Neutral Citation Number: [2009] IEHC 450

THE HIGH COURT

2008 307 JR

BETWEEN/

O. S. (A MINOR SUING BY HER FATHER AND NEXT FRIEND Z. S.)
APPLICANT

AND

REFUGEE APPLICATIONS COMMISSIONER, REFUGEE APPEALS TRIBUNAL, MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr Justice Cooke delivered on the 14th day of October, 2009

1. This is a further case in which leave is sought to apply to quash, by *certiorari*, a report under s.13 of the Refugee Act of 1996 by the Refugee Commissioner in circumstances where an appeal has been initiated but left in abeyance pending the outcome of this proceeding.

2. In a number of judgments delivered in recent months the High Court has reviewed the case law on the issue as to the attackability of a s. 13 report in those circumstances. In the light of the Kayode judgment the Supreme Court, earlier this year, in one of the more recent cases I endeavoured very briefly to state the criteria indicated by that case law in the following terms:-

> "It is now settled law that consistently with the scheme and legislative intention of the 1996 Act this Court should intervene to review a section 13 report and recommendation in advance of a decision on appeal by the Refugee Applications Tribunal only in the rare and exceptional circumstances where it is necessary to do so in order to rectify a material illegality in the report which is incapable of or unsuitable for rectification by the appeal and which will have continuing adverse consequences for the applicant independently of the appeal or if such that if sought to be cured by the appeal would have the effect that the issue or some wrongly excluded evidence involved would not be reheard but would be examined only for the first time." (*F.O. v. MJELR* (Unreported, Cooke J., 26th June, 2009, IEHC 300)).

3. Accordingly, as the court has repeatedly pointed out in these judgments, leave to seek the intervention of the court by way of judicial review in the asylum process before the appeal stage will not be allowed unless it is demonstrated to the court that a compelling case is made out as to the existence of some material illegality in the s. 13 report which is such that it is necessary for the court to intervene to cure it by way of judicial review because the statutory appeal will be inadequate or unsuitable to do so.

4. The background of this case can be briefly stated. The applicant minor is now seven years old. She was born in Vukovar in Croatia, formerly part of the Yugoslav Republic, in 2002. She arrived in the State with her parents in 2004. The family are Croats of Serbian ethnic origin. The parents applied unsuccessfully for asylum but, following the judgment in the Nwole case, the Minister invited the parents to make a separate application for asylum on behalf of the minor applicant in this case. The applicant, accompanied by her father, was interviewed under s. 11 on 29th February, 2008, and the authorised officer of the Commissioner issued the s. 13 report on 5th March, 2008. It contained a negative recommendation.

5. The s. 13 report in the case starts with the presumption that the applicant is not a refugee. This arises by virtue of the fact that Croatia has been designated as a safe country under s. 12(4) of the 1996 Act. Accordingly, the authorised officer is required to proceed on the basis that the applicant is not to be declared a refugee unless reasonable grounds are shown that she is a refugee.

6. The claim to a fear of persecution is based on her father's description of the treatment she and her parents had experienced before leaving Vukovar. Amongst various incidents recounted was one in which the minor applicant was with her mother when the mother was attacked in the street - one of a number of occasions of attacks by a woman who was apparently mentally ill. It is claimed that the police said they could do nothing about it because the woman was mentally ill. It is claimed that if she is returned to Croatia the applicant would also have difficulties at school and would be discriminated against in her education. She would not receive the medical treatment she needs for a bone disease and the family faces restrictions, both in housing and in the practice of their religion as Orthodox Serbs.

7. In the Report, the authorised officer acknowledges these difficulties and the legacy of bitterness between Serbs and Croats which has persisted since the post-independence conflict. The authorised officer essentially relies on two particular documents in assessing whether Croatia can be considered an unsafe country for this family, notwithstanding the presumption.

8. These documents are US Department of State International Religious Freedom Report of 2006 and a Department of State Report on Human Rights in Croatia 2006. From these the authorised officer draws the conclusion that, notwithstanding the slow progress and the problems and the bitterness that have persisted, the position is slowly improving, violence is decreasing and that State protection is now available. The authorised officer then concludes:-

> "The asylum process is essentially a forward looking one, and the crucial issue is whether the applicant would be at risk of persecution if she were to live in Croatia. It is not unreasonable to suggest that Croatia, as a future EU Member State and having to comply with EU standards will be able to afford protection to the Serb minority group to which the applicant belongs. Mr. S. did not present any evidence that O. would be at risk of persecution in Croatia. He has not submitted any reasonable grounds which would outweigh the general presumption that his daughter is not a refugee."

9. It is now sought to quash this report as unlawful on the basis of the statement of grounds which lists twelve proposed grounds but which, as elaborated upon in oral submissions by counsel for the applicant, appears to the court to involve the following essential contentions:-

(i) The first and most important attack is directed at the use of the country of the origin information in the report. It is said that only the two documents obtained by the authorised officer are relied upon, that they were never put to the applicant and that no opportunity was given to the applicant to comment on those documents. The documents submitted on behalf of the applicant were ignored and no explanation was given as to why they were rejected in favour of the officer's documents.

(ii) It is submitted that, as a result, the applicant's case has not been addressed and that, if confined to the statutory appeal, her case will only be considered for the first time on the appeal.

(iii)It is argued that the report fails to have regard to and comply with the obligations accepted by the State in ratifying the UN Convention on the Rights of the Child, in particular the authorised officer failed to make the rights of the applicant child the primary consideration. In addition it is submitted that the report violates Article 12 of the Convention by failing to afford the child the right to be heard.

