Neutral Citation Number: [2012] IEHC 3

THE HIGH COURT

2008 1301 JR

BETWEEN/

C. E.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

THE REFUGEE APPLICATIONS COMMISSIONER

IRELAND AND THE

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on 11th January, 2012

1. This application for leave to apply for judicial review of a decision of the Refugee Applications Commissioner on 30th October, 2008, rejecting her claim for asylum. One might wonder why the applicant has not pursued the more conventional route of appealing this decision in the first instance to the Refugee Appeal Tribunal before then, if necessary, exploring the options of judicial review in the event that such an appeal were to be unsuccessful. It must be borne in mind, however, that the Commission invoked s. 13(6)(c) of the Refugee Act 1996 ("the 1996 Act") by finding that the applicant had not made an application for asylum as soon as reasonably practicable after her arrival in the State and had given no reasonable excuse in that regard for failing to do so.

2. The effect of this finding is that the applicant will be denied the benefit of an oral hearing before the Refugee Appeal Tribunal: see s. 13(5)(a) of the 1996 Act (as amended). While the applicant has sought to challenge the constitutionality of these provisions, this issue was not pursued at the hearing before me.

3. Before considering this question, however, it is necessary first to examine the background facts. The applicant, Ms. CE, is a Nigerian national who worked as a cook for a prominent Nigerian politician in Abuja. In December, 2007 she submitted an application for a visa to our Embassy in Abuja on the basis that she wished to attend the wedding of her brother in Cork. To this end, the applicant submitted a sponsor's letter from her husband and a wedding invitation.

4. This appears to have been a charade, since Ms. E. admitted during the course of the s. 11 interview that the groom was a friend and not her brother. One may well doubt whether the visa would have been granted but for this misrepresentation.

5. At all events, Ms. CE arrived in Ireland on a flight with Turkish Airlines on 28th December, 2007, and she was scheduled to leave the State by 2nd January, 2008, at the very latest. It is common case that she did not take the return flight to Nigeria and that the next time that she came to the attention of officialdom was in September, 2008 when was arrested by members of An Garda Síochána while working under a false identity in a public house in a Dublin suburb. The applicant applied for asylum shortly afterwards.

6. The applicant's case for asylum may be summarised as follows. She says that in November, 2007 three men (of whose identity she is unaware) approached her with a bag of money and a bottle and she was instructed to empty the contents of the bottle into the food of her politician employer. While she took the bottle, she refused to carry out the instruction. It is now contended that Ms. E.'s life is under threat as a result, since the three individuals wish to take retribution against her for failing to carry out their instructions.

7. Ms. E. further contends that since her arrival in Ireland she has learnt via a telephone call from her cousin that a woman who was travelling in her husband's car was shot dead, adding that she presumed that the assailants thought that the occupant of the car was her. This incident was said to have occurred on a motorway towards the end of December, 2007.

8. The Commission member found against the applicant on credibility grounds. Ms. E. maintained that the reason she had not taken the return flight home was because she was ill at the time, yet she acknowledged that she did not get medical attention at the time and nor did she make alternative arrangements to travel home after she recovered from illness. The Commission likewise pointed to the fact that the applicant had only applied for asylum some eight months after her arrival and then only after she had been arrested in circumstances where she had been working illegally. In those circumstances, the Commission not unnaturally drew the inference that the applicant's conduct was not consistent with a genuine fear for her life and that the main reason for her arrival in the State was to work illegally.

9. The Commission could not, moreover, find any evidence from any reputable source that any person corresponding to the person named by Ms. E. as having been killed by assailants was so killed. This was another reason to find against the applicant on credibility grounds.

The fair procedures challenge

10. The applicant contends, however, that the Commission member infringed her right to fair procedures in three separate respects, each of which we can separately consider.

Ground 1: The reason why Ms. E. came to Ireland

11. The first ground of challenge is that the Commission member never put specifically put to the applicant that the reason why she came to Ireland was to work. It is true that this question was not put in express and specific terms, but the applicant can really have been under no illusion as to the line of questioning being pursued by the Commission member. The applicant was asked a number of questions regarding the wedding, her failure to take the return flight, whether she sought medical help for illness and the

circumstances in which she came to be working in the public house in the Dublin region.

12. There then followed this exchange:

> "Q. Why did you not apply for asylum when you first came to Ireland?
>
> A. I didn't want to be a burden on the government.
>
> Q. But you said that you feared for your life. That is not consistent with not applying for asylum?
>
> A. When I hear that they kill a person in my husband's car, I just believed that they thought it was me."

13. To my mind, the applicant was given every reasonable opportunity to explain the delay and, indeed, the unusual circumstances in which she came to make an asylum claim. The obligation to respect fair procedures is not an exercise in pure formalism, but it is rather an opportunity to enable the person affected to fairly put his or her case. This obligation further sees to it that, in the words of the Preamble to the Constitution, "the dignity…of the individual may be assured", in that no agent of the State can otherwise invoke the power of the State in a manner affecting legal rights or interests without giving that a person such an opportunity: *cf.* by analogy the comments of Henchy J. in *Garvey v. Ireland* [1981] I.R. 75, 99. The notion of dignity of the individual - with its implication of the importance of treating all citizens with courtesy and respect - requires no less.

