Neutral Citation Number: [2009] IEHC 451

THE HIGH COURT

2007 159 JR

BETWEEN

U. O.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered on the 9th day of October, 2009.

1. This is a further case in which leave is sought to apply for an order of certiorari and other reliefs by way of judicial review to quash a negative report and recommendation made by the Refugee Applications Commissioner under s. 13 of the Refugee Act 1996, in circumstances where an appeal to the Refugee Appeals Tribunal has been commenced in due time but left in abeyance pending the outcome of the present proceeding.

2. In a number of judgments delivered last term this Court reviewed the case law including the judgment of the Supreme Court in the Kayode case. In one of the more recent judgments F.O. v. Minister for Justice, Equality and Law Reform and Refugee Applications Commissioner [2009] I.E.H.C. 300 on 26th June, 2009, I endeavoured to state very briefly the criterion applicable to the issue of the alternative remedy of the statutory appeal in this way:

> *"It is now settled law that, consistently with the scheme and legislative intention of the 1996 Act, this Court should intervene to review a s. 13 report and recommendation of the Commissioner in advance of a decision on appeal by the R.A.T., only in the rare and exceptional circumstances 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 it 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 appeal."*

3. Accordingly, at the outset of the hearing of this application, I invited counsel for the applicant to identify to the Court the particular features of the 18 illegalities alleged in the Statement of Grounds for which relief was to be sought that were alleged to constitute compelling reasons for the intervention of the Court by way of judicial review. To put it in the form of a question, the Court invited submissions as to why the grievances raised against the s. 13 report of 30th January 2007, in the grounds to be advanced for relief, constituted fundamental errors of law which were incapable of or unsuitable for rectification by reconsideration of the application in the pending statutory appeal?

4. In a preliminary examination of the grounds in the Statement of Grounds, counsel for the applicant properly and correctly acknowledged that a number of them could not be said to raise issues going to the legality, as opposed to the quality, of the assessment contained in the report and which could not be cured or dealt with adequately in the statutory appeal. Counsel then addressed the issues covered in the remaining grounds in a series of submissions, which could be summarised as raising the following propositions:

> 1. The report's assessment of the claim to a fear of persecution is vitiated by a series of errors of fact and of law and by wrongful consideration of irrelevant matters.
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> 2. The cumulative effect of these errors is that what is described as the applicant's "core claim" has not been considered at all. As a result, the authorised officer, as a "protection decision-maker" for the purposes of the European Communities (Eligibility for Protection) Regulations 2006, has failed to comply with the mandatory requirements of Regulation 5, so that no lawful "protection decision", in compliance with that regulation, has been made.
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> 3. The applicant is entitled to a lawful decision, both at first instance before the authorised officer and, if necessary, on appeal before the Tribunal member.
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> 4. The illegality is incapable of being remedied by the appeal because the core claim has not been addressed and will then only be considered on appeal for the first time.
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> 5. The context in which these issues arise can be briefly described as follows. The applicant is a national of Nigeria, who is unmarried and who arrived in the State in October 2006 and claimed asylum. He apparently speaks good English. He claims to be of a minority ethnic group called the Ika, and his claim to a fear of persecution was based on threats to his life which he had received from another ethnic group, the Ozu. He explained this in the s. 11 interview, as follows:
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> *"They, the Ozu, use people for human sacrifice. They wanted me to join the youth section but I couldn't do it. When I refused, they wanted to kill me. When I refused, they started talking to my family that they were looking for me. My mum died because of this problem."*

6. He described how he left for the Benin Republic, where he lived from February until October 2006, when he left to travel to Ireland.

