Neutral Citation: [2015] IEHC 255

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 408 J.R.]

BETWEEN

B.N (NIGERIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, BEN GARVEY (SITTING AS THE REFUGEE APPEALS TRIBUNAL)

RESPONDENTS

JUDGMENT of Mr. Justice Eagar delivered on the 23rd day of April, 2015

1. This is a telescoped application to quash the decision of the second named respondent issued on the 5th March, 2010 in respect of the applicant's application for refugee status. The notice of motion and statement of grounds in this case was returnable on the 10th May 2010, and the reliefs sought were as follows:-

> 1) An order for *certiorari* seeking the quashing of the decision of the second named respondent pursuant to s. 16 (2) of the Refugee Act 1996 (as amended) (hereinafter "the Act of 1996");
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> 2) an injunction restraining the first respondent from taking any further steps in relation to the applicant's application for refugee status pending the determination of these proceedings.

2. The grounds upon which reliefs are pursued in this case are as follows:-

> a) The Refugee Appeals Tribunal erred in law and in fact and in breach of fair procedures in failing to have due regard to its obligations pursuant to the European Communities (Eligibility for Protection) Regulations 2006 and the EU Council Directive 2004/83/EC of the 29th April, 2004 (insofar as the provisions thereof have not been transposed into domestic law by the said regulations);
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> b) the Refugee Appeals Tribunal failed to have due and proper regard to the provisions of Council Directive 2005/85/EC of the 1st December 2005;
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> c) no proper regard has been had to the matter set out in the documentation furnished with the applicant's notice of appeal furnished herein and the decision is invalid;
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> d) the Refugee Appeals Tribunal failed to weigh appropriately the details given by the applicant and failed to assess the legal requirement as a matter of law to a well-founded fear of persecution;
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> e) no proper forward looking test was carried out and the process of which the credibility of the applicant appears to have been determined is invalid in that, *inter alia*, same is based on supposition and surmise rather than a proper objective assessment of the applicant's claim. No proper objective assessment of the applicant's credibility has been undertaken and the decision is invalid;
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> f) insufficient or inadequate or no consideration of the applicant's application.

The applicant's claim

3. The applicant was born in 1970 in Harare, Zimbabwe, received approximately 14 years education, is single and worked as an electrician for six years on a farm in Zimbabwe. He claims his father was active in politics and that the applicant was also involved in same. He stated that his father is Nigerian and not Zimbabwean as he had earlier stated. He claims his problems commenced in 2000 when the government seized the farm which gave employment to the applicant's father along with the rest of his family. They struggled economically for the next three years. He claims that in 2002 he went to Greece with an agent. He had no money to go to that country and states the agent told him he would have to work for four years to pay back the cost of the journey, which was unusually funded by the agent. The applicant claims that while living in Greece the agent employed him to undertake illegal activities, i.e. printing pirate CDs. When he refused to carry out this work the agent said he would have to return with the applicant to Zimbabwe. Both of them left Greece after six months and returned to Zimbabwe and again the agent paid for his flight. The applicant claims that in 2005 his father went to court but never returned. The applicant claims nobody knows what happened to his father. He claimed that two weeks after his father disappeared the family home was burnt down. He said he did not report the matter to the police because he believed that they could not do anything. Two years later in March 2007 he claims he was attacked by three men, tied up, blindfolded and taken to an unknown place where he was detained for a day before being released. After that ordeal the applicant went into hiding and states that he wanted to find someone to bring him to Dublin. He needed money to pay an agent so he borrowed US$1,900 from friends. He left Zimbabwe in December 2007 and arrived in Ireland on the 2nd January, 2008. After he applied, the applicant was furnished with a transfer order to Greece because it was established that he had sought asylum in that country prior to coming here. The applicant said he didn't wish to return to Greece because the agent might see him there and make trouble. He met a Polish girl in Ireland and lived with her for 18 months until she lost her job. The applicant then resurrected his asylum application

