Neutral Citation Number: [2009] IEHC 216

THE HIGH COURT

2006 1187 JR

BETWEEN /

R. L. A.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY & LAW REFORM

RESPONDENT

RESERVED JUDGMENT of Mr. Justice Cooke delivered on the 30th day of April, 2009.

1. Following the judgment delivered yesterday in the case of *Akintunde v. The Minister for Justice, Equality and Law Reform and the Refugee Applications Commissioner*, this is a further case in which leave has been granted to apply for an order of *certiorari* by way of judicial review to quash a report and recommendation of the Commissioner, notwithstanding the fact that the applicant has also commenced an appeal to the Refugee Appeals Tribunal which has been left in abeyance until the outcome of this application is known.

2. Leave was granted by Hanna J. on 30th May, 2008 upon two grounds as follows:

"1. The Refugee Applications Commissioner erred in law and in fact and in breach of the Statute by failing to take into account the matters set out in section 11B of the Refugee Act 1996, as amended, where there was an obligation to do so, and, in the circumstances, the decision is invalid. A mere statement that, 'This report has had regard to section 11B of the Refugee Act 1996, (as amended,)' is insufficient. The decision is invalid."

"2. The Refugee Applications Commissioner erred in fact and in law by reaching a conclusion that the applicant's application should be refused based on country of origin information which was never put to or shown to the applicant. It appears that this country of origin information was referred to in the decision and only consulted by the Commissioner and relied upon after the interview concluded, thus breaching the principle of *audi alteram partem* and breaching natural and constitutional justice. The failure to give the applicant an opportunity to deal with the matters which would appear to have been crucial to the determination made in the case renders the decision invalid."

3. The decision which is sought to be quashed is that contained in the Report and Recommendation of the Commissioner dated the 15th December, 2006, in which it was concluded that the applicant had failed to establish a well founded fear of persecution for the purposes of s. 2 of the 1996 Act. In effect, the Commissioner did not believe the personal history recounted by the applicant, which she, (the

Commissioner's officer,) recites in s. 5 of the report and which is based on a lengthy interview of the applicant. In that recital the officer interjects a series of observations or queries which reflect the basis of her doubts as to credibility.

4. Very briefly, the applicant said she met and married her husband and had her first child with him in 1997; and that her problems started seven years later in 2004, when she discovered that he was already married and when his children from the prior marriage began to call on and to threaten her because their father had left their mother. She feared them because the eldest son was a member of a student cult and he and his gang had set fire to her house. She reported this to the police who arrested the son but released him after three days. She claimed the police wanted nothing to do with the case because they are afraid of student cults. The Commissioner's decision quotes from country of origin information in relation to these student cults in casting doubt on the applicant's account of fearing her husband's children and the inference that the police could not afford her protection.

5. As in the *Akintunde* case, which was heard by this Court and in which judgment was delivered immediately before the hearing in the present case started, the Court invited submissions initially on the issue as to whether, in the light of the grounds for which leave had been granted, this case fell into the category of exceptional cases for the exercise of the Court's discretion to issue *certiorari* against a report of the Commissioner, rather than to require the applicant to pursue the statutory appeal in view, in particular, of the judgment of the Supreme Court in the *AK* case, delivered on 28th January, 2009.

6. It is fair to say that in his submissions, counsel for the applicant placed primary emphasis on the second of the grounds namely, that relating to the fact that the country of origin information document relating to student cults in Nigeria was not put to the applicant during her interview or during a second interview which might and ought to have been reconvened for that purpose. Relying in particular on the *Stefan* case, counsel submitted that this was a fundamental breach of fair procedures and a violation of the principle of *audi alteram partem*, and, as such, was at the most serious end of the spectrum of infringements of that principle. He insisted that the scheme of the Act entitled an applicant for asylum to two fair hearings, -"two bites of the cherry,"- as he put it. Such a failure to enable the applicant to respond to and to rebut information gathered by the Commissioner and causing her story to be doubted, necessarily has continuing adverse effects upon her relationship with the Irish State and could not be remedied by the statutory appeal.