7. In the challenged s. 13 report of 30th January 2007, the authorised officer first refers to that claim arising out of the refusal to join the Ozu ethnic group or its youth section, and mentions that the applicant claimed that he had failed to seek State protection because he was afraid to. The authorised officer then accepts that:

> *"Taken as a whole, it would appear that the allegations made in this claim would, on a cumulative basis, amount to persecution. However, due consideration must be given to the well-foundedness or otherwise of the applicant's claim in order to meet the refugee criteria."*

8. The report then proceeds, in its s. 4 (after more detailed recall of the evidence given as to the basis of the fear and the flight to Benin and then to Ireland,) to itemise a series of "serious credibility issues" with regard to the claim. Four specific aspects of the travel to Ireland are listed, leading to the conclusion:

> *"It is very hard to accept the applicant's account of how he travelled through airports without showing any documentation. Accordingly, I do not believe that the applicant has provided a full and true account of how he travelled to Ireland."*

Next, the report quotes from a United Kingdom Home Office "Operational Guidance Note", by way of country of origin information, to the effect that it contradicts (a) his claim to fear of persecution arising from his refusal to join the Ozu group, which is described in the report as a "secret society", and (b) his claimed inability to seek police protection. The same country of origin documentation is cited to discount the applicant's assertion that he could not re-locate in Nigeria so as to evade the source of the threats to his life.

9. The report then expresses further doubt as to his credibility by reference to three further aspects of the account he gave:

> (a) The claim to have been severely beaten in Benin City, when the only treatment he sought was that of getting painkillers from a chemist;
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> (b) The fact that the Ozu group destroyed things in his home yet he was able to run away umharmed; and
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> (c) The fact that he resided in Benin in safety for seven months and only left because he could not speak French.

10. The report then concluded:

> *"I believe that the applicant's failure to report the alleged threat against his life to the Nigerian police precludes him from claiming a lack of State protection in Nigeria. I also believe that the applicant has the option of moving to a different part of Nigeria. The established standard of proof in asylum cases is whether there is a real or reasonable chance that the applicant would face persecution should he return to his country. It is clear from the applicant's claim that he has not met the standard of proof for asylum purposes."*

11. It will be apparent from that brief summary of the main part of the s. 13 report that the substantive basis and central thrust of its negative conclusion is that the account given by the applicant has not been believed. This applies to each step in the story: the threats from the Ozu group; the incidents said to have occurred; the reasons for being in Benin and for leaving it; and the account of how he travelled to Ireland. As has been repeatedly stated in the case law of this Court on the assessment of credibility in asylum cases, the assessment is the task of the protection decision-makers and this Court will not intervene by way of judicial review so as to substitute its own assessment on that issue. (See, for example, the judgment of this Court in Radzuik v. Minister for Justice, Equality and Law Reform (Unreported, High Court, Cooke J., 29th July, 2009)).

12. It follows that where a s. 13 report turns upon a negative assessment of credibility, the only new assessment of credibility that can be sought and made in the applicant's favour is that of a second protection decision-maker, namely, the Tribunal member, on appeal before the Refugee Appeals Tribunal.

13. In general terms, to the extent that the grounds to be advanced in this case assert that the authorised officer acted "irrationally, unreasonably and in a manner which flies in the face of common sense" by reaching particular conclusions as to lack of credibility, those grounds are directed at the validity and quality of the authorised officer's analysis and understanding of the claim made by the applicant, and the view taken by the authorised officer of the personal history as given as the basis of the claim. (See, in particular, the grounds in s. E at paras. iii, vii, viii, xiv, xv and xvii.)

14. These grounds amount to the contention, in effect, that a mistaken view has been taken by the authorised officer and that a different conclusion should and could have been reached had the mistakes not occurred; had a more balanced analysis been made; had different, or better, or more up-to-date, or more relevant, country of origin been consulted; and had irrelevant matters not been considered. These are all considerations which go to the question as to whether the report's conclusion and recommendation are right or wrong. They do not, as such, constitute fundamental errors of law, incapable of remedy otherwise than by judicial review.

15. Having put the matter thus, in general terms, it is necessary to deal more specifically with the arguments made against particular aspects of the report. As indicated, one of the points most heavily urged by counsel for the applicant is that in this s. 13 report, what is referred to as the applicant's "core claim" has not actually been "addressed", with the result that, in the sense of the criterion quoted in the judgment in para. 2 of this judgment, on appeal, that "core claim" will only then be considered for the first time.

