THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 213 J.R.]

BETWEEN

P.D.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, THE REFUGEE APPLICATIONS COMMISSIONER, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan delivered on the 9th day of February, 2017

Issues

1. Leave was afforded to the applicant to bring the within judicial review proceedings by order of the 20th April, 2016. The statement required to ground the application for judicial review is dated the 30th May, 2016 and is claiming certiorari for the purposes of quashing the decision of the second named respondent of the 26th December, 2015 — 5th January, 2016 wherein it was found that the applicant had failed to establish a well-founded fear of persecution as required by s. 2 of the Refugee Act, 1996 as amended.

2. The applicant raises the issue as to whether or not the appropriate standard of proof was applied, namely whether or not the balance of probabilities is appropriate. In addition the applicant complains that no objective assessment was carried out in relation to the applicant's stated sexual orientation of homosexual but rather that conclusion was made based on stereotyped notion. The applicant also argues that he was not advised that the party who conducted the s. 11 interview would not be partaking in the balance of the process and this was in breach of fair procedures.

3. The application is grounded upon an affidavit of the applicant of the 4th April, 2016. In addition, there is an affidavit of James Jones, Solicitor, for the purposes of explaining why the judicial review application was not processed within the time limits provided.

Brief background

4. The applicant was born in 1988 and his application for refugee status is based upon his asserted fear of persecution in Malawi because of his homosexuality. The applicant originally arrived in Ireland prior to August, 2010 when he made his asylum application. A section 11 interview was subsequently conducted on the 1st October, 2010 and by a decision of the RAC of the 27th / 28th October, 2010 his application was refused. He was notified of this decision on the 2nd November, 2010. The decision was subsequently quashed by order of the 20th February, 2015.

5. Insofar as the within impugned decision is concerned the applicant attended a s. 11 interview conducted by Pat Maguire on the 23rd June, 2015. He received a decision on the 10th March, 2016 to the effect that his application was rejected. The relevant s. 13 report was not signed by the aforesaid Pat Maguire.

The impugned decision

6. The s. 13 report was signed by one Alex Bassett on the 22nd December, 2015 and Breda Buggy on the 5th January, 2016. Both parties were satisfied that the applicant was not eligible for refugee status.

7. The report runs to 10 pages. The applicant claimed to be a Malawian national however at para. 3.1 of the report it was found that the applicant was a Zimbabwean national and his claim was assessed as a national of Zimbabwe.

8. Paragraph 3.2 at p. 5 of the report is headed "Credibility" and within this paragraph there is an assessment of the applicant's stated sexuality (see p. 6 and 7 thereof).

9. The consideration identifies that the applicant did not know the date of birth of his former partner and indicated that it was in or about May. Evidence of the fact that the applicant had a Twitter profile and appeared to have "favourited" a video of adult heterosexual pornography was put to the applicant. The applicant indicated that the particular video identified to the applicant "is probably something which came on my Twitter page, and I liked it." An inquiry was made as to why he, as a gay man, would be interested in heterosexual pornography and he responded, "like I said, it was just something I just followed. It was not something I was interested in or liked." The report goes on to identify that the applicant admitted the Twitter page was his and he further admitted to viewing and following heterosexual pornography. Thereafter the report states:—

> "The ORAC is of the view that if someone views heterosexual porn and then clearly indicates their approval of such material, then it is reasonable to assume on the balance of probabilities that such a person is a heterosexual. Furthermore, if a homosexual person was interested in viewing porn, then it is reasonable to assume that such porn would be homosexual. When all of these issues are taken into consideration, the ORAC rejects the applicant's stated homosexuality as material fact."

Submissions

10. The applicant submits that the incorrect standard of proof was applied, namely the balance of probabilities. However the applicant is aware of a judgment I recently delivered in *ON v. Refugee Appeals Tribunal* [2017] IEHC 13 in which I found that the correct standard of proof to apply to the history or story of past facts as disclosed by an applicant in the instant type circumstances is that of the balance of probabilities coupled (in appropriate circumstances), with the benefit of the doubt.

11. Insofar as the applicant argues that the decision as to his homosexuality was based on a certain stereotype notion of the assessor the applicant relies upon the cases of C-148/13; 149/13 and 150/13 where the Court of Justice indicated that the assessment of sexual orientation should not be founded on questions based only on stereotyped notions concerning homosexuals. The Court also criticised a failure to address the individual applicant's situation.

12. Both parties in fact relied on para. 60 — 62 inclusive of that judgment of the Court of Justice. It appears to me for the sake of completeness both paras. 52 and 63 are also relevant. These paragraphs read as follows:—

