Neutral Citation Number: [2009] IEHC 296

THE HIGH COURT

2006 987 JR

BETWEEN/

O. A.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

RESERVED JUDGMENT of Mr Justice Cooke delivered on the 25th of June, 2009.

1. By judgment and order of 13th June, 2008, leave was granted by Birmingham J. to the applicant to bring the present application for, *inter alia*, an order of *certiorari* to quash a report of the Refugee Applications Commissioner made on 25th July, 2006, under s. 13 of the Refugee Act 1996 in which the Commissioner's authorised officer recommended that the applicant be not declared a refugee.

2. The applicant is a native of Nigeria who arrived in the State on 10th July, 2006 and claimed asylum. He says that in Nigeria he was involved in the motor trade and for some years had been Secretary General of a trade body, "The Motor and Spare Parts Association". He left behind in Nigeria a wife and three children.

3. It was in the course of his activities in the trade association that the applicant encountered and, he says, was forced to become involved with an Ogboni group. The Ogboni society is described in country of origin information as a secret society whose members are bonded to each other by oath and who indulge in various rituals such as the ritualistic cutting of the face of a first born male child.

4. In his asylum application and in the section 11 interview conducted by the Commissioner's authorised officer, the applicant described how he discovered that the executive committee of the association was controlled by or belonged to this Ogboni group and that he was forced by the group to join it. They wanted, he says, to take his blood and drink it to make him a blood companion and thus bind him to secrecy. He did not want this because he was a Christian but he claims that he was overpowered and forced to submit to this induction. As explained in more detail later in this judgment, the activities and, subsequently, the threats and attacks on himself and his family by members of this group were what the applicant claims forced him to flee Nigeria.

5. The applicant was interviewed on 26th July, 2006 by the authorised officer and the resulting report ("the Contested Report") which is now challenged, was made on 25th July, 2006. An appeal against that report to the Refugee Appeals Tribunal was commenced but has been left in abeyance pending the outcome of the present proceeding. It is to be noted that, if eventually pursued, it will be an appeal procedure in which the applicant may apply for an oral hearing as no

findings under s. 13(6) of the 1996 Act have been included in the Contested Report.

6. Leave was granted by Birmingham J. to apply for relief by reference to four broadly defined grounds but the application, as now presented, advances a single ground which is of more specific focus and which effectively consolidates some of those grounds. It can be characterised as directed at an alleged error of fact made by the authorised officer in assessing credibility which is said to be so fundamental as to go to jurisdiction and therefore to require the report to be quashed rather than leave the applicant to his statutory appeal remedy.

7. The section 13 report of the Commissioner is set out in sections headed as follows:

1. Introduction.

2. Legal Basis of Assessment.

3. Persecution Claimed.

4. Well Founded Fear; and,

5. Recommendation.

8. In the third section – "Persecution Claimed", the authorised officer summarises, - and it is accepted that she accurately and correctly summarises, - the description given by the applicant of the circumstances which led to his flight from Nigeria in July 2006, including his involvement with the Ogboni group; how he was forced into it; his resistance to its ritual activities and kidnappings; the threats and attacks by its members; his being forced to move with his family to get away from them; the death of his driver at the hands of a killer hired by the group; assassins being sent to his house; and his escape from another imminent attack on the night of 27th June, 2006 which led to his flight.

This summary is then followed by the following sentence:

"The applicant's claim is not considered sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights and therefore does not amount to persecution."

9. This statement which is said to be a finding or conclusion on the part of the authorised officer is described as, in effect, patently irrational if it is treated as constituting the officer's appraisal of the legal significance of the facts for the purpose of "persecution" in the sense of the Convention and s. 2 of the 1996 Act. Understandably, counsel for the applicant commends to the Court the observation made in respect of it by Birmingham J. when granting leave where he says,

"One has to say, taking it at face value, the conclusion reached is a surprising one and at face value might give rise to arguments as to whether, in fact, it could be regarded as a conclusion that was reasonably open and not one that was irrational."

As counsel for the applicant put it, the final sentence of the third section could only be explained as other than irrational if the authorised officer is concluding that the facts and events which are summarised under the heading "Persecution Claimed" are not believed. And that, in fact, is precisely the basis upon which the analytical parts of the report are then set out because the authorised officer immediately says, "Nonetheless, an examination of the circumstances and factors pertaining to the claim is set out in the following paragraphs of this report." There then follows in the fourth section an analysis of the basis of the claimed fear of persecution which is set forth under the three subheadings; "Credibility", "State Protection", and "Internal Relocation".