14. In the context of an asylum application, it is essentially a co-operative dialogue between the applicant and the decision-maker. This is, in any event, reflected in the language of s. 11C of the 1996 Act (as amended) which provides that an application is placed under a duty to co-operate with the investigation of the asylum claim. It must have been obvious to Ms. E. that the entire sequence of events - the misrepresentations regarding the visa and the wedding, the failure to take the return flight, her taking up employment in Dublin coupled with the belated application for asylum after her arrest - all called for a comprehensive explanation on her part. Any sensible person would have readily understood that the appropriate inferences would be drawn by the Commission member in the absence of such an explanation.

15. For these reasons, I would reject the contention that the Commission member infringed the principles of fair procedures in arriving at this conclusion.

Ground 2: Breach of s. 13(10) of the 1996 Act

16. The second complaint is that the Commission member failed to inform the applicant that no details in relation to the killing of the person named by her could be found in any of the reputable sources. The applicant was, however, asked whether the killing was reported in the media and she replied by saying that she did not know. It is clear, nevertheless, that Ms. E. was never specifically told that the Commission member could not locate any details in relation to the killing in any media outlet specialising in the coverage of Nigerian news, as one might otherwise have expected.

17. In the case of the Tribunal, s. 16(8) of 1996 Act requires that the Refugee Appeals Tribunal shall "furnish the applicant with … an indication in writing of the nature and source of any other information relating to the appeal which has come to the notice of the Tribunal in the course of an appeal …". As I recently observed in *LOJ v. Refugee Appeal Tribunal*, High Court, December 16, 2011:

> "This requirement must be regarded as a legislative embodiment of the principles of fair procedures for the purposes of a particular type of administrative decision, namely, an asylum application."

18. A very similar obligation is placed on the Commission member by s. 13(10) of the 1996 Act, so that the s. 16(8) case-law concerning the Tribunal can be applied, *mutatis mutandis*, to the Commission.

19. Just as in *LOJ*, in many respects the present case is indistinguishable from the decision of Cooke J. in *O. v. Refugee Appeals Tribunal* [2009] IEHC 607, a s. 16(8) case involving the Tribunal. In that case the applicant had claimed that he had been kidnapped by members of the Oodua People's Congress. On that point, the Tribunal member had said:-

> "The Oodua People's Congress is a Yoruba based association. It is partly seen as a vigilante group and also is regarded as a form of society for Yorubas who wish to integrate into the more influential parts of Yoruba culture and tradition. The Oodua People's Congress is a non-state actor and has carried out numerous human rights abuses in the past. According to a Home Office (U.K.) Operational Guidance Note on Nigeria (2005) the Nigerian police force takes appropriate action against cults such as the Ookua's People Congress. Despite this conclusion the applicant never followed up her complaint to the police."

20. Cooke J. held that the Tribunal member had thereby infringed s. 16(8) of the 1996 Act:-

> "This Home Office Guidance Note is referred to for the first time at this point in the Contested Decision. It features nowhere else. It was not a document available to the Commissioners' officer nor, apparently, was it explicitly used at the hearing before the Tribunal. It appears to be a document which is the result of the Tribunal member's own researches. It is accordingly, a document which was not put to the applicant at the appeal hearing or one upon which the applicant was afforded an opportunity to comment or in respect of which rebutting information might have been adduced. The court is accordingly satisfied that there has, in this regard, been an infringement of the requirement in s. 16(8) of the 1996 Act…."

21. Not without some hesitation, I have reached the conclusion in the light of the parallel reasoning of Cooke J. in O., that the Commission member inadvertently breached s. 13(10) by not disclosing the information in question. I will return presently to the implications of that finding.

Ground 3: The internal relocation option

22. The third complaint relates to the option of internal relocation. The applicant was asked whether, for example, it was possible for her to relocate to Rivers State, her place of origin. Ms. E. replied by saying that there was no place to which she could go where she would not be found. The Commission member nonetheless concluded that Ms. E. "could safely relocate within Nigeria to get away from her problems."

23. Ms. E. contends that in this respect the Commission failed to comply the principles enunciated in *E. v. Refugee Appeal Tribunal* [2010] IEHC 133. In this case Cooke J. observed that:

"It is well settled law both generally in the application of the Geneva Convention and of the 1996 Act and specifically by virtue of Regulation 7 of the European Communities (Eligibility for Protection) Regulations 2006, that a finding that internal relocation will provide protection involves a two fold consideration:

(a) First, the identification – if only in general terms – of an area or place in the country of origin which can reasonably be expected to be free of the particular source of persecution from which the applicant requires protection; and

(b) Secondly, an inquiry sufficient to confirm that a relocation there is feasible and reasonable to expect of the applicant (even if it involves hardship,) having regard to the personal circumstances of the applicant and of his family.