4. In answer to the presenting officer he said his girlfriend went back to Poland in December 2009 and thereafter the applicant was unable to sustain himself. In answer to further questions, he stated he visited Nigeria in 1997 with his father and doing so presented no problems. The applicant said his father had a Nigerian passport and he, the applicant, used his own passport and visa to travel to Nigeria. He was asked if he could have applied for Nigerian citizenship and he replied "*Yes*". He was asked why he did not apply for protection in Nigeria and he replied "*As Ireland was better*". It was put to him that if he went to Nigeria he could live there as a citizen. The applicant replied "*Yes*". The applicant said he had a choice but he preferred to come to Ireland. He referred to his questionnaire and the purported birth certificate submitted. There was inconsistent evidence in his birth certificate compared to the name used on his questionnaire. He was unable to explain the difference. It was also pointed out to him that the birth certificate contained reference to his father where it stated the nationality of the applicant's father was Zimbabwean and not Nigerian. The applicant said it was issued in 2004. He confirmed that it was again issued in 2007 and that it had the same inconsistencies. It was put to him that he had been given evidence that his father was born in Nigeria and the applicant said the birth certificate was a mistake. He was asked when did he go to Nigeria and he replied "*I went there in 1997 and stayed until 1999*". The applicant said he had a Zimbabwean passport but it got burnt when his house was destroyed. He was asked what name he used when filing an application in Greece and he replied "*Paul Newman*". He was asked why did he tell the Greek authorities that he was born in Sierra Leone. The applicant replied that the agent advised him.

The decision of the second named respondent
5. In his analysis of the applicant's claim the second named respondent indicated that the applicant presented as a 30 year old single male from Zimbabwe who claimed that owing to his involvement with a political group called the MDC (Movement for Democratic Change) (membership card put in evidence). He suffered persecution along with his father, a Nigerian national. He stated that in 2000, government forces seized the farm that he and his father worked on and that the family lost their livelihood as a result. Two years later he claims he went to Greece where he applied for asylum but left after six months when he did not like the type of illegal work offered to him by his agent. He and the agent then returned to Zimbabwe but he claims that in 2005 his father disappeared and the family home was burnt alongside all his documents. He claims that in March 2007 he was attacked by three people, tied up, blindfolded and detained for a day before being released. He went into hiding until he found an agent to bring him to Ireland. He borrowed the requisite money from friends and arrived in Ireland in January 2008. He went into hiding when he received a transfer order to Greece (because it was established he had sought asylum in that country prior to coming here). He met a girl who supported him and when she lost her job the applicant then resurrected his asylum claim.

6. The tribunal member said that other than his travel to Greece it was difficult to substantiate the events the applicant alleges took place given the inherently subjective nature of the claim. He claimed that he went to Greece with an agent in 2002 but paid no money for that journey. He claimed the agent paid for his journey and accommodated him for six months in Greece. The tribunal member then claims when the applicant refused to print pirated CDs, the agent simply paid again for their return to Zimbabwe despite having made an application for protection in that country stating that he left Zimbabwe because he was being persecuted. It is not credible that he would return voluntarily to the country that was allegedly persecuting him.

7. He then claims his father disappeared and the family home was burnt down in 2007 and that the applicant was beaten up, attacked, blindfolded, kidnapped and then released.

8. He made no attempt however to report any of these matters to the police and the applicant told the Tribunal that he believed they could not do anything about it. He then claimed that some friends gave him US$1,900 and he arrived here in January 2008 and made an application for international protection on the same day. He produced an MDC membership card and a birth certificate and whilst the validity or otherwise of the MDC membership card could not be established, the birth certificate was inconsistent with the applicant's own evidence as it gave a name different to that of the applicant. It also stated his father was a native of Zimbabwe.

9. The applicant's father is Nigerian and he acknowledged that he could have applied for a passport and citizenship of that country but declined to do so and stated "*I preferred Ireland*". He lived in Nigeria for two years, during which time he encountered no problems. The Tribunal was satisfied the applicant was attempting to conceal his true identity. When he asked the reasons for not wishing to return to Greece to continue with his asylum application, he stated he did not know the language and the agent who brought him there might make trouble for the applicant. These were no credible reasons for his deliberate evasion of the asylum process in Greece particularly as the agent whom he fears is the same person who allegedly brought the applicant back to Zimbabwe after his time in Greece.

10. He applied in Greece under a film stars name, "*Paul Newman*" and gave his national identity as Sierra Leonean yet he lodged an application in Ireland under a name B.N. and stated that his nationality is Zimbabwean. It is not possible for the Tribunal to ascertain the true identity or nationality of the applicant. He has applied for international protection in two countries providing completely different biographical information to each. This undermines his credibility.

