

THE HIGH COURT

[2010/536 JR]

BETWEEN

A. K.

APPLICANT

AND

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

RESPONDENTS

EX TEMPORE JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 31st day of July, 2015**Introduction:**

1. This is a telescoped application for judicial review of a decision of the Refugee Applications Commissioner of March 2010. The applicant makes two broad complaints about the decision: first, a core part of the applicant's claim was not decided and, second, the decision unlawfully includes a determination that s.13 (6) (b) of the Refugee Act 1996, as amended, ("the Act") applies to the decision, meaning that any appeal to the Refugee Appeals Tribunal will be on papers only.

Background:

2. The applicant says that he was born in 1978 in Ghana and that he fled Ghana because he feared persecution as a gay man.

The O.R.A.C. decision:

3. A number of credibility findings were made by the commissioner's officials; in particular, the commissioner rejected the applicant's evidence that he was a resident of the area called Bawku because of his lack of knowledge about the area, its language and its festivals. It does not appear that any of these findings on this point had anything to do with the applicant's demeanour. Secondly, the decision maker rejects the claim by the applicant that a certain incident involving his boyfriend occurred because of inconsistencies in the manner in which he, at various times, recounted the narrative of the particular incident. Again, it does not appear that the negative credibility finding related in any way to the demeanour of the applicant when he was giving evidence in respect of the incident. The applicant's account of the manner in which he arrived to Ireland was also rejected as being incredible. Again, the rejection of credibility as to this aspect of the applicant's history was not based upon demeanour.

4. The decision maker concludes at para. 3.4.4 as follows:-

"When the above points are considered cumulatively, it is asserted that a significant credibility deficit is observable. I do not believe the applicant to be a resident of Bawku. His account of the incident which precipitated his departure in his substantive interview was in variance to the information he provided in his questionnaire. His failure to seek asylum at the first safe country raises credibility issues and his account of his arrival to the State was wholly incredible (sic).

I have also had the opportunity of observing the applicant during his substantive interview and the manner in which he provided his testimony. I found him to be vague, evasive and hesitant throughout his interview."

The decision maker then refers to a decision of the High Court and continues:-

"As the applicant's general credibility has not been established; it is not appropriate to give the benefit of the doubt in this instance. Accordingly I find the applicant has failed to demonstrate a well founded fear of persecution."

At para. 3.4.5 the decision maker says:-

"The applicant was found not to be credible."

5. At s. 5 of the decision the decision maker deals with s. 13 (6) of the Act in the following way:-

"Due to the serious credibility issues outlined in the well founded fear section of this report, it is duly asserted that the applicant has failed to establish that he was a habitual resident of Bawku. Furthermore, his account of the incident which precipitated his departure in his substantive interview was in variance to the information he provided in his questionnaire. As such, Section 13(6) (b) of the Refugee Act, 1996 (as amended) applies to this application and states: *'That the applicant made statements or provided information in support of the application of such a false, contradictory, misleading or incomplete nature as to lead to the conclusion that the application is manifestly unfounded.'*"

Findings:

6. In relation to the first ground of challenge this court has given judgment in a case called *P.D. -v- Minister for Justice and Law Reform & ors* [2015] I.E.H.C. 111 dealing with the requirement to make findings on a core part of an applicant's claim. I repeat here what I said in that case which is that it is not necessary for a decision maker to decide every aspect of a claim advanced by an applicant. I said, and again I repeat here, that an application for asylum involves the establishment of a number of different factors. If any one of these factors fails the decision maker is entitled to stop the analysis and say it does not matter if the person is telling the truth about factors x,y,z because there is no Convention nexus between the fear and the events; "the applicant cannot be a refugee so I don't have to decide whether he is a member of that particular church or if he's gay or anything else about him." There is nothing wrong with that approach in my view. It is strange that the law is so well established but the claim is repeated to the point of tedium that there is a requirement on decision makers to decide every aspect of the claim. There is no such requirement in law.

7. Therefore, I find that there is no legal error of any sort in this case. Insofar as it can be said that the decision maker did not take a decision on whether the applicant was gay or not, this is not unlawful. The decision maker in this case rejected the credibility of the applicant and, therefore, it did not matter whether he was gay or not. His credibility was fundamentally and totally rejected. Whether fairly or not that is now a matter for the R.A.T. but in this case, the case was not made that the rejection of credibility was unfair. Argument was made that illegality attached to the failure to decide whether or not the applicant was gay and there was no illegality in that. Therefore, I reject the first ground of challenge.

