Neutral Citation: [2014] IEHC 516

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 117 J.R.]

BETWEEN

HELEN EYEFIA

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered the 4th day of November 2014

Introduction

1. This is an application for an order of *certiorari* by way of judicial review quashing the respondent's decision of the 22nd December 2010 to refuse subsidiary protection to the applicant pursuant to the European Communities (Eligibility for Protection) Regulations 2006 and for a similar order quashing the respondent's decision of the 13th January 2011 to make a deportation order in respect of the applicant under Section 3 of the Immigration Act 1999. Various ancillary reliefs are also sought. This matter was dealt with by way of "telescoped" hearing so that the application for leave and the substantive hearing were heard simultaneously.

Facts

2. The applicant is a 40-year-old woman and a Nigerian national. She arrived in the State on the 11th September 2006. On the same date, she was interviewed by an immigration officer pursuant to Section 8 of the Refugee Act 1996 and completed and signed a form known as an ASY 1. The immigration officer noted the following additional information on the form collected during the interview:

> "Applicant stated she did not apply for asylum in this country or any other country.
>
> Applicant stated she lived in a bus shelter in the market square in Benin city with her mother and family.
>
> Applicant stated she was brought to Italy from Nigeria and was forced to be a prostitute.
>
> A white man in Italy organised for her to come to Ireland."

3. On the 19th September 2006, the applicant applied for refugee status and completed a questionnaire in or about that date. She confirmed that she had no passport or documents verifying her identity. She stated she was single and had three children in Nigeria. She also confirmed that she had no documents to submit in support of her application. In response to question 21, "why did you leave your country of origin?", she replied:

> *"please I can not exple my self in write I can exple with my mouth.*
>
> *I leave my country Nigeria because of fears of people, so that they will not kill me. I also leave Italy to Ireland because of fears of a woman who take me to Italy for prostitute."*

4. She stated that she did not report her fears to the authorities. In response to question 25c asking why she did not report her fears, she said:

> *"because if I report her to the authorities, she will ask her boys to look for me and then they end up killing me."*

Question 29 asked "what do you fear may happen to you or any of the people included in this application if you return to your country of origin?" The applicant replied:

> *"What will happen is that if I returned to Nigeria the woman will kill me, and no one will ask her. So please you should help me. The other one in Nigeria will kill me too, she will talk I will report her."*

5. She further stated that she left Nigeria on the 22nd December 2005 and travelled with a woman to Italy. She said that a man provided travel documents for her to enter the State and she had travelled to Ireland with this man. She said that she did not pay for this arrangement. She had lived in Naples for nine months before arriving in Ireland.

6. On the 23rd September 2006, the applicant attended for an interview with an officer of the Refugee Applications Commissioner pursuant to Section 11 of the Act of 1996. During the course of the interview, the applicant again said that she lived at a bus stop in Market Square, Benin City for about three years. She lived there with her mother and four siblings whose ages she could not remember. She said that a woman in her hostel called Mary completed the questionnaire but she did not know Mary's nationality. She could not say what addresses in Nigeria she had lived at with the exception of the bus stop. When advised that she was not being co-operative, she came up with an address, Webo Lane, where she lived for about twelve years. They left there because they could not pay the rent. She then said that she left Webo Lane when she was about twelve years of age. When it was put to her that she was about fifteen, sixteen or seventeen at that stage and where did she go to live, she said she met a boy that she had children with after she left Market Square and his address was 188 Iyarema Street. She had three children with him. In 2005, her boyfriend asked her to leave because his friends were saying that her mother was destitute, a street woman and he did not wish to take care of the applicant and her junior siblings any more.

7. She said that three siblings were living with her and her boyfriend and three children but again she could not remember, even approximately, the siblings' ages. She did not know where the siblings went after they left her boyfriend's house, although one was only seven at the time. After she left her boyfriend, she went to work in a restaurant washing dishes. She met a woman who asked her if she would like a better-paid job. The applicant said she didn't mind, was interested and followed her. This woman brought her far away from Benin. She was brought to a house where there were men, one of whom asked if she was looking for a job. The man took out a gun and told her he would kill her. He put her in a room where there were two dead men. He asked her what her name was and she said "fire". He asked her to pick up a native pot used in rituals then scraped her hair and covered her head, face and body with a native chalk.