11. When asked why he re-entered the asylum process in this country and whether or not it was for financial assistance the applicant replied "*basically yes*". He re-entered the asylum process due to the departure of his girlfriend. The second named respondent quoted from Professor Hathaway "*That if one is truly fleeing persecution and delays in seeking international protection such conduct can go to credibility*". The second named respondent referred to the s. 13 interview when the applicant was questioned about the principles or aims of the MDC party. During the course of his interview the applicant was vague and unconvincing in his responses. He claims he did not know the names of the senior members of the MDC party and the tribunal member held that it was not credible that someone who is an alleged member of the MDC party since 2006 would be unable to state any specific aims or principles of the party or name any leading members of the party during the time of his alleged involvement. His lack of knowledge of the MDC goes to his credibility.

12. The second named respondent also considered the submissions in relation to why the applicant did not return to Greece and also considered that the statutory time for his transfer to that country had not elapsed and can no longer be executed owing to the non-cooperation of the applicant with the Irish authorities and the second named respondent was satisfied that the applicant lacks credibility.

13. The second named respondent also said he had considered all relevant documentation in connection with the appeal including the notice of appeal, the country of origin Information, the applicant's asylum questionnaire and the replies given in response to questions by or on behalf of the Commissioner from the report made pursuant to s. 13 of the Act of 1996. He affirmed the recommendation of the Refugee Applications Commissioner made in accordance with s. 13 of said Act.

Submissions of counsel
14. The main submission on behalf of the counsel for the applicant was that the Refugee Applications Commissioner assessed the applicant's claim on the basis that "*it would be assumed for the purposes of the report that the Applicant is a national of Zimbabwe*". He submitted that the second named respondent, in its decision of the 5th March, 2010, while appearing to consider the matter on

the basis that the applicant was Zimbabwean stated nevertheless that it was "*not possible for the Tribunal to ascertain his true identify or nationality*". He referred to a decision of the US Court of Appeals in the case of *Tenzin Dhoumo (Petitioner) v. The Board of Immigration Appeals (Respondent)* 416 F.3d 172. In this case the petitioner was born in India in 1963 to two Tibetan refugee parents and was raised in a Tibetan refugee camp in India. He entered the US in 1997 and filed an application for asylum stating among others things that he was unwilling to return to Tibet because he feared persecution by the Chinese government there. He denied that he was a native of and a citizen of India. He argued that he was a Chinese national and eligible for asylum based on a fear of persecution in China which includes Tibet as a political subdivision. Because the petitioner had never been to China the Immigration Judge directed that the petitioner address past occurrences in India. In denying the petitioner's claims the Immigration Judge did not discuss or make any specific finding as to the petitioner's nationality and made no reference to his argument that he was a national of China. The decision of the US Court of Appeals was that because the petitioner's nationality or lack thereof, is a threshold question in determining his eligibility for asylum. In doing so the Immigration Judge and the Board of Immigration Appeals erred in failing to address it. In fact, in that case the Immigration Judge did not discuss or make any specific finding as to the petitioner's nationality and the Board of Immigration Appeals summarily affirmed the decision without an opinion.

15. The Court of Appeals further discussed the issue that the petitioner had presented substantial arguments and evidence supporting his Chinese nationality to both the Immigration Judge and the Board of Immigration Appeals and their failure to address the position or make a finding as to his finding was erred. Substantial emphasis was laid by the Court of Appeal on the fact that India does not qualify as a "*safe third country*" having regard to the treaties involving the asylum procedures under US law.

16. Counsel further referred to *E.S v. The Refugee Appeals Tribunal* (Unreported, High Court, Cooke J, 15th July 2009) [2009] IEHC 335. In this case the applicant was a 30 year old single woman who claimed she had Zimbabwean nationality and her claim to refugee status was recommended for rejection by the Refugee Applications Commissioner on the ground that the story she told was not credible. The Commissioner's authorised officer had doubts as to whether the applicant was a national of Zimbabwe.