7. In these circumstances, the issue which this Court must decide is not whether the procedure before the Commissioner was unfair by reason of the non disclosure of the impugned document as such, but whether that failure renders the statutory appeal inappropriate and inadequate in remedying the alleged defect in the sense identified by the case law, including that of the Supreme Court in the *AK* case and the judgment of this Court in the *Diallo* case of 27th January, 2009 and the other judgments recited in that judgment. In other words, does that non disclosure necessarily have continuing adverse effects on the applicant such that she would be deprived of a true rehearing of her case on appeal? Is there here an issue which would then be heard and considered only for the first time on such an appeal?

8. The Court considers that these questions must necessarily receive a negative answer. The principal reason why this is so lies in the scheme of the Act and the inherent difference between the two stages of the asylum process before the

Commissioner and the Tribunal, the one investigative and unilateral, the latter adversarial and adjudicatory.

9. It is not disputed by the respondent that the document in question was not put to the applicant during her interview nor was its existence or its consultation disclosed until it was provided as an annex to the report of the Commissioner as notified pursuant to section 13(10) of the Act.

10. It must be noted that, in this regard, the current statutory scheme, as applicable to the steps and dates of the present case, is clear and deliberate. Section 10 of the 2003 Act deleted s. 11(6) of the 1996 Act as originally enacted, thereby removing an applicant's entitlement to see all documents on which ORAC relies before finalisation of the report. There is thus, since that change, no statutory obligation on the Commissioner to notify an applicant in advance of general country of origin information to which recourse may be had in verifying the credibility of the personal history given by an applicant. That is the rationale which underlines s. 13(10) and which reflects the practicality of the investigative stage of the process.

11. When a first interview takes place, the interviewer has only the contents of the asylum application and the questionnaire to go on. He or she cannot foresee what claims, facts or events will be presented in evidence during the interview to corroborate the assertion of refugee status. An applicant may, as it were, out of the blue, elaborate a claim by reference to a particular event such as a prison break, a political demonstration, a tribal conflict, and so on. Of necessity, therefore, it may only be after the interview that it is possible to check the veracity of such claims by recourse to country of origin information. Clearly, (and counsel for the Minister expressly accepted this proposition,) if such a verification produces contradictory information on specific factual matters peculiar to the applicant's situation, then there may well be an obligation, in application of the principle of fair procedures, to reconvene the interview or to put that information to the applicant by inviting written comments before the report is adopted and the recommendation is made.

12. But when the information is of a general nature relating to the conditions prevailing in the country of origin, there is, in the Court's judgment, no necessary breach of fair procedures in an investigative process of this kind by reason only of the fact that country of origin information is furnished with the report in accordance with section 13(10). The reason for that is that when the narrative report with the accompanying documents is furnished, the applicant is placed in the position to decide whether to accept or reject the basis upon which credibility has been assessed. If the applicant considers that the disbelief is unfair and unfounded and that any general country of origin information is out of date or inaccurate or incomplete, he or she is then in the position to challenge it before the Tribunal on appeal and to do so by adducing new country of origin information and giving testimony again. In so appealing, the applicant is, in effect, saying, "It was wrong not to believe me, and the Tribunal Member should now form a different view of my story and substitute a new appraisal." That is the purpose of such an appeal, and it is clearly capable of remedying such an alleged unfairness in the assessment and it is manifestly the more appropriate forum in which to do so.

13. The applicant's counsel submitted that the present case is distinguishable from that of the *Stefan* case and placed particular emphasis on a sentence taken from the judgment of the Murray C.J. in the *AK* case where the Chief Justice characterised the ground there relied as directed at the quality of the

Commissioner's report. The Chief Justice said, that he, (the Commissioner,) "did not fail to take into account anything which he ought to have taken into account and did not take into account anything which he ought not to have taken into account."