8. The man started to do a ritual and when it did not work he thought it must be because she had not given her correct name. She said that later on she managed to escape through a window. She ran into the bush and heard people following her so she hid behind a tree. She then met an elderly woman whom she asked for help. She met other people in a compound and told her story. The old woman took care of her and introduced the applicant to her daughter who said she would help her. The daughter took the applicant to her home and bought her clothes in the market. They then went to Lagos and stayed in a hotel for two days. They then went to an airport and travelled to Italy. She was brought to a house where there were other girls and was forced to be a prostitute. She was brought to a house in Naples where men were brought to her. She was not allowed to leave the house.

9. The woman poured water on the applicant and she ran out of the house and met a white man who, after a week, brought her to Ireland. When she arrived in Ireland with this white man, he gave her €30 and left her. He said he could not help her any more and did not tell her where to go. She was unable to say where the old woman lived or where her daughter lived. When asked why she thought the white man helped her, she said he felt sorry for her. She did not know if he was visiting Ireland and he paid for her journey. She confirmed that she had no documents and that the man had everything.

10. She was asked to explain why she stated in the questionnaire that her last address was the bus stop in Market Square when she told the interviewer that it was in fact her boyfriend's address. She reiterated that it was her boyfriend's house and not the bus shelter.

11. The Commissioner's officer delivered her report on the 25th September 2006 in which she stated that she was satisfied that the applicant had failed to establish a well founded fear of persecution in accordance with Section 2 of the Act of 1996 and recommended that the applicant should not be declared a refugee. The application appears to have failed primarily because of credibility issues surrounding her account. The applicant appealed to the Refugee Appeals Tribunal ("RAT").

12. It appears from the replying affidavit of the respondent herein that before the appeal came on for hearing, on the 7th November 2006, the applicant instituted judicial review proceedings in respect of the Commissioner's decision. The application for leave was refused by Birmingham J. on the 11th July 2008 and an order for costs was made in favour of the respondent. Those proceedings have not been exhibited in either party's affidavit so that the nature of the claim being made at that time is not known, nor the reasons for the court's refusal to grant leave.

13. On the 27th November 2008, the applicant's appeal to the RAT was heard on oral evidence and the applicant was represented by solicitors and counsel. On the 17th August 2009, the RAT affirmed the Commissioner's recommendation that the applicant should not be declared a refugee. The tribunal found that the applicant's account was neither credible nor plausible and gave clearly understandable reasons for so finding. The tribunal said:

> "That such a litany of disasters could befall an individual in a lifetime let alone in the space of such a short while is not credible... In my view this claim stretches credulity and is not capable of being believed. I do not accept that the applicant's story is credible. There are serious credibility issues going directly to the core issues in this claim...the core story is internally inconsistent and in my view not capable of being believed."

14. The tribunal also concluded that internal relocation and state protection were available to the applicant and this was a complete answer to a claim for refugee status. This finding was in any event not necessary as the negative credibility finding disposed of the matter. No challenge was brought to the decision of the RAT.

15. By letter of the 2nd November 2009, the applicant's solicitors made an application for subsidiary protection pursuant to the European Communities (Eligibility for Protection) Regulations 2006 together with an application for leave to remain pursuant to Section 3 of the Immigration Act 1999 as amended. The documents enclosed with the letter included extensive country of origin information.

16. They also enclosed a completed subsidiary protection application form. Paragraph 1.8 of the form requested the applicant to "Set out fully all of the grounds relating specifically to your circumstances upon which you are relying in support [of] your application for Subsidiary Protection in the State". The applicant's response was:

> *"The applicant was held against her will in a hut where rituals were performed upon her. She was later brought to Italy and was forced to work as a prostitute against her will. She arrived in Italy in 2008. The applicant fears for her life if returned."*

17. Paragraph 1.10 of the form states "If you are relying on any documentary evidence already submitted with your asylum claim, please identify such evidence in the space below." The applicant replied:

> *"All information in her asylum application."*

18. In the leave to remain application form, the applicant was asked pursuant to Section 3 (6) (h) to identify any humanitarian considerations she wished to bring to the Minister's attention and she responded as follows:

> *"The applicant has suffered a lot and was forced to work as a prostitute in Italy prior to arriving in Ireland. The applicant desires to make a new life for herself in the State. The applicant has been in the State for three years."*

Thus, no new or different grounds were put forward in the Subsidiary Protection and leave to remain applications that had not already been advanced in the asylum application.