17. Cooke J. commented that the notice of appeal against the decision of the Refugee Applications Commissioner suggested that the grounds of appeal had been drafted or lodged without or with only minimal regard to the actual circumstances of the applicant's case and to the contents of the report under appeal. Thus submissions were made as to a fear of persecution on the grounds of religion and ethnicity which had never been mentioned by the applicant. It was difficult to avoid the impression that these grounds of appeal constituted some form of standard generic appeal capable of adaptation from case to case but which has not actually been adapted to this case. Having sifted through all the grounds of appeal Cooke J. took the view that an ambiguity and therefore an uncertainty as to the exact basis of which the tribunal member in this case finally decided to affirm the recommendation made pursuant to the section 13 report. The tribunal member had expressed a serious doubt for the reasons as to whether the applicant was in fact a national of Zimbabwe. He said the rejection was based on such an inference and that the ambiguity and uncertainty in the decision in this case lies in the fact that it gives a clear impression that the tribunal member comes to the same view as the authorised officer, namely that the applicant is not a national of Zimbabwe but the decision contained no conclusion to that effect in express terms.

18. Earlier Cooke J. had pointed out that it was axiomatic that the establishment of the country of origin of a claimant to refugee status is fundamental to the assessment of the claim because it is otherwise impossible to determine whether the claimant is outside that country owing to a convention fear of persecution.

19. Counsel for the applicant indicated that there was a failure to examine the MDC membership card (which this court found difficult to read) and which contained few details.

20. Counsel also indicated that country of origin information was not consulted although it appeared clear to this Court that this was not an issue which affected the decision of the second named respondent.

21. Counsel also indicated that almost all the issues raised by the applicant's advisors in their submissions were ignored. He also referred to the law in the area of the assessment of credibility in refugee matters as set out in *I.R. v. Minister for Justice Equality and Law Reform* (Unreported, High Court, Cooke J, 24th July 2009).

22. Counsel for the respondent initially stated that the applicant had sought to quash the decision by a reference to grounds contained in its statements of grounds. He submitted that the grounds were generic in nature and raised no specific plea of illegality in respect of the Tribunal's decision. He submitted that the grounds are too vague and lacked the specificity required to constitute legitimate grounds of judicial review. Without prejudice to this objection, he then made submissions in regard to the complaints raised in the submissions of the applicant.

23. Counsel on behalf of the respondent highlighted the findings of the second named respondent. He highlighted that the Refugee Applications Commissioner carried out a EURODAC search on foot of the applicant's fingerprints and that this established that the applicant had applied for asylum in Greece on the 22nd January, 2003. The Commissioner then issued him with a notice of a determination to transfer his application to Greece but he evaded transfer to Greece and after a year had elapsed he re-engaged with the asylum process because his Polish girlfriend had returned and he ended up in financial difficulty. He claimed to have been a member of the MDC opposition party and to have attended rallies which were attacked by Zanu-PF members. He was taken away for interrogation and tortured and this prompted him to flee. He submitted a birth certificate and an MDC party membership card. In the view of this Court the MDC party membership card is not particularly clear and the birth certificate is in a slightly different name.

24. He had told the Greek authorities that he was from Sierra Leone. He had also given a false name and nationality to the Greek authorities. He was asked questions about the MDC and was unable to name any of the senior members of the party or any of the principles for which it stood except with a generic summary that "*ill treatment should stop in the country*". Counsel for the respondent stated that the submissions accompanying his notice of appeal were notable except for generic claims of illegality on the part of the Tribunal and the recital of tranches of country of origin information about the abuse of power by Zanu-PF in Zimbabwe.

25. Counsel for the respondent further submitted that while giving evidence to the second named respondent that the applicant had reiterated in the main the claim advanced by him before the Commissioner but he now stated his father was Nigerian and not Zimbabwean which was contrary to what he had said in his questionnaire and that which was on his birth certificate. The birth certificate produced by him suggested that his father (again with a misspelling of his name) was a native of Zimbabwe when in fact his father was a national of Nigeria. He stated he had visited Nigeria with his father in 1997 and that he was entitled to apply for Nigerian citizenship.