16. The first point in respect of which this argument is put concerns the use of country of origin information relation to secret societies. The applicant says that the claim has nothing to do with secret societies but rather with the caste or ethnic group to which the applicant belongs, his parents having been from different ethnic groups. (The father was apparently an Ika and his mother an Ozu.)

17. Having read the exhibited note of the s. 11 interview, the Court has some doubt as to whether the authorised officer has, in fact, made a mistake in treating a group which carries out illegal human sacrifices as a secret society rather than a caste. The applicant's description was that he was "getting hassle" from an ethnic group called the Ozu. He explained that he was under pressure to join its youth section, which carried out human sacrifices. The country of origin document referred to does, indeed, deal with secret societies, but even if it is more correct to describe the Ozu and its youth section as an ethnic group or caste, as counsel for the applicant argues, the point made by the authorised officer may well still be valid, namely, that where illegal activities such as human sacrifice are carried out by groups and even by secret societies, the Nigerian authorities will treat such acts as criminal offences, so that State protection is available.

18. The country of origin information is not simply being referred to on the point of the treatment of groups or secret societies but as one of the issues in his account giving rise to doubt as to his credibility. He is not believed by the authorised officer when he says he could not report the threats to his life by a group which carries out human sacrifices because, in Nigeria, such activities are indeed regarded as criminal offences and treated by the authorities as such.

19. Nevertheless, even if the authorised officer could be said to have been mistaken in treating a caste, for this purpose, as a secret society and the issue as one of forced recruitment, that issue and that mistake are now identified and there is no reason why they should not form the subject matter of a specific ground of appeal with a view to having the Tribunal member reach a different conclusion on the basis of proper and relevant country of origin information, if that is required. Again, this is an instance in which it is asserted that the authorised officer has made a mistake in understanding and analysing the so-called "core claim" and it is the precise legislative function of the appeal to enable that grievance to be canvassed and, if justified, to be cured. If it is not cured and remains wrong in law if repeated as part of the Tribunal decision, judicial review still lies.

20. Next, it is argued that there was an unlawful failure to allow the applicant to comment on the country of origin document which the authorised officer looked to on the questions of the availability of police protection and internal relocation. As this Court has pointed out in several judgments, the two-stage scheme of the asylum process of the 1996 Act does not require an authorised officer at the investigative stage, to invite comments on country of origin information by an applicant, when, as is frequently the case, it is information which is consulted after the s. 11 interview in order to verify the existence or otherwise of general, political, social, ethnic, religious or other conditions in a country of origin which may have become relevant because of the account given and the claim made.

21. It is only when the events or incidents relied upon in the applicant's personal history may have some connection with such conditions or a public event – arrest at a demonstration, membership of a political party, membership of a trade union, for example – and that information discloses contradictions with the personal history, that the authorised officer may have an obligation to put the matter to the applicant before the report is finalised.

22. That is not the case here. The Home Office document referred to above was consulted only in relation to the issue of forced recruitment to secret societies, (which the applicant says, in any event, is irrelevant,) and as to the availability of State protection and internal relocation. If that information is wrong, inadequate, out-of-date or otherwise unsatisfactory, it is capable of being rebutted by the presentation of appropriate information on the appeal.

23. It is asserted in ground E (vii) that there has been a serious error of law, in that the authorised officer has expressed the view that the applicant's failure to report the alleged threat to his life to the Nigerian authorities precludes him from claiming a lack of State protection in Nigeria. It is submitted that this is a wrong legal presumption, in that an omission to seek State protection does not dispense with the need for an actual inquiry as to whether protection is available. Reliance is place in that regard on the judgment of McMahon J. of 16th January 2009 in the case of EAE and OPE v. RAT and Minister for Justice, Equality and Law Reform [2009] IEHC 5.

24. This submission is based, in the Court's view, on a misreading of the report in this respect. The authorised officer has not made such a presumption. The matter is, again, one of the serious credibility issues arising out of the personal history given by the applicant. In effect, the authorised officer is expressing the view that he disbelieves the applicant's statement that he could not go to the police because, according to the Home Office report and contrary to the applicant's claim, the Nigerian police will in fact pursue illegal acts by secret societies, even if societies of the kind as such are not themselves unlawful. But even if that is a wrong assessment by the authorised officer and a mistaken reliance on that country of origin document, it is again a matter which is eminently capable of, and appropriate for, reconsideration on appeal and, if appropriate, by reference to new country of origin information adduced by the applicant.