19. The respondent's executive officer issued a recommendation on the 6th October 2010 that the applicant had not shown substantial grounds for believing that she would face a real risk of suffering serious harm if returned to Nigeria. On the 10th December 2012, the respondent's higher executive officer recommended that the applicant be refused subsidiary protection and on the 22nd

December 2010, the respondent's assistant principal determined that the applicant was not eligible for subsidiary protection.

20. On the 13th January 2011, the respondent issued a deportation order in respect of the applicant on foot of an examination of the file under Section 3 of the Act of 1999 which was carried out by the same executive officer on the 5th October 2010.

The Proceedings
21. On the 7th February 2011, the applicant issued the within judicial review proceedings seeking orders of *certiorari* quashing both the subsidiary protection decision and the deportation order together with ancillary reliefs. The applicant's grounds may be summarised as follows. The respondent failed in both instances to take relevant considerations into account, and in particular the country of origin information ("COI") submitted by the applicant, in reaching his decisions.

22. The applicant further says that the respondent failed to consider the threat to the applicant in the context of the lack of police protection and non-availability of internal relocation in Nigeria, again related to the COI information and in the same vein, that no reasonable decision maker could have arrived at the conclusions that the respondent did having regard to such information. The applicant further complained in her submissions that the respondent gave no or no adequate reasons for discounting the applicant's COI information.

23. On the 19th May 2014, the applicant applied to the court to amend her grounds to include new claims based on recent decisions of the High Court and European Court of Justice and in particular of Hogan J. in *MM v. MJELR & Ors* [2013] IEHC 9 along the lines that the applicant was entitled to an oral hearing of her application for subsidiary protection separate and distinct from that in her asylum application and that the findings in the latter could not be carried through to the former. This application was refused and an order for costs was made against the applicant. There was no appeal.

24. Counsel for the applicant, Mr. O'Shea BL nonetheless urged on me that I should consider a submission based on these grounds having regard to the supremacy of European law over national law. I am satisfied that to do so would amount to an impermissible reversal of the order of the court previously made herein and would render largely meaningless the purpose of the pleadings in judicial review applications. Indeed, counsel for the respondent, Ms. Carroll BL complained, justifiably in my view, that she was taken by surprise by this submission in circumstances where this is precisely the situation that the rules exist to preclude.

25. Mr O'Shea also submitted that I should have regard to argument based on Article 8 of the European Convention on Human Rights, despite the fact that none of the applicant's grounds makes any reference to it. For the same reasons, I decline to do so.

26. The respondent, in his statement of opposition, opposed the application on the grounds that he was able to conclude on the material available to him that the applicant failed to show that she would face a real risk of serious harm in Nigeria. The material indicated that it was open to the applicant to make a complaint to the police in Nigeria and avail of protection although she had never sought to do so. The respondent further pleaded that he was entitled to rely on the decision of the RAT which was neither challenged nor corrected in the written representations made on behalf of the applicant.

27. The applicant submitted that the respondent did not properly consider the COI submitted by the applicant and was obliged to give reasons as to why he rejected it. In oral submissions, the applicant went further and complained that the respondent relied on COI which post dated the application and had not been furnished to the applicant to enable her to deal with it. It was submitted that the respondent simply recited the Nigerian constitution without any consideration of whether it was applied in practice contrary to regulation 5.1 (a) of the 2006 regulations. It was said that the same flaws applied to the respondent's consideration of the availability of state protection and internal location.