14. Clearly, the non translation of part of the applicant's own evidence in the *Stefan* case fell into the former of those two tests, because an available piece of relevant evidence was not looked at, at all. The Court does not consider, however, that the present case comes within the latter test - that of having had regard to something that ought not to have been taken into account. This is so because, in the investigative stage, it is the function of the Commissioner to assess the credibility of the story told by verifying aspects of the general country of origin context or the conditions prevailing there as claimed, and to do so against independent country of origin information and to take such information into account. Whether or not any resulting documentary evidence or information must be put to the applicant before completing the report depends on the nature and content of the document and the effect which it has on the applicant's credibility, as already explained above. It is information which is proper to be taken into account and the only issue so far as concerns the respect for fair procedures is whether it must be put to an applicant before the report is finalized or whether it is of a kind which it is sufficient to provide with the report in accordance with s. 13(10).

15. In this case, the Court is satisfied that the particular document in issue here does not come into this second class because its only purpose was to verify the general picture relating to student cults. It should be noted that in that respect it can be also be seen as supportive of the applicant in that it confirms both the existence and the nature of the activities of such student cults. Otherwise, however, the document and its information is but one of a series of factors identified by the Commissioner in appraising credibility. As such, a challenge to the appraisal is a challenge to the quality of the decision and can clearly, and more appropriately, be re assessed on the statutory appeal. Moreover, having received this report and the impugned document, the applicant now knows the precise basis for the negative finding of credibility and is in a position to rebut it on appeal and to argue as to why it was mistaken or unbalanced or unfair in the assessment of her situation and personal history.

16. The Court considers that the second ground, if it has any substance at all, is equally appropriate to the forum of the statutory appeal. The Court does not accept the proposition that the Commissioner only complies properly with the provisions of s. 11B of the Act if the headings in subparas. (a) to (m) are treated as a mandatory checklist which must be gone through seriatim in every report and made the subject of a positive or negative conclusion. The Court entirely agrees with the observations of Birmingham J. in the *Akpata* case where he comments on this issue as it was mentioned in the course of the ex tempore judgment given by Hanna J. when granting leave in the present case.

17. The standard sentence, "This report has had regard to section 11B," in these reports is in fact superfluous and irrelevant to the validity of a report. Whether or not there has been any failure to comply with s. 11B depends on the actual content of the report and the particular circumstance of the case which is alleged to have relevance to any one of those indices of credibility. If a case does not turn on credibility at all, then s. 11B is wholly irrelevant.

18. In the present case, the second sentence of the report refers explicitly to the fact that the applicant submitted her passport, identity cards and so on, thus

disposing of heading (a) of the section. Similarly, the last paragraph of s. 5 of the report states expressly that the applicant failed to explain why she did not apply for asylum in France, thus taking into account the relevant heading in that regard at subparagraph (b).

19. If a report contains no negative conclusion on any particular heading of s. 11B, then the applicant is entitled to proceed to appeal, (where an appeal is taken,) on the basis that those indices of credibility are not relevant or not in issue and cannot play any role in any reappraisal of credibility on appeal.

20. Finally, the Court rejects the proposition that if an applicant has cooperated in the investigation he or she is entitled to a positive finding to that effect under sub heading i) of the section. If no negative finding by reference to s. 11C is made, the applicant is by that fact alone deemed to have cooperated and is entitled to so claim. If a challenge is to be made to the assessment of credibility in a Commissioner's report on the basis of a failure to have regard to s. 11B factors, then it is necessary for the applicant to give at least some minimal indication of what the basis of that challenge is going to be and to do so by reference to one or more specific headings in the sub-paragraphs a) to m).

21. An applicant must identify some factor, document, evidence or information which was before the Commissioner or available to the Commissioner and relevant to that assessment but which it is alleged was not, or could not have been, considered by the Commissioner because it is not dealt with in the report or is inconsistent with the content of the report. A report cannot be said to be unlawful simply because it contains an assertion that s. 11B has been had regard to and because no comment is made on each and every one of the headings (a) to (m), whether they are relevant or not. No serious attempt has been made to identify such factors in this case.

22. For these reasons, the Court will reject this application.