> *"52. It follows that, although it is for the applicant for asylum to identify his sexual orientation, which is an aspect of his personal identity, applications for the grant of refugee status on the basis of a fear of persecution on grounds of that sexual orientation may, in the same way as applications based on other grounds for persecution, be subject to an assessment process, provided for in Article 4 of that directive.*
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> *60. As regards, in the first place, assessments based on questioning as to the knowledge on the part of the applicant for asylum concerned of organisations for the protection of the rights of homosexuals and the details of those organisations, such questioning suggests, according to the applicant in the main proceedings in case C-150/13, that the authorities base their assessments on stereotyped notions as to the behaviour of homosexuals and not on the basis of the specific situation of each applicant for asylum.*
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> *61. In that respect, it should be recalled that Article 4(3)(c) of Directive 2004/83 requires the competent authorities to carry out an assessment that takes account of the individual position and personal circumstances of the applicant and that Article 13(3)(a) of Directive 2005/85 requires those authorities to conduct the interview in a manner that takes account of the personal and general circumstances surrounding the application.*
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> *62. While questions based on stereotyped notions may be a useful element at the disposal of competent authorities for the purposes of the assessment, the assessment of applications for the grant of refugee status on the basis solely of stereotyped notions associated with homosexuals does not, nevertheless, satisfy the requirements of the provisions referred to in the previous paragraph, in that it does not allow those authorities to take account of the individual situation and personal circumstances of the applicant for asylum concerned.*
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> *63. Therefore, the inability of the applicant for asylum to answer such questions cannot, in itself, constitute sufficient grounds for concluding that the applicant lacks credibility, inasmuch as such an approach would be contrary to the requirements of Article 4(3)(c) of Directive 2004/83 and of Article 13(3)(a) of Directive 2005/85."*

13. On the one hand the applicant argues that the basis upon which the second named respondent found that the applicant had not established homosexuality was based upon stereotype notions whereas the respondent argues that stereotype notions on their own cannot form the basis for such a finding and an individual assessment is required by virtue of the case law aforesaid. The respondent suggests that such an individual assessment was made based upon evidence put in the public domain by the plaintiff and publicly available. It is suggested that it would be difficult to give a better example of individualisation, as required by the Court of Justice, in respect of an applicant's assessment of sexual orientation.

14. I am satisfied that the findings made by the second named respondent in the impugned report was not based on stereotyped notions nor on questions the applicant could not answer but rather on an individual assessment of the applicant in the current circumstances and therefore I believe that the second named respondent's rejection of the applicant's stated homosexuality was made within jurisdiction, without any inherent unfairness or impropriety or without any fundamental flaw. In these circumstances the finding comprised a qualitative decision for which the second named respondent was entitled to make.

15. The applicant argues that the applicant was not advised that the interviewer might not be deciding his case and he asserts that this was unfair to the applicant. The applicant acknowledges that in other cases such argument has been rejected. He further acknowledges there is no statutory prohibition on different persons conducting the s. 11 interview to the persons ultimately making the decision. The respondent refers to a number of cases including *Konadu v. Minister for Justice Equality & Law Reform* (Unreported, High Court, 23rd January, 2008) and *O (HP) v. Minister for Justice Equality & Law Reform* [2011] IEHC 97, a judgment of Cooke J. to the effect that this portion of the applicant's argument will not succeed where the s. 11 report did not rely on the demeanour of the applicant but rather on clear contradictions and discrepancies.

16. I am satisfied that in the instant circumstances the report did not rely in any manner whatsoever on the demeanour of the applicant but rather on the contradictions and discrepancies identified in the report therefore no unfairness was occasioned to the applicant by reason of different personnel conducting the interview and making the ultimate recommendation.

17. The applicant argues that judicial review is the appropriate remedy rather than pursuing an appeal and wishes to argue against the line of authority commencing with the judgment of *B.N.N. v. Minister for Justice Equality and Law Reform* [2008] IEHC 308. The applicant acknowledges that these arguments are formally raised and assumes that the arguments will be rejected because of current jurisprudence in the High Court.

18. The applicant argues that the B.N.N. line of authority is not consistent with the Supreme Court decision in *Tomlinson v. Criminal Injuries Compensation Tribunal* [2006] 4 I.R. 321 which effectively held that the existence of an appeal ought not prevent the court from dealing with the matter on a judicial review basis. Rather, the existence of such appeal is a factor to be taken into account. It is a question of justice. If a decision is made without jurisdiction or in breach of natural justice a right of appeal should be immaterial. With a statutory scheme the Court would lean to requiring an applicant to exhaust all remedies but this depends on circumstances. In the case that was before the Supreme Court the issue was a question of law and therefore the Supreme Court felt that judicial review was more appropriate.

19. The respondent relies on the principles identified in the case of *P.D. v. Minister for Justice & Ors.* [2015] IEHC 111. As part of MacEochaidh J.'s assessment of the relevant principles I note that he quotes from Murray C.J. in *A.K. v. RAC* (Unreported, Supreme Court, 28th January, 2009) where the Court indicated that it was satisfied that the issue raised constituted an attack on the merits and not on due process. As to whether or not judicial review or an appeal would be the most appropriate remedy would depend on all of the circumstances including the degree to which fairness was compromised.

20. As I have already found that the decision made was a qualitative decision for which the second named respondent was entitled to make then it appears to me that there is no evidence that the decision might be impugned on the basis of lack of jurisdiction or in breach of natural justice. Therefore, whether pursuing the applicant's line of authority or the respondents, the most appropriate remedy is that of appeal.

Conclusion

21. I am satisfied that the applicant's arguments relative to:

(a) the standard of the balance of probabilities being inappropriate;

(b) the unfairness to the applicant of different personnel conducting the s. 11 interview and ultimately concluding the relevant s. 13 report; and,

(c) the argument that judicial review is a more appropriate remedy than an appeal;

are matters which must fail by reason of the jurisprudence herein before outlined.

22. Insofar as the asserted claim that the second named respondent relied only on stereotype notions in the assessment of the applicant's sexuality I do not accept that this argument is borne out by the content of the impugned decision but rather the decision maker took an individual approach and assessment to the applicant's assertions.

23. Therefore, for the above reasons, I will make an order extending time and a further order refusing the relief of certiorari.