The Law
28. The latter topic was considered by Charleton J. in *Fr N & Ors v. Minister for Justice, Equality and Law Reform* [2008] IEHC 107 where he considered a similar submission:

> "54.... It was argued for the applicants that a fair consideration of the country of origin information material would have required the respondent Minister in each of these cases to issue a letter as regards deportation and subsidiary protection and then to receive and, secondly, fairly consider a submission, in that regard. That submission is correct and accords with the practice of the respondent Minister and the facts in this case. Then there is the third stage, where a decision is made, as it was made in this case. It was argued that other stages should follow. If the Minister is to look at other country of origin information then it is contended that there must be, fourthly, a stage where this other material is furnished to the applicant who would then be asked whether any submissions were to be offered either in general, or it might be argued, as to particular parts, of the country of origin information. At the fifth stage a further submission would be received from the applicant which then, at a sixth stage, would be analysed for the purpose of coming to a rational decision whereby one type or set of country of origin information is preferred from another. Finally, the seventh would involve a reasoned decision being made by the Minister as to why one set of country of origin information, or one aspect of country of origin information, is to be preferred in contrast to another. This was to be set out in writing as a reasoned decision and would be the subject of applications for judicial review.
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> 55. The procedure argued for presupposes a complete lack of trust being properly exercised by the respondent Minister through his officials. The relevant directives, and the case law that I have cited in this judgment, emphasise the necessity for the decision maker to obtain up to date country of origin information. That process may be assisted by submissions on behalf of the applicant. Neither under European or national law do they control the process. Once a submission is made, it is not necessary either under European or national law, to return to an applicant with queries or questions unless, in the opinion of the Minister, such query or question may be of assistance to him in discharging his function in determining the true state of the applicant's country of origin.
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> 56. It was further argued on behalf of the applicants that a failure to engage in this seven stage process contended for, would leave an applicant for judicial review without a reasoned decision and in circumstances where the Minister may reasonably decide an application on the basis of one piece of country of origin information, or several reports, in contra-distinction to another. In my view, the Minister is under a duty to act carefully and honestly in considering an applicant's entitlement to subsidiary protection. An applicant will, no doubt, make the best possible case that is available on the basis of country of origin information. That case may assist the Minister, it may be real in terms of what it puts forward, or it may be exaggerated. Any submission may be checked against what the Minister already has available to him and supplemented by any reliable additional reports. The receipt of submissions may assist in the process, but does not relieve the Minister of his responsibility to make a decision.

57. The reality of the multiplicity of written decisions on judicial review on refugee matters emanating from the High Court displays strong evidence for the proposition that judges, in considering the actions of the statutory bodies under the Refugee Act 1996, exercise a heightened level of scrutiny when compared to other forms of judicial review that concerns administrative decision makers. I do not think that it would be fair to the principle of the primary importance of human rights merely to apply in judicial review applications of a determination by the Minister a test as to whether his determination as to the situation in the country of origin of the applicant, and as to whether protection was reasonably available within that territory, by asking whether that decision flew in the face of fundamental reason and common sense; the ordinary test for overturning decisions of fact in judicial review of administrative or quasi-judicial tribunals. Rather, it seems to me, that a decision on the country of origin of an applicant and the availability of protection within its territory should be scrutinised if a judicial review is taken and the decision should only stand if it be a rational one that is fairly supported by the country of origin information. That, it seems to me, is what Council directive 2005/85/EC, the procedures Directive, is seeking to achieve when placing on the examining bodies and member states the responsibility in making objective and impartial decisions based on precise and up-to-date information from reliable sources."

29. Charleton J. went on to consider relevant authorities on this point:

"58. I am fortified in this conclusion by the decision by Clarke J in *Kouaype v. Minister for Justice Equality and Law Reform and Another* [2005] I.E.H.C. 380. There, a similar claim was made that the Minister should enter into correspondence regarding the prohibition on refoulement under section 5 of the Refugee Act 1996. Clarke J rejected the proposition in the following terms: --

"In *Baby O. v. Minister for Justice Equality and Law Reform* [2002] 2 I.R.169 the Supreme Court again had to consider the statutory regime in respect of deportation orders. While many of the issues which were relevant in that case do not arise here, the court did consider grounds raised by the applicant in Baby O based upon s. 5 of the 1996 Act. The decision of the Minister in that case (in so far as it was concerned with s. 5) was the same as in this case i.e. 'the Minister has satisfied himself that the provisions of s.5 (Prohibition of Refoulement) of the Refugee Act 1996 are complied with in your case'. In respect of that decision of the Minister, Keane C.J. said the following: --

"I am satisfied that there is no obligation on the first respondent to enter into correspondence with a person in the position of the second applicant setting out detailed reasons as to why refoulement does not arise. The first respondent's obligation was to consider the representations made on her behalf and notify her of the decision; that was done and accordingly this ground was not made out."

