to address the Minister on the issue, must fail on the basis that the applicant was contacted by the Minister on 2nd February 2012 by letter prior to the making of his decision. In that letter the Minister expressly stated that he intended " *...to process your application taking into account the information submitted by you on your original application for asylum in the State and the details supplied by the UK Border Agency."* Further, the letter gave 15 working days for the applicant to make observations in respect of the new information which had come to light from the UK Border Agency and the applicant did in fact make such observations through his solicitors on 2nd March 2013. It is my view that this is a clear example of the applicant's 'right to be heard' being fully vindicated by the Minister in line with the comments of the ECJ (at para. 95) that "*the applicant must be able to make known his views before the adoption of any decision that does not grant the protection requested*".

35. The second contention of the applicant is that the two language reports produced on his behalf regarding language analysis and nationality were not mentioned in the subsidiary protection decision made by the Minister and there is therefore no indication that they were taken into his reckoning in making his decision. It is contended by counsel for the respondent that the Minister did take into account these reports in respect of the applicant's s. 17(7) application and therefore they were considered by him in making his decision with regard to subsidiary protection. It was further submitted that such decisions are taken by the Ministerial Decisions Unit and that it is an artificial exercise to draw boundaries and say that the reports were not considered by the Minister in respect of the subsidiary protection application. It is my view that there is no evidence that the Minister or his officials took account of these reports in relation to the application for subsidiary protection or the application for leave to remain. In line with the reasoning of Hogan J. in *M.M*, (supra) it not lawful to borrow findings from a separate process for a subsidiary protection decision. It is evident that in this case, that the Minister failed to conduct " *...a completely fresh assessment of the applicant's credibility*" (per Hogan J. at

para. 47).

36. It must be remembered that judicial review is a discretionary remedy. An applicant who establishes a legal error in the decision making process may be disentitled to the relief he seeks, notwithstanding that error. In this case, it is suggested by the respondent that there has been a significant lack of candour on the part of the applicant sufficient to disentitle him to relief.

37. The respondent received information from the UK Border Agency that two applications for visas to enter the United Kingdom were made by the applicant using a different name to the name he uses in these proceedings and using a Tanzanian passport. It is a significant feature of this case that the applicant never informed the respondent that he had been to Tanzania, that he had used a Tanzanian passport and that he had applied for and had been granted permission to enter the United Kingdom. This indicates a very significant lack of candour on the part of the applicant according to the respondent. Though given the opportunity, he has decided to provide an explanation for only one of the visas granted to him to enter the United Kingdom. No explanation has been given for the visa granted to him in 2001.

38. In Hogan & Morgan '*Administrative Law in Ireland*' (4th Ed.) at para. 125, p. 866, the learned authors refer to lack of good faith and the general conduct of the applicant as factors impacting upon the discretion of the court exercising judicial review jurisdiction. The matter is put as follows:

> *"All applications for judicial review require the utmost good faith and full disclosure of all material facts on the part of the applicant. This is because the initial application is ex parte, together with the fact that there is usually no oral evidence and because of the generally weighty issues raised by the application.*
>
> *Accordingly, relief may be withheld where the applicant has been guilty of gross exaggeration in his affidavits or where relevant evidence has been suppressed or where there has been a failure to make a proper disclosure."*

The authors refer to the dictum of Fennelly J. in *Gordon v. The Director of Public Prosecutions* [2002] 2 I.R. 369 at 375, where he said:

> *"On any application made ex parte, the utmost good faith must be observed and the applicant is under a duty to make a full and fair disclosure of all the relevant facts of which he knows and where the supporting evidence contains material, misstatements of fact or the applicant has failed to make sufficient or candid disclosures, the ex parte order may be set aside on that very ground."*

39. I accept that the applicant provided an explanation for the visa granted to him in 2004. He has failed to provide any explanation in respect of the visa granted to him in 2001. In my view this failure does not amount to bad faith or lack of candour. There is no suggestion that he has been untruthful. The height of the respondent's complaint is that no explanation had been given as to the circumstances in which a visa was granted to a person bearing the same fingerprints as the applicant but having a passport from Tanzania in 2001. I agree that no explanation has been provided but the absence thereof is in the realm of the curious rather than the bad. It does not reveal conduct that should deprive the applicant of a remedy otherwise deserved.

40. I accept that the respondent's officials ought to have referred to and weighed the effect of the applicant's language and nationality reports in the decisions on his application for subsidiary protection and on his application for leave to remain.

Notwithstanding the fact that these reports had not been submitted with these applications or had not formed the basis of any claims advanced in those applications, they were expressly referred to by the applicant's solicitor in submissions referable to the processing of these applications and in particular in the letter sent to the decision maker by the applicant's solicitor in response the claim that the applicant was from Tanzania. In this way, the reports and their conclusions were added to the processes. In my view it was incumbent on the decision maker to weigh these reports before rejecting the claims made. In essence, the decision maker should have balanced the evidence from the UK that the applicant was Tanzanian with the evidence from the language reports that he was Somalian. This exercise never occurred. In my view the conclusions reached in the absence of this exercise are unlawful.

41. I therefore grant leave to seek judicial review and make final orders quashing the decisions in suit. The matters will be remitted to the decision maker and a copy of this decision shall be available to the officials and Minister when the matter next comes to be considered, at the election of the applicant.