Neutral Citation Number: [2010] IEHC 251

THE HIGH COURT

JUDICIAL REVIEW

2008 808 JR

BETWEEN

F. M. J.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered 25th day of June, 2010.

1. In this application the applicant seeks leave to apply for judicial review of a report (dated 23rd April, 2008) and a negative recommendation (dated 24th April, 2008) made by officers of the Refugee Applications Commissioner ("RAC") on his application for asylum pursuant to s. 13 of the Refugee Act 1996 (as amended).

2. The applicant was apparently a minor when he arrived in the State in December 2007 but has since reached the age of eighteen and an order has been made since the commencement of this proceeding continuing the action in his name without the joinder of a next friend. The proceeding was also brought initially against the Refugee Appeals Tribunal but an undertaking not to proceed with the appeal has been dispensed with and the Tribunal has since been dropped from the proceeding.

3. Both sides accept that in order for leave to be granted to pursue an application for judicial review of a s. 13 report of the RAC it is necessary for the applicant to establish "substantial grounds" within the sense of s. 5 of the Illegal Immigrants (Trafficking) Act 2000. In addition, it is accepted by the parties that, in accordance with the established case law of the Supreme Court and High Court, such grounds must also come within the category of exceptional cases in respect of which the High Court will agree to intervene at its discretion by way of judicial review of a s. 13 report rather than require an applicant to pursue first the statutory appeal available before the Tribunal pursuant to s. 15 of that Act. As the Supreme Court has held in its judgment of 29th January, 2009 in *A.K. v. RAC* (Unreported, 28th January, 2009) and as the High Court has held in a series of subsequent judgments, the asylum process as provided for in the scheme of the Act of 1966 is such that judicial review of the first stage of the process before the RAC is inappropriate and unnecessary save in exceptional cases and it is desirable that the jurisdiction of the High Court ought not to be invoked until the examination of the asylum application has been concluded before the Tribunal where an appeal is available and has been taken. This Court expressed the position in its judgment in *Adebayo v. RAC & Another* (Unreported, 25th June, 2009) when it said that:

> "This Court should intervene to review a s. 13 report and recommendation in advance of a decision on appeal by the RAT only in the rare and exceptional cases where it is necessary to do so in order to rectify a material illegality in the report which is incapable of or unsuitable for rectification by the appeal; which will have continuing adverse consequences for the applicant independently of the appeal; or is such that if sought to be cured by the appeal, will have the effect that the issue or that some wrongly excluded evidence involved, will not be reheard but will be examined only for the first time on the appeal."

4. The report and negative recommendation of the RAC in the present case turned entirely upon the issue of credibility and, in particular, upon the question as to whether the applicant was telling the truth when he said that he was from Somalia and spoke the Bajuni dialect of Swahili. The officers of the Commissioner came to the conclusion and based their report upon a finding that this was not so and that the applicant came from Kenya and spoke a dialect of Swahili found in the central region of that country. This finding was, to a large extent, attributable to a linguistic analysis report provided to the RAC by a Scandinavian language analysis undertaking called "Sprakab". What happened was this.

5. On applying for asylum the applicant was interviewed by an officer under s. 8 of the 1996 Act with the aid of a Swahili interpreter. For the purposes of his interview under s. 11 of the Act he requested and was given an interpreter who spoke the Bajuni dialect. As is evident from the detailed note of the s. 11 interview, no difficulty of interpretation or understanding arose at the s. 11 interview by reference to the particular dialect of Swahili and no issue to that effect is raised.

6. On 28th February, 2008, the applicant went to the offices of the RAC by agreement to take part in the language analysis interview. This was conducted over the telephone and lasted some 24 minutes. The interview was conducted from the Swedish end by a Sprakab expert. Sprakab subsequently furnished a written report to the RAC which was given to the applicant and his advisors who were invited to comment upon it within a period of ten days.

7. The expert opinion as expressed in the report in clear terms is that the analysis led to the conclusion that the applicant spoke a variety of Swahili which was "with certainty not found in Somalia" and was "with certainty found in Kenya". That assessment is at the highest range of the scale of certainty of assessments made in such reports.

8. In response to the invitation by letter of 11th March, 2008, the applicant's representatives, the Refugee Legal Service, sought to refute the analysis made in the report. The submission made a number of points by way of objection to and refutation of the report as the basis for the s. 13 recommendation of the Commissioner:

- The expert conducting the interview from Sweden did not speak Bajuni;
- Observations in the report to the effect that the interviewee was trying to disguise his dialect were unfounded when

the interviewer did not speak that dialect;

• The applicant had been obliged to require the interviewer to speak clearly and had not fully understood him;

• There were discrepancies between what the applicant remembered having said and what he is reported to have said in the report;

• The report went beyond its remit in commenting upon the applicant's degree of knowledge of certain matters outside the scope of linguistic analysis.