25. It is appropriate next to address the general point made by counsel for the applicant by reference to the European Communities (Eligibility for Protection) Regulations 2006 and to Regulation 5, in particular. As already mentioned, the case is made that, by reason of the various issues raised, the applicant's "core case" has not been lawfully addressed in the manner required, or "mandated", as counsel describes it, by that regulation. It is submitted that the authorised officer is a "protection decision-maker", in the sense of the definition of "protection decision" in Regulation 2, and that the applicant is entitled to a lawful protection decision which complies fully with the minimum requirements laid down in the Regulation, and especially in Regulation 5. It is argued that this is so, notwithstanding the availability of the statutory appeal, because the applicant is entitled to have two lawful hearings and not just one lawful appeal.

26. The Court considers that this submission is mistaken and that it misconstrues the scheme and effect of the 2006 Regulations and of the Directive which it implements. It is true that the authorised officer is obliged to present a s. 13 report as a "protection decision" which complies with the requirements of standards laid down by the regulations, including taking into account the matters itemised in para. 1 of Regulation 5. These explicitly include at (a), all relevant facts as they relate to the country of origin and at (c), the individual and personal circumstances of the protection applicant; but this does not mean or imply that if an authorised officer makes a mistake in considering, or even failing actively to look for and consider, such relevant facts or personal circumstances, that the resulting report is not simply mistaken or wrong but so fundamentally unlawful, for want of compliance with the Regulation, as to require that it be quashed because it is incapable of being remedied on appeal.

27. Nothing in the 2006 Regulation or in Council Directive 2004/83/EC precludes a protection decision being arrived at by means of a two-stage process of investigation and appeal. Regulation 3 designates both the authorised officer and the Tribunal member as "protection decision-makers" for this purpose. Thus the obligation imposed on the Member State to attain minimum standards in protection decisions is fully satisfied, in this Court's judgment, by an asylum process in which mistakes by an authorised officer, at the first stage, whether they be of fact or law, of understanding or analysis, of assessment or conclusion; are capable of being remedied by the protection decision of the RAT on appeal. It is the final decision which counts as the definitive protection decision for that purpose.

28. This Court therefore rejects as unfounded the basic submission made in this case, namely, that what is called the "core claim" of the applicant has not been the subject of a lawful protection decision on the part of the authorised officer of the Commissioner by reason only of the fact that the decision is alleged or found to be mistaken in its understanding or assessment of the claim to a fear of persecution made; or in its assessment of credibility of the evidence given as the basis for that fear; or in its consultation or failure to consult country of origin information; or in its examination of the availability of State protection or internal relocation; provided that on appeal to the RAT, no legal obstacle prevents the Tribunal member arriving as a decision which cures or avoids those mistakes.

29. Finally, the Court considers that it is a mischaracterisation of the content and effect of the report to claim that the core claim has not been considered and that any appeal would amount to a first hearing of the claim. All of the essential elements of the account given by the applicant as the basis for his claim to fear persecution at the hands of Ozu group are mentioned in and considered by the report. Even if it were the case (quod non) that some or all of the issues raised in the proposed grounds could be said to identify mistakes of law or fact, the issues thus raised all go to the approach and analysis made by the authorised officer; to what he considered and to what he failed to consider and to the manner in which the negative conclusion has been drawn from his judgment of the material before him. But the "core claim", in the sense of the substance of the claim, has in fact been examined. An appeal based on the very grounds now advanced would not involve, in any sense, an examination of any facet of the application for the first time only.

30. For all of these reasons, the Court is satisfied that there is no substance in the assertion that this is one of the rare and exceptional cases in which it would exercise its discretion to intervene by way of judicial review in respect of any one of the grounds proposed to be advanced if leave were granted. Leave must therefore be refused.