30. Charleton J. went on to cite with approval the judgment of Feeney J. in a claim for judicial review of a deportation order:

"59. Similarly, and based on similar reasoning, Feeney J rejected the same proposition in *Izevbekhai v. Minister for Justice Equality and Law Reform*, [2008 IEHC] 23. At para 4.7 Feeney J stated as follows:-

"4.7 The narrow view as to the scope of review available in respect of a decision by the Minister to make a deportation order subsequent to a failed asylum application, recognises that the decision-making process carried out by the Minister is not an inquisitorial process. An inquisitorial body has obligations in relation to fair procedures and a requirement to bring to the attention of the party, whose rights may be affected, matters of substance and importance which the inquisitorial body may regard as having the potential to affect its judgment. However, the Minister is not carrying an inquisitorial process. In this case his decision does take place subsequent to a failed asylum application. The claim that there was reliance on undisclosed materials in breach of fair procedures does not arise herein. The requirement to disclose relevant documentation to asylum seekers and their legal representatives extends to bodies such as the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal but does not extend to the exercise of the ministerial discretion. There is no requirement for the Minister to enter into correspondence based on country of origin information and this is clear from the judgment of Keane CJ in the *Baby O* case (see page 183). The court is satisfied that there was no obligation on the Minister either in a general way or in any way to identify any reasons giving rise to his decision to deport. The claim that the Minister had such obligation is rejected."

31. Charleton J. returned to this issue in the decision portion of his judgment:

"69. The primary focus for a decision maker under Directive 2005/85/EC is on obtaining reliable and up-to-date country of origin information. It is not necessary for the Minister, in making such decisions, to engage in dialogue with the applicant for subsidiary protection. Rather, the responsibility is his to make a fair and reasoned appraisal, after submissions in writing by an applicant, based on what he knows of the country from which the applicants come. The concept of subsidiary protection does not apply to individual circumstances concerned with commission of crime, such as trafficking or prostitution or genital mutilation, unless the individual circumstances of an applicant in the light of country of origin information leads to the conclusion that a state of affairs exists in respect of which neither national protection where they live in the country of origin, nor internal relocation to another part of their country of origin, a fundamental obligation cast on those seeking international protection, is available to them. The relevant definitions are considered in the text of this judgment.

70. The procedures involved in considering subsidiary protection entitle an applicant to make representations to the Minister. The primary question in considering those representations should be whether what is contended for is new, or has already been, in substance, the subject of a determination by the Refugee Applications Commissioner or, on appeal, the Refugee Appeals Tribunal."

32. The applicant placed significant reliance on the decision of MacEochaidh J. in *Barua v. The Minister of Justice and Equality* [2012] IEHC 456. That was a case in which the applicant made an application for asylum and submitted eleven documents to the Commissioner in support of his application which were claimed to corroborate his account. Nine or possibly ten of these documents appear to have been personal to the applicant. The application appears to have failed primarily on adverse credibility findings which were described by the court as being marginal. The sole complaint in that case was a failure on the part of the decision maker to address all of the documents which had been submitted in the claim for subsidiary protection. The personal documents were of considerable importance in that case as they were potentially capable of corroborating the veracity of the applicant's account where his credibility was clearly in issue. MacEochaidh J. had the following to say on this issue (at paragraph 20):

"It is a startling feature of this case that this documentation was not referenced, even casually, by the decision maker. Not every document submitted needs a separate and microscopic examination. However, in a case such as this, where

> the documentary evidence is apparently corroborative of the applicant's story, this is an issue which the decision maker ought to address."

