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THE HIGH COURT
JUDICIAL REVIEW

[2006 No. 201 JR]

IN THE MATTER OF THE REFUGEE ACT 1996, THE IMMIGRATION ACT, 1999 AND SECTION 5 ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000

BETWEEN

K. C. C.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice McGovern delivered on the 2nd day of March, 2007

1. On the 24th July, 2006 the applicant was given leave to apply for judicial review of a decision made by the respondent on the grounds set out in the order of Finlay Geoghegan J.

2. The applicant is a national of C. who arrived in Ireland and made an application for declaration of refugee status on the 24th November, 2003. The applicant stated that he fears persecution in C. by reason of his political opinion and the fact that he is a member of the SCNC which is considered to be a secessionist movement. The SCNC advances the rights of English speaking people in C. and seeks independence and autonomy. The applicant alleges that the rules and regime in C. engages in targeting, harassment, torture, arbitrary arrest and detention and denial of political rights and rights of association and assembly to members of SCNC and other groups. The applicant claims that his uncle who was a member of another opposition group, the SDF, was killed by the regime in 1992.

3. The applicant attended for interview with the Refugee Applications Commissioner (RAC) and submitted documentation. The RAC recommended that he not be declared to be a refugee and the applicant appealed to the Refugee Appeals Tribunal (RAT). It was accepted that the applicant's former legal advisers failed to produce and submit proper objective country of origin information to the tribunal in support of his claim. At page 7 of the decision the RAT states "no country of origin information was submitted on behalf of the applicant." It seems that a section 13 report was subsequently re-submitted and this included some country of origin information which indicated that there had been some persecution of SCNC activists but that the risk of persecution depended on the nature of the activities in which the activists where engaged. Such information as was available suggested that while there had been persecution prior to 2001 that by that the SCNC activists were no longer in prison and there was no longer wide-spread persecution.

4. The applicant's appeal proceeded before the RAT who affirmed the recommendation of the RAC to refuse his appeal. The applicant then made an application to the respondent pursuant to s. 17(7) of the 1999 Act seeking the consent of the Minister to make a further application for a declaration under the Act on the grounds that there was fresh country of origin information which included objective reports from reputable sources outlining the targeting and arrest and ill treatment of SCNC supporters and human rights oppression of people in a similar situation to the applicant. This information included up to date reports which post dated the decision made in the original application for asylum and which, the applicant maintains, demonstrated a heightened and current level of ill treatment of SCNC members and supporters. He says that this material could not possibly have been submitted previously. He also referred to earlier country of origin reports which though accessible to his former legal advisors was not furnished to the RAC or the RAT.

5. By the letter of the 6th February, 2006 the respondent informed the applicant's solicitor of the refusal to give his consent pursuant to s. 17(7) of the Refugee Act, 1996. The letter refers to the documents submitted by the applicant and states

> "these documents have been examined as have the original case made by your client to the Refugee Applications Commissioner and the findings of the Refugee Applications Commissioner. Additionally, an examination has been made of the case made in Notice of Appeal (including Grounds of Appeal) submitted to the Refugee Appeals Tribunal and the findings of the Tribunal. It has been decided that the new information adduced on your client's behalf does not significantly add to the likelihood of your client qualifying for asylum on the totality of the evidence already available and considered. As a result, it has been decided to refuse your request on your client's behalf."

6. The letter went on to assure the applicant's solicitors that the documents which had been furnished would be added to the applicant's file in the event that consideration had to be given to any s. 3 assessment being carried out in respect of the applicant.

7. The hearing of this judicial review application took place with another judicial review application under the Asylum legislation, namely the case of *Chris Onos Itaire* bearing High Court record number 2005 No. 887 JR. The two cases were run in tandem because similar issues arose on the powers of the Minister to refuse consent to a further application under s. 17(7) of the Act. A more detailed analysis of the powers of the Minister under s. 17(7) can be found in my judgment in the *Itaire* case.

8. The preamble to the Refugee Act, 1996 describes it, *inter alia*, as "AN ACT TO GIVE EFFECT TO THE CONVENTION RELATING TO THE STATUS OF REFUGEES DONE AT GENEVA ON THE 28TH DAY OF JULY, 1951, THE PROTOCOL RELATING TO THE STATUS OF REFUGEES DONE AT NEW YORK ON THE 31ST DAY OF JANUARY, 1967, AND THE CONVENTION DETERMINING THE STATE RESPONSIBLE FOR EXAMINING APPLICATIONS FOR ASYLUM LODGED IN ONE OF THE MEMBER STATES OF THE EUROPEAN COMMUNITIES DONE AT DUBLIN ON THE 15TH DAY OF JUNE, 1990…AND TO PROVIDE FOR MATTERS RELATED TO THE MATTERS AFORESAID."

9. In *E.M.S. v. The Minister for Justice, Equality and Law Reform* (Unreported Judgment, Clarke J., 21st December, 2004) at page 5 of the judgment the learned judge stated "there is a potential difficulty in applying the *jurisprudence* of the Course of the United Kingdom in refugee matters to the Irish situation having regard to the difference in the manner in which the respective jurisdictions have legislated for the protection of those seeking refugee status."

