Neutral Citation Number: [2009] IEHC 231

THE HIGH COURT

2006 1491 JR

BETWEEN

N. N.

APPLICANT

AND

REFUGEE APPLICATIONS COMMISSIONER AND

THE MINISTER OF JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice McMahon delivered on the 22nd day of May, 2009

Facts and Background

The applicant, a Croatian national, seeks asylum for reasons of ethnicity, religion and nationality. She arrived in the state with her husband and two children on or about the 21st December, 2004. She applied for asylum shortly thereafter and the two children were included in the application.

Having considered the information, the first respondent, the Refugee Applications Commissioner (RAC), was satisfied that the applicant had failed to establish a well founded fear of persecution in accordance with s. 2 of the Refugee Act 1996 (as amended), and recommended that the applicant should not be declared a refugee. She also recommended that s. 13(6)(e) of the Refugee Act 1996 (as substituted by s. 7(h) of the Immigration Act 2003) applied to this application which meant that the appeal available to the applicant was not an oral re-hearing, but an appeal on paper only.

I set out in full here, the three grounds relied on by the applicant and for which leave was granted by Charleton J.

"5. The relief herein is sought on the following grounds:-

(a) that the first respondent failed to take all relevant material into consideration when making the recommendation of 21 October, 2006, namely the fact that the applicant was raped for ethnically motivated reasons, when stating that "if the applicant has experienced problems of verbal abuse and discrimination which may be distressing, but do not amount to persecution" and that "the instances in which the applicant has recounted in her section 11 interview and application questionnaire cannot be said to amount to persecution". The first respondent refused her claim for asylum for that reason, in circumstances where the applicant was not impugned or put in issue by the first respondent and therefore her evidence regarding the said weight must be taken to be substantially true.

(b) that the first respondent breached the applicant's natural and constitutional rights to have the said investigation conducted in accordance with fair procedures, and failed to take all relevant material into consideration when

making the said recommendation, more specifically, ….(see *infra*)…[material] that the applicant attempted to submit, at which the first respondent refused and/or failed to accept from the applicant, thereby acting outside the first respondent's jurisdiction and *ultra vires.*

(c) that the first respondent breached the applicant's legitimate expectation that a female officer, experienced in dealing with claims for asylum involving rape and sexual violence, would make the assessment of the applicant's claim for asylum. In circumstances where the applicant's claim for asylum was substantially based on her ethnically motivated rape and that fact was completely ignored by the first respondent, her servants or agents, the said failure to assign a so experienced female officer had a material and detrimental impact on the applicant's interview and therefore denied her rights in natural justice."

I will deal with each of these in turn, in the order they were opened in court, but before doing so, however, I set out the relevant part of s. 2 of the Refugee Act 1996 (as amended):-

"… a 'refugee' means a person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country…".

It is also significant to note that the Minister for Justice, Equality and Law Reform has designated the country which the applicant stated she is a national of, and/or has a right of residence in, to be a safe country of origin. In accordance with s. 11A of the Refugee Act 1996 (as inserted by s. 7(f) of the Immigration Act 2003), the applicant is therefore presumed not to be a refugee unless she shows reasonable grounds for the contention that she is.

The first ground advanced by the applicant is that the first respondent did not take into account the fact that the applicant was raped and threatened when coming to her decision that the applicant was not a refugee.

It should be recalled in that context that the applicant is a Croat national and although she married a Serb, she and her children remain Croats. Her parents are Croats. Her country is Croatia. The well founded fear of persecution which a person must have before he/she is considered a refugee must be persecution from circumstances arising in his/her country. Section 2 does not refer to persecution, real or apprehended, from another country, in this case, Serbia for example. The applicant has given evidence, which is accepted, that the rape of which she speaks occurred in Serbia. The first respondent, in her report was clearly aware of this distinction. At para. 3.1 of her report, the first respondent says:-

"The applicant claims that she was harassed and intimidated in Croatia on account of her marriage to an ethnic Serb. She held that *in Serbia* she was subjected to intimidation and was raped in October, 2004." (Emphasis added).

At para. 4.9, the first respondent makes the following finding:-

"Country of origin information indicated that the Croatian Government has taken steps to protect minority rights in Croatia and that the situation for the Serb minority has improved. The applicant has experienced problems of verbal abuse and discrimination, which may be distressing, but do not amount to persecution.

From an objective analysis of this claim, it is not apparent that the applicant has a well founded fear of persecution in Croatia.

The applicant has not presented any reasonable ground which would outweigh the general presumption that the applicant is not a refugee."

In reaching her conclusion, the first respondent was perfectly entitled to regard the allegation regarding the rape committed in and the threats emanating from Serbia as being *nihil ad rem*. In fact, for her to take this into account in considering s. 2 would amount to an error in interpreting the section, in my view. She did, quite properly, expressly consider the harassment and intimidation she was subjected to in Croatia, but concluded in that regard that it was not such as to amount to "persecution". Again she was perfectly entitled to come to that conclusion on the evidence before her.