10. It is under the first of these three subheadings that the applicant identifies what is said to be the fundamental error of fact on the part of the authorised officer which vitiates her exercise of jurisdiction and necessitates the quashing of the report as unlawful.

11. In this subsection headed "Credibility", the authorised officer points to three particular areas of evidence drawn from pages 13, 14, 15, 20, and 27 of the section 11 interview and comprising specifically the replies to questions 54, 55, 69 and 81. In the third of the matters, based upon the reply to question 55, she refers to the applicant's account of answering the door of the house to killers whom he thought were armed robbers who would simply take the money and go but who, he says, produced a photo of him, hit him, and he woke up in hospital. She says, "It is difficult to accept that having allegedly being threatened, that the applicant would let assassins into his house and allow them to identify him using a picture. This casts doubt on the credibility of the applicant's claim."

12. On the second point, the authorised officer refers to the replies at questions 55, 69 and 81, where he described moving to Oshogbo to get away from the group and how they located him there. She says he was unable to explain how they located him and quotes him as saying, "I cannot say. I was surprised myself." She concludes, "It is hard to believe the group would be able to find him in a country as vast and densely populated as Nigeria. It is difficult to accept this aspect of the applicant's claim and the reliability of his evidence."

13. It is to be noted that neither of these factors identified as undermining credibility in the applicant's account, is disputed in the present claim. The error is said to lie in the first paragraph of the credibility section which reads as follows,

"The applicant claims that as part of the Ogboni society, they used to kidnap people for rituals (Q54 p. 13). He alleges that they

"used incantation so they couldn't speak. We took them to a hideout and took out their hearts and heads … herbalists do this." (Q54 p.13)

Mr. A. claims that, 'We use medicine, Ju Ju, so people couldn't see us, they showed me the regalia and incantation to use so people don't speak or see again, they just follow us.' (Q55. p.14) It is incredible that the applicant would be able to kidnap people using merely an incantation. It is unbelievable that Mr. A. and this group would be able to use Ju Ju to prevent their alleged kidnapped victims from seeing them. This completely undermines the veracity of the applicant's claim. Furthermore, at his section 8 interview and in his questionnaire, Mr. A. declared himself to be a Christian, i (*sic)* is hard to reconcile Mr. A.'s beliefs with regard to incantations and Ju Ju with his declared religion."

14. It is submitted that in the second half of that passage the authorised officer has made a fundamentally wrong finding to the effect that the applicant himself and not just the other members of the group had carried out kidnappings, indulged in incantation, and used Ju Ju to prevent victims seeing them. It is not disputed that the use of the first person plural, "We use medicine, Ju Ju, so people couldn't see us", etc., accurately quotes the relevant replies to the questions from the interview transcript but is said that the authorised officer has wrongly failed to understand the clear effect of the applicant's testimony which was that he was never actually involved in any such activities and that it was his refusal to be involved that was the cause of his problem and led to his being attacked and to the attempts on his life.

15. While it might be possible to suggest that this submission reads far more into that paragraph of the report than is warranted, the Court is prepared to accept for the purpose of the present application that the authorised officer may have made a mistake. The passage might possibly be open to the interpretation when read in the context of the report as a whole, that the authorised officer was not saying that the applicant carried out the kidnappings or indulged in Ju Ju himself; she may simply be construing his testimony in the replies cited as indicating that while not wanting to be involved as a Christian, he nevertheless feared that the Ogboni were capable of exercising the powers they claimed.

16. However that may be, the Court is prepared to accept that the passage quoted above may represent a mistaken assessment of the applicant's evidence as it appears in the interview and in the handwritten account supplied by the applicant with his asylum questionnaire. The issue before the Court is whether, in the context of this case, it is an error which requires or justifies the annulment of the section 13 report.

17. The Court is satisfied that it does not for reasons which shall now be set out and primarily because, contrary to submissions that have been made, any such error is not one which goes to jurisdiction and is a matter which is pre-eminently one to be dealt with by way of the remedy of the statutory appeal.