18. This second consideration is relevant because there may well be reasons of ethnicity, religion, political affiliation or family history why an applicant might not be able to move to or be safe in a given relocation and that can only be decided if the area or place is identified and has been made known to the applicant. In this case no particular area of possible relocation was mentioned either by the Tribunal member or in the s. 13 report so the applicant has never had it identified. No consideration was given as to whether there were areas outside Anambra state where Massob was active and if so which areas they were. This omission is all the more surprising in this decision because the Tribunal member quotes directly from para. 91 of the UNHCR Handbook: "In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would have been unreasonable to expect him to do so."

24. For my part, I consider that the Commission member here generally did comply with these requirements. It is important to stress that the underlying facts here are very different to those disclosed in *E.* In that case the relocation option arose in the context of the aftermath of extensive communal violence, prompted by ethnic rivalry. It was for that reason that Cooke J. indicated that a mere generalised statement regarding the relocation option was insufficient.

25. Here the Commission member considered that the applicant could move away from the Abuja region to other parts of Nigeria, not least Rivers State from whence she originally comes, so that the statement was not a pure generalisation. In any event, it must be recalled that Ms. E.'s fear is prompted by concerns regarding three (admittedly unidentified) individuals. This is different from the situation in *E.*, where the concerns arose from *ethnic rivalry*, as quite obviously in that situation it would be necessary to ascertain - as Cooke J. himself expressly noted - whether the same risk of serious communal violence obtained in other parts of Nigeria.

26. For these reasons, I do not consider that the Commission member erred in the manner in which she dealt with the internal relocation option.

Whether the applicant should be required to appeal to the Refugee Appeal Tribunal?

27. There remains to consider the implications of the finding that the Commission member erred in failing to put the question of the internet searches to the applicant during the course of the hearing. This is not the place to essay again the vexed question of whether an applicant is required to exhaust all administrative remedies before commencing judicial review proceedings. Doubtless not all of the authorities can be completely reconciled, either by reference to statements of principle or the application of those principles to the facts before the court. It is, however, clear that there is no *a priori* rule in that regard and that a court must balance a variety of relevant factors: see, *e.g., Tomlinson v. Criminal Injuries Compensation Tribunal* [2005] 1 I.L.R.M. 394 and *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. 483.

28. In the context of asylum matters, it is decidedly preferable that an applicant should exhaust his or her right of appeal to the Tribunal unless there are compelling reasons for suggesting that this would otherwise be unjust or that the error could not be satisfactorily corrected on appeal: see, *e.g.,* the comments of Hedigan J. in *B.N.N. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 308, [2009] 1 I.R. 719 at 732-735. It is, after all, the function of the Tribunal to address the errors (if such there be) disclosed by the first instance decision. Of course, many of these errors can be characterised as jurisdictional, but in truth they often register in the middle of a spectrum which ranges from a pure appeal point on the one hand to that to which goes to the very essence of the jurisdiction on the other. Save where the error registers at the upper end of this spectrum or where the facts disclose a clear injustice, the judicial preference for exhaustion of administrative remedies tends to prevail, again for all the reasons set out by Hedigan J. in *B.N.N.* and the extensive authorities quoted therein.

29. The error here falls into the middle range. It is quite far removed from that disclosed in *Stefan v. Minister for Justice* [2001] 4 I.R. 203 where material information had been withheld from the Commission member by reason of a translation error. This omission was found to go to the very essence of a fair adjudication before the Commission and, further, that it was one which could not be safely cured by means of an administrative appeal.

30. The present case is somewhat different, given that the error in question - non-compliance with the requirements of s. 13(10) of the 1996 Act - is a technical one. It would be unrealistic to say that the error goes to the very heart of the Tribunal's jurisdiction, even if it could otherwise be characterised as a jurisdictional error in the sense understood by the modern doctrine of jurisdictional error which has evolved since the seminal decision of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147.

31. Of course, one must be mindful of the fact that the appeal in the present case will not be an oral one. But the critical question here is whether the Commission member was correct to say that there were no media reports of the killing of the person named by Ms. E. That is not something which requires oral testimony before an administrative tribunal.

32. If the Commission member was wrong in this conclusion, then the matter can readily be resolved by the provision of such reportage, even if only by local media outlets. It would seem very surprising if the shooting dead of a named female on a motorway in December 2007 did not attract some coverage, even if only again in the local media in Nigeria. Furthermore, now that this issue has been identified as one of importance, the applicant will also have the opportunity of presenting any such media reports before the Tribunal. Were she to do so, it would certainly put - to say the very least - the decision of the Commission into a fresh perspective.

Conclusions

33. It is for these reasons that I am of the view that Ms. E.'s complaints in relation to s. 13(10) can best be dealt with on appeal. It is for that reason that I would, in the exercise of my discretion, refuse to grant her leave to apply for judicial review to quash that decision.