26. Counsel on behalf of the respondent said that the Tribunal affirmed the recommendation on the basis of the lack of credibility particularly on account of the applicant's gross ignorance in matters relating to the MDC, the birth certificate with the wrong name and the wrong nationality of his father and that the applicant had applied for asylum under an assumed name in Greece saying he was

a national of Sierra Leone and then returned to the country where he said he was being persecuted prior to leaving there again. He referred to a case of *R.S. (a minor) v. The Refugee Appeals Tribunal & The Minister for Justice Equality and Law Reform* (MacEochaidh J, 13th February, 2014) [2014] IEHC 55. In that case reciting the decision of Cooke J. in *E.S.* referred to by counsel for the applicant MacEochaidh J. stated:-

> *"I agree with the dicta of Cooke J. cited above, to the effect that it is imperative that a finding of nationality be made as it is impossible to declare a person a refugee unless a decision maker has determined the nationality of the asylum claimant. However, this could not mean that in a case where an asserted claim as to nationality is rejected, the Tribunal Member or decision maker must them identify the nationality of the claimant. Such a finding would serve no purpose in circumstances where an asserted claim as to the core of a claim is rejected and no further analysis of any aspect of the claim is required."*

Discussion

27. It appears clear to this Court that it is not always possible to make a finding of nationality and that there is no duty on the tribunal member or decision-maker to identify the nationality of an applicant. In this case the findings of lack of credibility on the part of the applicant is that the Tribunal was not satisfied to identify his nationality as that of Zimbabwean. However it is clear that consideration was given as to the nationality of the applicant and is in marked contrast to the US Court of Appeals case in *Tenzin Dhoumo (Petitioner) v. The Board of Immigration Appeals (Respondent)* where the Court of Appeals criticised the failure of the both the Immigration Judge and the Board of Immigration Appeals to address the position at all. The tribunal member in this case clearly did consider the issues.

28. I am further satisfied and adopt the decision of MacEochaidh J. in *R.S. (a minor) v. The Refugee Appeals Tribunal & The Minister for Justice Equality and Law Reform*, previously referred to above, in relation to identifying a nationality.

29. The tribunal member in his decision indicated that he had considered all relevant documentation including the notice of appeal and the country of origin information. Ground 3 of the notice of appeal avers to the appellant's conduct in the following terms *"it is submitted that the Applicant has been at all times cooperative in seeking to progress the investigation and assessment of his claim for refugee status"*. This is undoubtedly not the position. Substantial country of origin information was furnished with the notice of appeal but no issues arose out of the country of origin information and it appears to this Court that counsel for the applicant was not really dealing with the issue of the decision of the second named respondent.

30. In this case the applicant had applied for refugee status in Greece in 2002 having given a false name and stated he was a native of Sierra Leone. The exact basis of his claim in Greece is not clear. He went with an agent to Greece who paid his fare (which is most unusual) on the basis that the agent told him he would have to work for four years to pay back the cost of the journey and that the agent employed him in printing pirate CDs. He then said he refused to do that and the agent then went back with him to Zimbabwe after six months and according to the applicant the agent paid for his fare back.

31. The applicant left Zimbabwe in December 2007 and once it was discovered that he had applied in Greece he was served with a transfer order to Greece and at that stage the applicant decided he would disappear and only applied again for asylum when the girlfriend who he was living with had lost her job and returned to Poland and the proposed transfer order to Greece had lapsed.

32. The applicant had a Nigerian father and was therefore entitled to become a Nigerian citizen..

33. The decision of the second named respondent as to credibility in my view was reasonable and I am satisfied that the second named respondent's assessment of credibility was in terms of the "full picture" that emerges from the available evidence and information and taken as a whole was in accordance with Cooke J.'s review on the conclusions on credibility in *I.R. v Minister for Justice, Equality and Law Reform* [2009] IEHC 353. Further Cooke J. at para. 8 said:-

> *"When subjected to judicial review, a decision on credibility must be read as a whole and the Court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in disregard of the cumulative impression made upon the decision-maker especially where the conclusion takes particular account of the demeanour and reaction of an applicant when testifying in person."*

34. It was a reasonable finding for the second named respondent to state that it was not possible for him to ascertain the true identity or nationality of the applicant and I adopt the decision of MacEochaidh J. in *R.S. v. Refugee Appeals Tribunal and the Minister for Justice Equality and Law Reform*, cited above, in regard to this finding.

Decision of the court

35. In these circumstances it is clear to me that the decision of the second named respondent was reasonable in all circumstances and that in those circumstances I will refuse to make an order of *certiorari* quashing the decision of the second named respondent.