18. The law in relation to this issue is now clearly and definitively established by the judgments of the Supreme Court in *Stefan v. The Minister for Justice* [2001] 4 I.R. 203, and *Kayode v. The Refugee Applications Commissioner*, (Unreported, 29th January, 2009), which the Court is satisfied confirm the approach taken to the question of intervention by this Court to quash reports of the RAC in a number of other judgments of this Court and particularly those of Hedigan J. in *B.N.N. v. The Minister for Justice*, (Unreported, 9th October, 2008), and my own judgments in *Diallo v. The RAC*, and *Mhlanga v. RAC*, (Unreported, 27th January, 2009).

19. It is unnecessary to once more rehearse that case law. The essential principles are sought to be summarised in the judgment in the *Diallo* case at paragraph 19. In effect, as is said by Hedigan J. in the *B.N.N.* judgment, "It is only in very rare and limited circumstances that judicial review is available in respect of an ORAC decision." In this Court's judgment it should and will intervene in the statutory asylum process to review a report of the RAC under s.13, prior to the exhaustion of that process by decision of the Refugee Appeals Tribunal, only when it is necessary to do so, to rectify some material defect which will have continuing adverse effects on the applicant independently of the statutory appeal; or to cure some illegality which is incapable of being remedied by the statutory appeal, or, as in the Stefan case, is such as would result in a

material issue or a significant piece of wrongly excluded evidence being considered only for the first time on the appeal.

20. This is not simply a matter of self imposed restraint or curial deference on the part of this Court. It is the approach which is consistent with the particular features of the statutory asylum process and thus conforms to the legislative objective in establishing that scheme. As has been pointed out in those judgments, the asylum process established by the Refugee Act 1996, as amended, together with the related Acts of 1999 and 2000, provide for a two stage procedure before, respectively, the Commissioner and the Tribunal. The first stage is essentially investigative in character and requires the Commissioner to inquire into the asylum application, to interview the applicant, to collate all relevant evidence and information including that provided orally and in writing by the applicant and that gleaned by the officer's own researches; and then to present a report to the Minister which incorporates the findings of the Commissioner and a recommendation as to whether the applicant should or should not be declared to be a refugee. (See s.13(1) of the 1996 Act.)

21. Where the Commissioner recommends that the applicant be declared to be a refugee, the Minister has no discretion but to accept the report and to give the applicant a declaration of refugee status. (See s. 17(1)(a) of the 1996 Act.) Where a negative recommendation is made, the applicant is entitled to appeal it to the Tribunal and unless there are findings made under s. 13(6) of the 1996 Act in the report, the appeal takes the form of rehearing on which the applicant is entitled to challenge the content of the report; to contest any findings it purports to make; to adduce new evidence including new country of origin information in rebuttal, and to require that a fresh assessment as to credibility of his claim is made where credibility has been put in issue in the report.

22. By way of contrast, the proceeding on appeal to the Tribunal is primarily (though not exclusively) adversarial in nature with the burden of proof shifting to the appellant and the Commissioner's presenting officer intervening to stand over the section 13 report in the role of *legitimus contradictor*.

23. These distinct but complimentary roles are underpinned by the contrasting provisions of sections 11(10) and 16(8) and of the 1996 Act. Under the former, the investigative role of the Commissioner is illustrated by the requirement that it is only "when so requested" that with, or following the section 13 report the Commissioner is required to provide an applicant with copies of any reports, documents, or representations in writing submitted to the Commissioner and an indication in writing of the nature and source of any other information which has come to the notice of the Commissioner in the course of the investigation.

24. Under section 16 (8), on the other hand, the Tribunal is required to provide an applicant with reports and documents furnished to it by the Commissioner, together with an indication in writing of the nature and source of any other information which has come to the attention of the Tribunal itself during the course of the appeal, and to do so in advance of making its decision. In other words, although the appeal is adversarial in its procedural character, it still retains an investigative function subject to the requirement that any material recovered in its investigative initiatives be submitted for comment or rebuttal by the applicant prior to any decision being adopted on the appeal.

25. It follows from this in the Court's judgment, that the authorised officer of the Commissioner when making a section 13 report is not required to decide definitively the issue of credibility of an applicant's claim to a well founded fear of

persecution if returned to the country of origin. The officer is required to inquire into that claim, to collate all relevant information, to furnish a report and to form an opinion as to the basis of a recommendation to the Minister. The Commissioner is not, therefore, vested with a jurisdiction to decide definitively on credibility of the claim. The jurisdiction is to report and recommend, even though it includes a function of making findings. It is clear from the wording of s. 17 (5) in particular, that the jurisdiction to decide to refuse a declaration of refugee status is vested in the Minister.