(iv)A further ground is mentioned based on the proposition that the so called "O'Keefe test" does not apply when reviewing an administrative decision such as the report under section 13 by the Commissioner. Instead, anxious scrutiny should be applied and on that basis the Commissioner drew an incorrect or unreasonable conclusion in relation to country of origin information because the case for refugee status was stronger than the case against it.

10. A number of other grounds are canvassed in the statement of grounds which were not mentioned in oral argument but it is clear that none constitutes a basis for intervention by the court at this stage. Indeed, it is questionable whether any of them are stateable as a basis for attacking a s. 13 report as such.

11. The court considers that none of the four specific grounds above suffices to place this case amongst the category of exceptional cases which require intervention by judicial review.

12. First, the criticism of the treatment of the country of origin information. It is incorrect to say that the applicant's country of origin information was not considered by the Commissioner. Not only is it listed and mentioned in the report but it is clear from the transcript of the interview that it was actually discussed at the interview. At p. 8 of the note the interviewer says:-

> "According to Irish law Croatia has been designated a safe country. From reading country of origin information, such as UN documents and US State Department reports on Croatia and the documents you submitted, it is evident that Serbs do face discrimination in Croatia. However, the country of origin information also states that the situation is improving, albeit slowly, including in the area of housing. For instance, violence against ethnic Serbs has decreased by 45% in 2006 compared with the previous year. A Serbian NGO noted better police performance and general improvement of the political climate as factors that have led to the stability." (emphasis added)

13. In the face of that it seems plainly incorrect to say that the documentation was not considered. The authorised officer of the Commissioner is not obliged to enter into a debate, nor is he or she obliged to allow comment on country of

origin documentation when it is of a general character. This is not an adversarial hearing; it is an interview. It is the function of the Commissioner to carry out an inquisitorial investigation and compile a report which goes with his recommendation to the Minister. It is an information gathering exercise and an interview in which a specialist assessor is required to make a personal appraisal of the applicant with a view to advising the Minister as to whether the applicant is telling the truth. It is not an adversarial adjudication and thus not "a hearing" in that sense.

14. In any event, in this case the documents were not consulted, clearly, behind the applicant's back or in a way in which the applicant was deprived of an opportunity of making comments, as alleged. As already indicated, the two documents were before the authorised officer at the interview, as the quotation from p. 8 above indicates and the gist of the reliance placed upon them was actually stated at the interview.

15. Next, it is said that the alleged mistreatment or unbalanced appraisal of the country of origin documents means that a written appeal is unsuitable and inadequate and that it would place the applicant at a continuing disadvantage in all future steps in the asylum process. This argument is particularly difficult to understand in the circumstances of this case. The complaint is that the country of origin information documents were wrongly used. It is explicitly stated that the authorised officer misjudged the relative force of the case for and against Croatia being a safe country in treating and examining the two sets of documents. If that is so, then the complaint is particularly apt for a written appeal because the ground is based on the force of documentary evidence. It is not claimed that the issue as to whether Croatia is or is not a safe country is in any way dependent on or influenced by some new oral information or testimony the applicant and her father might wish to give.

16. That is the central and, really, the only issue which faces the applicant in this case. Has the presumption against refugee status, arising from a designation of Croatia as a safe country, been displaced by the evidence given by the applicant, or rather her father, such that whatever the general position might be, it is necessary to conclude that Croatia is not safe for this particular family? That substantive issue is a matter for the appraisal by an authorised officer and for the decision of a Tribunal member. It is not a matter for the High Court on judicial review. The court asked several times, during the course of oral submissions, what the purpose of an oral hearing was proposed to be in this case? What was it that the applicant wished to be heard saying by a Tribunal member that would serve to establish that the country she left five years ago at the age of two was now unsafe to return to? Unfortunately, the court received no relevant or meaningful reply to that question.

17. Next, the ground based on the Convention on the Rights of the Child. It is not disputed that the Convention is not incorporated into Irish law, although ratified. Therefore even if an Article was shown to be ignored or infringed, it could not form the basis of an annulment of an otherwise valid administrative decision taken by a competent authority. In any event, the only specific Article relied upon here is Article 12 of the Convention which provides as follows:-

> "1). States parties shall assure to the child, who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight, in accordance with age and maturity of the child.

> 2). For this purpose the child shall, in particular, be provided the opportunity to be heard in any judicial administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with procedural national law."

18. That Article could not be said, in the court's view, to have any bearing on the present case. This applicant has, in fact, been heard. She was present at the interview. She can also be heard on any appeal by putting in a written statement if she wishes to do so. Article 12 clearly recognises the entitlement of the contracting states to pursue the objective of the Convention through the procedural rules of national law. Nothing precludes a child to whom it applies being heard in a two stage procedure which is partly an interview and partly a written appeal. Moreover and above all, reliance on this Convention and, in particular, on Article 12, is a strong reason for not granting leave in this case, rather than for granting it. This is so because if the child has a right to be heard orally on appeal (*quod non*,) it is the decision of the Tribunal on appeal without a hearing which would be flawed and not the s. 13 report.

19. Finally, the ground raised in relation to the O'Keeffe test, as it is called. It is difficult to understand the relevance of this as a ground for quashing the s. 13 report. It is more an argument as to the approach and standard to be adopted by this Court in exercising its judicial review. In so far as it is raised to support the criticism of the conclusion drawn by the authorised officer from the documents consulted by way of country of origin information, it meets the same difficulty already outlined above in respect of the more general attack on the authorised officer's treatment of that information and is, accordingly, equally unfounded.

20. For all of these reasons leave must be refused.