33. He continued (at paragraph 22):

> "Given that the findings of lack of credibility -- which I am not invited to disturb -- are marginal, it seems to me that there was a duty upon the respondent to weigh those credibility issues with the corroborative documentary evidence and to balance the two. If that documentary evidence was dismissed, it should have been dismissed for a reason stated."

34. And further at paragraph 27:

> "As noted above, if documents which are *prima facie* corroborative of an applicant's account of relevant events are to be discounted, dismissed or rejected, or somehow found not to have corroborative effect, it is incumbent on the decision maker to explain why. There may be overwhelming reasons, unrelated to the documentation, to reject the credibility of an applicant but if this is so, then the decision makers should say that and should clearly state the basis on which documentation which seemingly supports the applicant's story is discarded, rejected or dismissed. An objective outsider, such as this court, is left guessing why the applicant's documents submitted in support of the claim did not appear to have that effect... Documents which *prima facie* support the applicant's story deserve comment, and this is especially so when marginal credibility findings are relied upon by a decision maker to dismiss an applicant's story and refuse protection."

35. MacEochaidh J.'s comments are entirely consistent with the views previously expressed by Cooke J. in *IR v. Minister for Justice, Equality and Law Reform* [2009] IEHC 353 regarding the treatment of documents which are pertinent to credibility issues and also of McDermott J. in *AMN v. Refugee Appeals Tribunal* [2012] IEHC 393.

Analysis of the Issues

36. It seems to me however that *Barua* is not of assistance to the applicant in this context. The documents relied upon here are general in nature, relate to COI and are not specific to the applicant. They could not be said in any sense to be material to the issue of credibility which was clearly a very major obstacle for this applicant. The applicant's account was found in very trenchant terms by the RAT to be internally inconsistent in itself and not capable of being believed. Nothing in the documents submitted by the applicant had any bearing on that finding. It will be recalled that the negative credibility findings made by the Tribunal were not challenged nor did the applicant seek to address same in the subsequent application for subsidiary protection.

37. In my view the respondent had no obligation to furnish to the applicant the COI upon which he relied, to invite submissions thereon or to give detailed reasons as to why he did not accept every item of COI submitted by the applicant. His duty was to have regard to and fairly consider up-to-date COI from sources he considered to be reliable. In that regard, there was no suggestion by the applicant that those sources considered by the respondent were unsatisfactory in any way. The applicant did not suggest that the respondent did not fairly consider any relevant COI but rather that he appears to have rejected the applicant's COI without giving reasons for doing so. I am of the view that the respondent's conclusions are fairly supported by the COI upon which he relied and it could not in any sense be said that those conclusions were irrational.

38. The applicant criticised the manner in which the respondent dealt with the issue of torture or inhuman or degrading treatment or punishment and argued that the respondent did no more than set out one article of the Nigerian constitution without any consideration of how that provision was applied, contrary to the 2006 regulations. This conclusion was to be drawn from the fact that following the citation of the Constitution, the respondent went on to deal with the issue of trafficking and considered a Danish immigration service document on that subject. However, it is clear that the respondent subsequently considered a significant body of documentation dealing with torture and inhuman or degrading treatment before concluding:

> "Overall, and having regard to all facts on file, I am not satisfied that the applicant has demonstrated that she is without protection in Nigeria and I do not find that there are substantial grounds for believing that the applicant would be at risk of serious harm by 'torture or inhuman or degrading treatment' in Nigeria if she returned there."

39. The same comments apply with equal force to the respondent's findings on the issues of state protection and internal relocation. It seems to me that there was more than ample evidence available to the respondent upon which he was entitled to conclude that such protection/relocation was available to the applicant and by no means could the respondent's conclusions in that respect be characterised as unreasonable or irrational. However, as I have said, those findings are superfluous in circumstances where the application manifestly failed on credibility grounds.

40. The applicant also sought to rely on *Barua* in a different context, namely as support for the proposition that the respondent was not entitled to rely on the findings of the RAT in relation to the applicant's claim. For the reasons already given, this submission is clearly outside the applicant's grounds and is rejected.

41. Accordingly I will dismiss this application.