

**THE HIGH COURT
JUDICIAL REVIEW**

2006 1219 JR

BETWEEN /

N.N.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY & LAW REFORM AND THE REFUGEE APPLICATIONS COMMISSIONER

RESPONDENTS

RESERVED JUDGMENT of Mr. Justice Cooke delivered on the 20th day of May, 2009.

1. By order of 31st July, 2008, O'Keefe J. granted the applicant leave to apply for an order of *certiorari* by way of judicial review to quash a report and recommendation of the second named respondent ("The Commissioner") of 26th September, 2006 ("the Contested Report") which recommended that the applicant be not declared a refugee. Leave was granted on two grounds as follows:-

1) The second named respondent failed to take into account adequately or at all the fact or significance of the applicant's status as a HIV Positive person in consideration of persecution in the future and as to a membership of a particular social group in the consideration of whether State protection was available to her.

2) The Refugee Applications Commissioner erred in law and in breach of Statute by failing to take into account the matters set out in s. 11B of the Refugee Act 1996 (as amended) as there was an obligation to do so and in circumstances the decision is invalid. A mere statement that "this report has had regard to s. 11B of the Refugee Act (as amended)" is insufficient compliance with the terms of the said statutory requirement.

2. Upon the commencement of the hearing in this case the second above ground was withdrawn by counsel on behalf of the applicant in the light of the judgment which the court had delivered on 30th April, 2009 in the case of *Ajoke v. Minister for Justice Equality and Law Reform & Another* in which the same ground had been rejected as unfounded.

3. In addition to submissions on the above remaining ground, the court invited the parties, in view of the judgment of the Supreme Court on 28th January, 2009, in *A.K. v. Minister for Justice, Equality and Law Reform & Ors.* (Unreported) to make submissions on the issue as to whether the present case fell into the category of exceptional cases in which the court might exercise its discretion to issue an order of *certiorari* notwithstanding the availability of the statutory appeal to the Refugee Appeals Tribunal under s. 16 of the Refugee Act 1996.

4. It should be noted in that regard that such an appeal had been lodged on behalf of the applicant in this case but had been rejected by the Tribunal as out of time.

5. The applicant is a national of South Africa who arrived in the State in September, 2006 and claimed asylum here having destroyed her passport on arrival.

6. In the affidavit sworn on 13th October, 2006 to verify the facts in the statement of grounds for the present application, she states that:-

"The primary reason I fear persecution in South Africa is that I fear being killed or harmed by my husband and I say that no adequate State protection is available to me. I also say that I will be persecuted by being denied treatment for my medical condition in South Africa."

7. The applicant's country of origin, South Africa, is a country which has been designated by the respondent Minister as a safe country of origin pursuant to s. 12(4) of the 1996 Act. Such a designation does not exclude an applicant from refugee status but creates, in effect, a presumption which must be overcome by virtue of the matters which the Minister has regard to under s. 12(4)(b) of the Act when making such a designation namely, that the country in question complies with, *inter alia*, its obligations under the Convention Against Torture, that it has a democratic political system, an independent judiciary and that it is governed by the rule of law.

8. In the Contested Report the Tribunal Member deals primarily with the main ground for refugee status put forward by the applicant namely her fear of persecution in the form of abuse by her husband. That aspect of the applicant's claim was examined by the Commissioner in some detail and found to be lacking in credibility.

9. The Contested Report also deals with the question of the applicant's health as a person with HIV status. It does so, however, from a particular angle which it is now argued was not raised. The matter is mentioned in a number of places in the Contested Report.

10. In s. 3 under the heading "persecution claimed" the Commissioner states:-

"She claims that she fears for her health due to her HIV status as medication is not free in South Africa."

11. In s. 4 under the heading "well founded fear" the health issue is mentioned at para. 4.1.3: "the applicant claims when she five months pregnant she found out she was HIV Positive."

12. The principal finding of the Commissioner is that contained in para. 4.1.7 and it is this with which the applicant now takes issue as the basis for this remaining ground for seeking to quash the contested report. It is as follows:-

"The applicant is currently seeking medical attention in Ireland with regard to her HIV status. Country of origin information from South Africa states that there is treatment for people suffering from symptoms of Aids. However the prospect of life prolonging treatment is still remote for the majority of those infected. Those in need of treatment who cannot afford to pay for it can register for treatment at a government clinic or hospital. However certain criteria must be met before they can receive treatment (British Home Office Report 2006). Although it is accepted that the applicant may not get the medical care she needs in South Africa, there is no evidence to suggest she would be treated differently from any other South African in the same situation. Therefore it does not fall under any of the conventions. There is no indication she would be persecuted should she return to South Africa."