10. There is no equivalent provision in the United Kingdom legislation to s. 17(7) and the United Kingdom has introduced the Geneva Convention directly into domestic law in a manner not done by the Refugee Act, 1996. However it seems to me to be clear from the preamble to the 1996 Act that the State in seeking to give effect to the Geneva Convention and other conventions mentioned therein assumes certain obligations and accepts the application of these conventions to the treatment of refugees save and insofar as the

1996 Act and subsequent legislation imposes controls on the manner in which the convention is implemented in this jurisdiction. In the *E.M.S.* judgment Clarke J. stated "I am nonetheless satisfied that there are substantial arguable grounds for taking the view that the relevant *jurisprudence* of the United Kingdom Courts would be followed in this jurisdiction." He was referring to decisions in English law relating to the manner in which a fresh claim by an asylum seeker should be entertained. Obviously, the Courts in this jurisdiction will reach their own conclusions based on the legislation in the State. But while there are some differences of approach in the legislation in the United Kingdom and in Ireland the courts here and the United Kingdom have adopted a broadly similar approach to matters of Asylum Law. In *Singh (Manvinder) v. Secretary of State for the Home Department* (8th December, 1995 C.A.) Bingham M.R. stated "the asset test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a reasonable prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim." The applicant claims that this is the correct test and that the respondent heard in law in stating "it has been decided that the new evidence adduced on your client's behalf does not significantly add to the likelihood of your client qualifying for asylum on the totality of the evidence already available and considered."

11. The respondent argues that the Minister's decision to refuse his consent must be decided on the basis of the established legal test of reasonableness as laid down by case law in this State including *O'Keeffe v. An Bord Pleanála*.

12. I accept that that is one basis on which the Minister's decision must be looked at but I think that the "anxious scrutiny" test also applies. In the case of *R v. Secretary of State for the Home Department, Ex-parte Onibiyo* [1996] 2 All E.R. 901 Bingham M.R. stated "The Geneva Convention, read with the 1967 protocol (New York, 31st January, 1967; T.S. 15 1969); Cmnd 3906) provides in Article 33(1):

> "No contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

13. This is the overriding obligation to which States party to the convention commit themselves. The risk to an individual if a State acts in breach of this obligation is so obvious and so potentially serious that the courts have habitually treated asylum cases as calling for particular care at all stages in the administrative and appellate processes." It seems to me that that is a correct statement of the law and comes within the ambit of "anxious scrutiny". And since the purpose of the Refugee Act, 1996 is, inter alia, to give effect to the Geneva Convention and other related conventions on the treatment of refugees I think this is the correct test to apply.

14. The applicant failed in his application before the RAC and the RAT. It is quite clear from the decision of the tribunal member that the applicant was not found to be credible. See pages 11-13 of the decision. The Tribunal member pointed out certain inconsistencies and contradictions in the applicant's account concerning his membership of the SCNC. At page 12 of the decision the Tribunal member states:

> "In the broader nature of the applicant's claim and its context, these are, to some extent, not significant aspects of it, but the Tribunal is, on the basis of the applicant's evidence and its clear subsequent contradiction, and then his reluctance to admit the earlier contradictory evidence until pressed to the point of embarrassment, unable to believe the applicant and accordingly cannot find him to be credible.
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> The Tribunal is fortified in this assessment when considering the plausibility of some of the matters which the applicant stated.
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> Firstly the Tribunal finds it on the basis of first principles, to be implausible that the Policeman who most severely tortured the Applicant while in custody would have assisted in helping him to escape from jail using his own private car and then driving him a distance of at least 50 miles from K. to L. and arranging for his travel by boat to B. having incredibly got the Applicant's Birth Certificate from his mother and given it to the boat driver who happened to be Agent who also quite incredibly happened to be the man who put him up in his house in B. for two days before travelling with him all the way by plane through a transit airport to Ireland.
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> To add to the implausibility of this the applicant was pressed on whether this agent called K. was a clergy man or not. In his Questionnaire he said he was a clergy man but he was unconvincing before the Tribunal and said that he only called him a clergy man because he helped him.
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> In conclusion therefore the Tribunal without any hesitation finds the applicant not to be credible, and aspects of his story were simply implausible.
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> The Tribunal accepts on the basis of the evidence that the applicant may well be a member of the SCNC in C. but does not accept that he was persecuted in the fashion in which he alleges."

15. It seems quite clear from the decision that it turned on a negative finding of credibility which was expressed in quite trenchant terms and supported by examples given in the decision. An important element in the asylum process is the candour and credibility of an applicant. Where an applicant has been found not to be credible certain consequences may flow from that. In this case it seems to me that one of the consequences is that, notwithstanding the fresh country of origin evidence which the applicant seeks to produce, the applicant's claim cannot be properly considered because he is not a credible witness. I do not think the courts can lay down any hard and fast rule on issues of credibility. Each case must be looked at on its own terms. For example an asylum seeker might be found to be incredible on some issues but might still be able to satisfy the RAC or RAT that he has a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or particular opinion and meets the other criteria of the definition of a "refugee" under the Act. But in this particular case the credibility of the applicant was so damaged that I do not believe it would be possible for the relevant authorities in this State to make an accurate assessment of his involvement in the SCNC which is crucial to his chances of success. In those circumstances it seems to me that whether one applies the "anxious scrutiny" test or the *O'Keeffe* test to the respondent's decision it was not unreasonable or irrational or flying in the face of reason. I do not think it is necessary in this decision to decide whether or not the Minister set out the correct test in the letter to the applicant's solicitor because even if he did apply the test contended for by the applicant namely whether there was "a realistic prospect that a favourable view could be taken of the fresh claim despite the unfavourable conclusion reached earlier in the claim", the Minister was entitled to do what he did having regard to the serious credibility issue. In view of that issue I do not think it could be said there was a realistic prospect that a favourable view could be taken from the fresh claim and I hold the Minister was acting within his powers to refuse consent to the new claims.

16. *Certiorari* is a discretionary remedy and I think that in view of the lack of credibility of the applicant in his application to the RAC and RAT this is another matter which I can consider in deciding whether or not to grant this applicant.

17. Having considered all the factors outlined above I am of the opinion that the Minister was acting properly and within his jurisdiction and I refuse the relief sought.