9. The s. 13 report, as indicated, concluded that the applicant was not credible in his claim to originate from Somalia and not from Kenya. It is not disputed that there are two basic aspects to that conclusion. In the first place, the officers identify three particular questions put during the interview to test the applicant's knowledge of matters related to the area of Somalia from which he came and, secondly, the content of the Sprakab report. It was pointed out that the applicant could not give the population of Chula, the island where he had lived; that he had named Mdowa as an island when it is the main village on Chula; and that he could not remember the name of the aid organisations which had offered assistance to that island following the tsunami of December 2004.

10. In the second element, the report relied upon conclusions in the opinion of the language analysis report to the effect that the applicant did not speak the Bajuni dialect but spoke a dialect of Swahili using a pronunciation typical of the Kikuyu tribe of Central Kenya.

11. The findings set out in the Sprakab report are based upon an analysis of the language spoken during the telephone interview by reference to the phonological characteristics, the lexicon and colloquialisms used and also to the applicant's knowledge of country and culture of Somalia. In the first and second of those parts of the report the authors quote specific sentences from what was said by the applicant in the interview in order to illustrate differences in the dialect of the Bajuni dialect as compared with the Swahili spoken in Kenya and words and expressions used in the latter and not in the former. Particular sentences and expressions are cited as spoken and the translations are given. To give one example of the analysis of colloquialisms he is quoted as using the word "samaki" for fish whereas the expert says that the word "isi" would be used by someone speaking Bajuni.

12. In challenging the report and recommendation of the RAC the applicant is forthright in condemning the assessment of credibility which it contains. Insofar as concerns the first part of the assessment based upon allegedly wrong or inadequate answers to three questions, the case is forcefully made that a consideration of the detailed note of the interview demonstrates very clearly that these three questions have been selectively isolated in disregard of many other questions to which the applicant gave detailed answers which it is said are entirely correct. He was, for example, asked the names of clans in particular areas and the names of militias in control of particular places. He was asked to name islands. He gave the number of mosques, shops and villages on the island.

13. A broad and detailed challenge is then made to the Sprakab report and the central argument raised is that this ought never to have been admitted, used or relied upon by the Commissioner having regard to the submissions made against it in the letter of 26th March, 2008. It is submitted that the applicant's position on appeal is incurably prejudiced by the reliance placed upon that report and, in particular, by the absence in the report of any statement of reasons on the part of the RAC for reliance upon the report notwithstanding the objections raised to it.

14. In the detailed objections raised as to the admissibility of the report and the reliance upon it by the RAC, it is submitted that it is by no means clear which expert actually conducted the interview and which was responsible for the report. Two were clearly involved and according to the C.V.'s provided neither speaks the Bajuni dialect although "Analyst 249" had spent some time with the Bajuni people and studied the dialect. It was argued that the report considered the interviewee to be a man when in fact he was a boy and erred in requiring, as a result, a knowledge of country and culture which could not be expected of a youth. The report had gone beyond its remit by making assessments of credibility such that the s. 13 report was vitiated by an obvious delegation of that function on the part of the Commissioner.

15. Particular emphasis is laid upon the fact that only a short period was permitted for observations upon this report at a time when the applicant had no access to the recording of the interview. It was only subsequently in 2009 that a CD-Rom with an audio recording of the interview on which the analysis is based was made available. On that basis it is argued that this case comes within the category of rare and exceptional cases identified in the case law in that if the applicant is confined to the appeal, the basis of the language analysis report namely, the audio recording of the interview, will only be considered for the first time on appeal. There has been a denial of fair procedures in that the applicant has been deprived of an opportunity of responding to the report by reference to the recording prior to the making of the RAC recommendation.

16. The Court is satisfied that no substantial ground is thereby made for the grant of leave to seek judicial review of this s. 13 report in advance of the conclusion of the examination of the applicant's asylum application by the pending appeal before the RAT. This is, in the Court's judgment, manifestly not a case which comes within the category of case which will attract the intervention of the Court by way of judicial review in order to cure a material illegality which is incapable of or unsuitable for remedy by the statutory appeal.

17. The reason for that conclusion can be simply stated. All of the issues which have been raised are directed at the assessment made of evidence as to credibility arising out of the investigation of the asylum application before the Commissioner. The assessment of credibility is quintessentially the function of the Commissioner and the Tribunal in the asylum process. It is not the function of the High Court on judicial review. When the outcome of the examination of the asylum application is presented to the Minister for his decision under s. 17 (1) of the 1996 Act, both the report under s. 13 and the Tribunal decision are presented to him. Where credibility is in issue it is the overall result of both stages of the investigation which must be lawful in order to provide a valid basis for the Minister's ultimate decision. That is the rationale for the reticence of the High Court to intervene in the process until the examination of the asylum application is complete.