13. In reply to a specific question on the point in the course of the hearing, counsel for the applicant confirmed that the argument now advanced in support of the ground was not based upon any proposition to the effect that the discrepancy in the level, quality or availability of treatment for a person in the applicant's condition in this country as opposed to in South Africa amounted to a basis upon which a claim to refugee status might be founded. The argument to be made was quite distinct namely, that as a sufferer from HIV Aids, the applicant was a member of a particular social group, that is to say, women suffering from HIV Aids and that this fact alone, once mentioned in the application, put the Commissioner on enquiry as to whether the applicant as a member of that group would be exposed to discrimination amounting to persecution if returned to South Africa. It was accepted that this particular issue had not been raised by or on behalf of the applicant before the Commissioner but it was urged that once she mentioned her HIV status there was an onus on the Commissioner to investigate the possibility that she was exposed to the risk of being refused medication in South Africa thereby putting her life in danger. According to the applicant there is a wealth of country of origin information to the effect that the authorities have a deliberate policy of withholding medical treatment from Aids sufferers in spite of world-wide pressure on South Africa to accept that modern medicines can be made available to deal with it.

14. In arguing that the mention of the applicant's HIV status placed a duty on the Commissioner to investigate this possible aspect to the applicant's claim to fear persecution even if it had not been explicitly articulated by her, particular emphasis was placed upon paras. 66 and 67 of the UNHCR "Handbook on Procedures and Criteria for Determining Refugee Status". These paragraphs point out that it is not for the asylum applicant to identify the precise basis for his or her claim to be a refugee.

"Often the applicant himself may not be aware of the reasons for the persecution feared."

The handbook also advises that:

"It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met with in this respect."

15. It must be pointed out that while the UNHCR Handbook is a useful and authoritative guide to officials charged with investigating claims to asylum under the 1951 Convention, it does not have force of law. If a report of the Commissioner is so flawed as to be unlawful, it is because it fails to comply with some requirement of Irish law and not because an officer of the Commissioner may have failed to follow exactly an advice in the handbook.

16. In this case, however, it is in any event clear that the Commissioner's officer did in fact follow up and investigate the immediate implication of the fear expressed by the applicant by reference to her status as a sufferer from HIV Aids. She took the step of seeking out country of origin information on the treatment available for sufferers from the condition in South Africa and the relevant extracts were annexed to the Contested Report when furnished to the applicant. The information confirms that there is indeed a very major problem in South Africa and that the authorities are struggling to deal with it. Treatment is available in the form of anti-retroviral drugs in the private sector and while such treatment is also available in the public health system it is available only to a very limited degree.

17. In that sense, it is clear that the Commissioner did, in s. 4.1.7 of the Contested Report, identify the applicant as a member of a particular social group namely, those suffering from the HIV Aids condition. Moreover, it is clear that the country of origin information cited does support the general proposition embodied in the conclusion in that section namely that "there is no evidence to suggest that she will be treated differently from any other South African in the same situation." It is sought to suggest that the applicant should have been treated as a member of a somewhat different social group namely "women sufferers" from the condition but no basis had been advanced on her behalf to the effect that women sufferers are treated any differently either in the private or public sectors in South Africa from male sufferers of the condition.

18. In effect, while accepting that the Commissioner did have regard to the applicant's condition as a sufferer from HIV Aids and did look at the implications of that fact by examining country of origin information as to the availability of treatment, it is argued that the Commissioner acted unlawfully by failing to discharge the "shared duty to investigate all relevant facts" by taking the further step of examining government policy in South Africa on the question of the possible discriminatory distribution of the limited availability of drug treatment.

19. In the court's judgment the investigative role and duty of the Commissioner does not extend that far. That is

particularly so when the more obvious implication of the facts advanced has indeed been investigated and examined. There is no obligation, in the courts view, upon the Commissioner to anticipate or formulate possible variations or refinements on a fear of persecution advanced by an applicant and to conduct investigations in order to eliminate the possibility of their being applicable.

20. The Court accordingly finds that the ground advanced for seeking to quash the report and recommendation of the Commissioner in this case is unfounded.

21. In those circumstances it is unnecessary to consider the issue as to whether, in any event, such a ground would have been inappropriate for the exercise of the court's discretion to issue an order of certiorari as against a report of the Commissioner under section 13 of the Act, had the ground been well founded.