8. As to the second ground, this one raises a slightly more nuanced point. It deals with the circumstances in which a decision maker exercises discretion under s. 13 (6) of the Act. In passing it is to be noted that the section empowers the decision maker to make a finding which will have the effect of depriving the applicant of an oral appeal, provided he or she is certain that false, contradictory, misleading or incomplete information has been given to the decision maker which is of such a character as to warrant a finding that the application is manifestly unfounded. It is a legislative provision which requires some reflection because falsity and the other characteristics listed in the subsection, generally are not susceptible to qualitative analysis; either something is true or it is false. Therefore, the decision maker must consider whether the false, contradictory, misleading or incomplete matter relates to such an important part of the story as to warrant a finding that the application is manifestly unfounded. If the person, for example, gives a false name, that may or may not be a matter that is hugely germane to the tale or if a person gives a false date of birth that may be an irrelevant matter. If the person says they have three sisters and it turns out they have five sisters and for some reason they want to disguise that fact that might not be a matter that warrants a s.13 (6) finding.

9. In any event, the matter for decision today is whether the s.13 (6) finding was made lawfully or not. To refer back for a moment to the findings of credibility in this case, there is no doubt that there are two categories of findings; those that relate to the pure essence of what was being said rather than the manner in which it was being said and those that relate to the manner in which the evidence was being given. There is no doubt but that very strong demeanour findings are contained in the decision and very strong pure essence findings, if we can call them that, are also made in respect of the applicant.

10. In the decision of this court entitled *S.U.N. (South Africa) v. Refugee Applications Commissioner* [2012] I.E.H.C. 338 Cooke J. dealt with the power of the decision maker to exercise discretion under s.13 (6) (b) of the Act and the first part of his decision confirms that, indeed, the exercise of the powers is a discretionary matter and it is not a requirement of the decision maker to make a finding under the Act where a relevant fact is apparent from the decision. What is interesting in the decision of Cooke J. is that he details the negative credibility findings which were found in that case. I am not going to set them out in this *ex tempore* judgment except to say that at para. 4 of his judgment he sets them out and they are pure logic or essence findings unrelated in any way to demeanour. Yet the learned Judge characterises them throughout the judgment as "personal credibility findings" and the court is unsure as to whether Cooke J. characterises them thus because somewhere in the report, which of course this court does not have access to, there is mention of the fact that they are based on demeanour as well. It is unclear as to why Cooke J. is calling these findings "personal credibility findings." It is possible that he believes that any credibility finding based upon what a person said is a "personal credibility finding." It is unclear to me whether Cooke J. intended this to be what he said.

11. Having reviewed the law and the obligations under the Procedures Directive to provide an effective remedy, the court found as follows at para. 45:-

"It follows, in the judgment of the Court, that where the Commissioner has a discretion (as has been found above) as to the inclusion or non-inclusion in the s. 13 report of a statutory finding under s.13 (6), the obligation to ensure that an applicant has access to an effective remedy by way of appeal under s. 16 to the Tribunal requires that the finding under paragraph (e) ought not to be included when the effect will be to deprive the applicant of an oral hearing in an appeal against a negative recommendation which is based exclusively or predominantly upon lack of personal credibility."

12. In my view the decision in this case is one which is based, in part, on demeanour findings. I have no doubt that demeanour findings are personal credibility findings in the manner in which that phrase is used by Cooke J. throughout the judgment in *S.U.N.* Equally, I have no doubt that the only manner in which the applicant can overturn the negative credibility findings based upon his demeanour is to have access to an oral hearing, in order to give his evidence again for it to be assessed independently. It is not possible for me to determine whether or not the decision rejecting the credibility in this case is based exclusively or predominantly on demeanour or exclusively or predominantly upon the lack of logic in what the applicant said. But it is possible for me to say that part of the decision is based upon it. I am, therefore, of the view that to deprive the applicant of an oral hearing in this case would be a breach of the State's obligation under article 39 of the Procedures Directive which requires the State to provide an effective remedy to a person in respect of whom a decision on an application for asylum has been taken.

13. In those circumstances, I am led to the conclusion that the decision to include a s.13 (6) finding was unlawful and I direct that the s.13 (6) finding be severed from the decision of the O.R.A.C. and that the rest of the decision remain in place so that it can proceed now on appeal to the R.A.T..

Costs:

14. In relation to the costs in this case, costs follow the event. Costs to include reserved costs to the applicant to be taxed in default of agreement.