18. What is in issue on this application is, in essence, the assessment made and reliance placed by the authorised officers of the Commissioner on the evidence before them arising out of the s. 11 interview and the inquiries they have conducted. The language analysis report forms part of that inquiry. It is an item of evidence. Its probative value may be questioned. The competence or qualification of its authors may be attacked. Its contents can be challenged as incoherent or inconsistent. It may well be open to being refuted as wrong. It cannot, however, be said to be "inadmissible". It is part of the Commissioner's function of inquiry. The applicant agreed to cooperate in its provision: it was not done behind his back.

19. The appeal before the RAT is a full appeal on both fact and law. Where credibility is concerned and an applicant claims that he has been wrongfully disbelieved, all means are available to him to persuade the Tribunal member to take the opposite view. In this

case it is open to this applicant, given that there is to be an oral hearing, to demonstrate to the Tribunal member both by new third party evidence and by his answers to questions put by his own legal representative and those put by the Tribunal member or the presenting officer that all of the answers he gave at the s. 11 interview are true and correct and ought to have been believed. It is open to the applicant to attack the Sprakab report in detail and in depth by producing his own linguistic expert to show that the Sprakab expert has been mistaken. There may well be an explanation as to why "Smaki" is more widely used in Swahili than the Sprakab expert thought. Significantly, perhaps, although the applicant has been in possession of the recording since 2009, he has himself not sworn any affidavit in this proceeding to challenge the criticisms made of his own use of language nor has there been any attempt to submit the details of the Sprakab report to criticism by an opposing expert.

20. In essence, the crucial issues in this case are those of credibility and the way in which the evidence as to credibility has been assessed. The statutory function of the appeal before the RAT is to enable that issue to be looked at de novo in its entirety. The Tribunal member can be urged to completely disregard the Sprakab report as fundamentally flawed. It may be possible by recourse to the recording to point to mistakes in the quotations used in the written report. The Tribunal member may accept that submission and would be entitled to commission an entirely new language report from the Commissioner pursuant to s. 16 of the 1996 Act. The Tribunal member would be equally entitled to disregard the role played by that report in the s. 13 recommendation and review the balance of the s. 13 report to the exclusion of linguistic analysis. Equally, the applicant is entitled to go to an appeal equipped with his own experts knowing precisely the nature of the issues which need to be addressed. That is why both under the 1996 Act and the Qualifications and Procedures Directives of the European Union, a full appeal on issues of both law and fact is made available to an asylum applicant.

21. Nor, in the judgment of the Court, is there any infringement of an entitlement to fair procedures here. The Commissioner fully respected the entitlement to fair procedures on the part of the applicant by affording the applicant an opportunity to make submissions upon the evidence that had been gathered during the investigation namely the Sprakab report. Submissions were in fact made. The fact that other or better submissions might have been made had the recording been available does not affect the validity of the s.13 Report. All that has changed is that in 2009 the applicant obtained possession of a CD-Rom with the recording of the telephone interview. No reliance on that is placed in the challenged report. The evidence relied upon is that of the written Sprakab document.

22. The Court cannot accept either that there has been any breach of fair procedures or infringement of the obligations to state reasons in the fact that the s. 13 report does not address and respond to the submissions made against the Sprakab report in the letter of 23rd March, 2008. The obligation in law to state reasons for an administrative decision applies to the entitlement of the addressee to understand why an adverse decision has been made and to the ability of the High Court to exercise its function of judicial review in relation to that decision. Here, the decision is one as to credibility. It is abundantly clear why the RAC thought the applicant ought not to be believed when he said he was from Somalia and not from Kenya. The actual reasons given may be open to challenge on the basis that they are mistaken in fact or vitiated by error of law but once reasons have been given, the question as to whether the reasons given are valid or invalid, tenable or untenable is a distinct issue and not one which goes to compliance with the duty in law to give reasons.

23. The Court is accordingly satisfied that this is not a case which comes within the categories of cases established in the case law where it would be justifiable or necessary for the Court to exercise its discretion to intervene by way of judicial review in advance of the conclusion of the examination of the asylum application by the decision of the RAT on an appeal which is pending. The issue in this case turns entirely upon the credibility of the applicant when he says he is from Somalia and not from Kenya. On appeal to the Tribunal, that issue will be open to be reassessed de novo based not only on any existing evidence but also on any new evidence available to the applicant including evidence directed at proving that the Sprakab Report is wrong; and there is no argument advanced to this Court on this application as to the competence and reliability of that report which is not apt to be considered and dealt with more thoroughly and flexibly by the Refugee Appeals Tribunal.

24. The application for leave is therefore refused and it is unnecessary to consider the ancillary issue as to the adequacy of the explanation, if any, furnished as to why there is good and sufficient reason in this case for granting an extension of approximately eight weeks for the making of the application.