I reject the applicant's argument on this ground.

The second ground advanced on behalf of the applicant is that in refusing to accept country of origin information proffered by the applicant, the first respondent acted in breach of the applicant's natural and constitutional rights to fair procedures.

The applicant tendered the following documents to the authorised officer in the course of the interview:-

a. United States State Department Report on Croatia, 2005;

b. United States State Department Report on Montenegro, 2005;

c. A Wikipedia article on the Croatia Party of Rights;

d. A Wikipedia article on Branimir Glavas;

e. Human Rights Watch Report of 2006.

When the applicant states that the authorised officer refused "to accept" this documentation, it is incorrect to conclude that the documentation was not considered. According to the report of the first respondent, each of the proffered documents were physically accepted and examined by the authorised officer, who concluded that all the reports were available to her internally and the reports were returned, for this reason, to the applicant. The first respondent in the interview notes remarked: "All reports which are internally available have been returned to the applicant." One cannot conclude from this that the first respondent did not have the relevant information before her, much less that she did to take into account in coming to a conclusion, in so far as it may have been relevant. It seems to me that a determination of relevancy is one of the functions entrusted to the authorised officer under the legislation and if documentation is proffered how can any serious objection be sustained if she returns it, saying "Thank you. I already have that documentation". Such action would also be in keeping with best practice, ensuring that only the most up-to-date information is used in coming to a proper recommendation. In any event, much of the information proffered was patently irrelevant, referring as it did to conditions and politicians in Serbia, not Croatia (the applicant's country) and the rest was clearly in the public domain and available to the authorised officer.

In the circumstances, I do not consider that there has been a breach of fair procedures under this heading as alleged by the applicant.

The third argument put forward on behalf of the applicant was that the first respondent breached the applicant's legitimate expectation that a female officer, experienced in dealing with claims involving sexual violence and rape, would hear her case. In support of this, the applicant produced an internal memo between two employees of the respondent wherein one officer requests another officer to "please assign this investigation to an experienced female officer".

To ground an argument on legitimate expectation, the applicant must show first, that an undertaking was given to her and second, that she relied on it in some way. There is no evidence before me that any undertaking was made to the applicant at any stage by the respondent or any of its officers. What was exhibited was an internal communication which was not addressed to the applicant and could not be seen as an undertaking or assurance to the applicant (how the applicant came into possession of this document was not explained to the court). Since it was not addressed to her, the applicant fails to meet the first requirement. Neither is there any evidence to show that the applicant relied on this letter in adjusting her approach to the case. Since the letter was not addressed to her, she would not have any entitlement to rely on it in any event. Moreover, the letter does not say, as the applicant argues, that an officer "experienced in sexual assaults or rape" was to be assigned to the case. All that was suggested in this internal memo was that "an experienced female officer", should be assigned to the case. There is no doubt that the female officer assigned was experienced. The evidence before the court was that the officer assigned had in excess of four years' experience, had interviewed more than 250 refugee applications by the end of 2005, and more than 305 refugee applications by the end of 2006, and had undertaken specific training by UNHCR as well as completing a course conducted by the Rape Crisis Centre specifically designed for ORAC interviewers who were required to process asylum claims for victims of rape and sexual abuse.

The applicant is not entitled to dictate to the respondent which officer will hear a case. I reject the applicant's argument based on this ground too.

Availability of Appeal
I acknowledge that, in this case, because Croatia has been designated as "a safe country" by the Minister that the applicant's right to appeal is not to a full oral re-hearing. Because the applicant's complaint in this case relates in essence to a claim that the decision contains findings with which the applicant disagrees or the applicant suggests that the external examiner made a mistake in its finding, I am of the view that her concerns can be fairly and more appropriately addressed on appeal to the Refugee Appeals Tribunal (RAT). In *Z. v. Minister for Justice* [2008] I.E.H.C. 36, McGovern J. made the following observations with which I agree:-

"The Oireachtas has put in place a statutory scheme for dealing with asylum applications which includes a right of appeal from decisions of the RAC. While there may be circumstances in which an error made by the RAC should properly be dealt with by an application for judicial review, the Courts should only grant leave to an applicant where the issues cannot adequately or conveniently be resolved before the RAT."

I refer also to the case handed down by Cooke J. on the 29th April, 2009, entitled *Akintunde v. Refugee Applications Commissioner and Minister for Justice, Equality*

and Law Reform which reviews the circumstances in which the court should exercise its discretion in refusing *certiorari* when the more appropriate remedy for the applicant is to avail of the appeal set up under the system.

For all the above reasons, I am satisfied that the appeal mechanism is the appropriate route which the applicant should take in this case and for these reasons, I reject the applicant's application for *certiorari* and injunctions.