26. It necessarily follows in the Court's judgment that if the Commissioner, through his authorised officer, without wrongfully excluding relevant available evidence, makes a mistake in the appraisal of the credibility of evidence supporting the claim for refugee status based upon disbelief in the claimed circumstances giving rise to the alleged fear, it cannot go to the jurisdiction in the sense contended for in this case. The report is an appraisal for consideration of the Minister, it is not the exercise of a determining jurisdiction so far as the issue of credibility is concerned.

27. That point appears to be well illustrated in the present case. In essence, the claim made here is that the authorised officer misunderstood, wrongly construed, or mistakenly interpreted the applicant's evidence. It is submitted that it was wrong, on the available testimony, to say that the applicant had said that he had taken part in kidnappings or been involved in Ju Ju or incantations. That is pre-eminently an issue of credibility. It is well established that it is not the function of this Court to assess the credibility of the story told by an applicant in support of a claim to refugee status. This Court, on judicial review, is concerned only with the legality of the process by which a finding of lack of credibility is reached.

28. It is accepted in this case that, with the possible exception of the applicant's use of 'we' and 'us' when referring to the activities of the Ogboni group, the evidence collected from him as to the events and circumstances of his flight from Nigeria are correctly recorded in his statement in the questionnaire, in the notes of the interview, and are accurately summarised in the third section of the Contested Report. The complaint is that in one out of three aspects of that evidence identified by the report as indicating a lack of credibility, the authorised officer has made a mistake in her understanding or interpretation of the evidence.

29. It is claimed that the report is therefore invalid but the purpose of the complaint is to bring about a situation in which a different and correct view of the evidence will be substituted by a reappraisal in the investigative stage, thereby leading, it is presumably hoped, to a different opinion being reached notwithstanding the remaining unchallenged parts of the present report.

30. That, however, is the purpose and function of the statutory appeal; to afford an applicant an opportunity to persuade a second administrative officer, the Tribunal member, to reach a different conclusion as to credibility based upon a full reappraisal of the totality of the collected information and a fresh assessment of the applicant's own personal testimony. That is not the function of the Court on judicial review.

31. The statutory appeal would be deprived of its purpose and the scheme of the legislation would be distorted if the High Court was to intervene by way of *certiorari* on occasions when it is claimed, and even plausibly demonstrated, that a mistake has been made in a section 13 report in the evaluation of evidence as to credibility with the result that a wrong opinion has been reached.

32. As already indicated, the authorised officer in this case has set out her analysis of the credibility of the applicant's claim under the subheading "Credibility" in the fourth section of the report, and only the first of the three indices of lack of credibility is now under challenge. Contrary to the applicant's submission, the Court does not consider that the paragraph in question embodies a fundamental error incapable of being remedied by the appeal. If it is mistaken, it is a mistake as to the effect or interpretation of the applicant's evidence.

33. The applicant identifies that mistake with precision in the present application. On the statutory appeal, he would be able to isolate it and give evidence to correct it. If, notwithstanding the observations of Birmingham J. in the judgment of 13th June, 2008, and the conditional acceptance of the apparent mistake in the present judgment, the Tribunal were to adopt the same assessment of the applicant's involvement in the ritualistic activities of the Ogboni group as a basis to reject the appeal, judicial review will still lie as a remedy if it can be demonstrated that the process of reaching that conclusion is still tainted by illegality. But because it is, above all, an issue going to the credibility of the claim in which the Tribunal member, like the authorised officer, will have had the benefit, (unlike the Court), of assessing the personal testimony and demeanour of the applicant in an adversarial context, it is the scheme and purpose of the Act that any alleged flaw in the process of that assessment should come to this Court on judicial review only after both steps of the asylum process have been completed.

34. Accordingly, the Court is satisfied that if there has been any error of fact, as alleged, in the Contested Report (which issue the Court is not here deciding), it is one which falls under the scheme of the statute to be determined first by means of the statutory remedy of appeal to the Refugee Appeals Tribunal, before this Court can be required in the exercise of its discretion to intervene by way of order of *certiorari*.

35. The application for relief will therefore be refused.