Neutral Citation Number: [2009] IEHC 298

THE HIGH COURT

2006 836 JR

BETWEEN/

P. S.

(A MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND B.O.)

APPLICANT
AND

REFUGEE APPLICATIONS COMMISSIONER,

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr Justice Cooke delivered on the 18th day of June, 2009.

1. The applicant is a young South African, now aged 18 years of age, who arrived in the State on the 7th May, 2006, presented her passport at Dublin Airport and thereafter claimed asylum. Her fear of persecution if returned to South Africa is based on her claim that when returning from school one day at the age of 14, she was set upon by an unknown man and raped. She was afraid to tell anyone about this at the time and it was only some five to six months later when neighbours of her grandmother, with whom she was living, said that she should be taken to hospital that she discovered she was pregnant. She fears that if returned to South Africa, "It will happen again" as she put it in her asylum application.

2. Immediately on her arrival in Dublin she was hospitalised and shortly afterwards gave birth to a stillborn child. Her application for asylum was made on the 15th May, 2006. She was interviewed in the company of her mother by an authorised officer of the Refugee Applications Commissioner on the 21st June, 2006. Her mother had been in the State for some two-and-a-half years prior to her daughter's arrival. The officer's Section 13 report, dated the 26th June, 2006 ("the Contested Report") recommended that she be not declared to be a refugee. An appeal to the Refugee Appeals Tribunal was commenced but has been left in abeyance pending the determination of the present application.

3. By order of McMahon J. of the 11th July, 2008, the applicant was granted leave to bring the present application for, *inter alia*, an order of *certiorari* to quash the Contested Report and recommendation of the Commissioner.

4. There is some confusion as to the precise scope of the grounds in respect of which leave was granted. The court order of the 11th July, 2008 refers to, "the grounds set forth in paragraph E" of the statement of grounds filed on the 13th July, 2007. This date appears to be a mistake for the 13th July, 2006, the date of filing of the only statement of grounds produced on this application. Furthermore, that statement of grounds contains no paragraph E setting out grounds. The

grounds are set out at a paragraph 2 but this appears to be a mistake for paragraph 5 as it is preceded by paragraphs numbered 1 to 4. The grounds in paragraph 5 are 16 in number and are listed as (A) to (P). The order states that all of those grounds were allowed. However, in his judgment of the 11th July, 2008 granting leave, McMahon J. pointed out that the issue raised in the ground advanced at paragraph (L) of the statement of grounds, to the effect that s. 13(6) of the Refugee Act 1966 was repugnant to the provisions of Article 30, para. 5 of the Constitution by depriving the applicant of an oral hearing on appeal, had been dealt with by the Supreme Court in the case of *V.Z. v. The Minister for Justice* [2002] I.R. 135. The learned High Court Judge expressed his agreement with the judgment of McGuinness J. in that case to the effect that an oral hearing was not necessary in all cases. He said further, "The applicant does not advance any legal basis to demonstrate that the law as expressed by McGuinness J. does not apply in the present case". Nevertheless, McMahon J. appears to have considered that there was still a substantial issue raised in respect of that ground justifying leave being allowed because of the "interconnectedness of the various grounds".

5. Whatever may have been the position on the hearing of the application for leave, no argument whatsoever was raised by reference to that ground on the present hearing and the Court will therefore treat it as having been withdrawn in the light of McMahon J.'s observations. In fact, the case as presented at the hearing of the substantive application distilled the 16 grounds of the statement to two grounds which might be characterised as follows:

1) The first ground is directed at the basis upon which the Commissioner's authorised officer and author of the Contested Report concluded that the applicant did not have the well founded fear of persecution which she claimed although it was accepted that she had been raped and required support and assistance. In particular, the authorised officer is alleged to have failed to conduct the applicant's interview fairly and in compliance with the UNHCR guidelines on interviewing applicants for refugee status, having regard especially to her young age, to her distressed and vulnerable condition following her recent hospitalisation and the loss of her child. The authorised officer's conclusion was said, in effect, to be based on a single reply in the interview without any explanation of her reasons for fleeing South Africa and without putting to her the other possible motives for flight from South Africa referred to in the report.

2) The second ground is more specific and alleges that the country of origin information relied upon in appraising the application was used unfairly, selectively and included material and information consulted by the officer but not disclosed to the applicant.

6. At the outset of the hearing, the Court invited the parties, in the light of the judgment of the Supreme Court of 28th January, 2009 in the *Kayode* case, to address the issue as to whether this was one of the particular cases in which the Court might exercise its discretion to issue an order of *certiorari* against a report of the Commissioner when a statutory appeal to the Tribunal had been lodged and was still pending. In that regard, the Court noted that the appeal would be without an oral hearing because of the Commissioner's finding, pursuant to s. 13(6)(e) of the 1996 Act, that the applicant was a national of South Africa which is a designated safe country of origin. Having heard the submissions on that issue the Court proceeded to hear the submissions on the two above grounds as it appeared to the Court that this might be such a particular case, at least in respect of the first ground which is directed at the allegedly flawed character of the interview of the applicant. Clearly, if that ground was shown to be well founded, a purely written appeal might be an inadequate remedy.

The First Ground

7. The applicant submits that the Commissioner acted unlawfully in failing to take into account, adequately or at all, her young age, her vulnerable and stressed personal condition as a victim of rape and the recent loss of her child, when interviewing her for the purpose of the report. The Commissioner thereby failed, it is argued, to comply with the UNHCR guidelines which reflect Article 3 of the UN Convention on the Rights of the Child, by applying the principle of "the best interests of the child".

8. In particular, it is submitted that at para. 5.4 of the report, the officer reached a conclusion which is based upon a proposition never put to the applicant where he says, "While the applicant may indeed require support and assistance, there is the possibility that she had motives other than flight from persecution for leaving South Africa and travelling to Ireland." In this regard reliance was placed particularly on a passage in the judgment of 11th July, 2008 granting leave where McMahon J. observed,

"In my view, there is very little basis from the interview to justify a finding on the applicant's motives being other than a fear from persecution. It sounds dangerously close to speculation and it is only slightly modified by the use of the word 'possibly'. Bearing in mind that the applicant was not only a child but also a victim of sexual violence, I do not consider that the interview process in this case fully recognised the vulnerability of the applicant in the circumstances. If the suspicion was that the applicant came to Ireland to be with her mother or to avail of medical services, this should have clearly been put to her."

9. The Court is satisfied that this ground, upon more detailed examination, is devoid of any basis in fact. Although the precise consequence of the authorised officer's defective approach to the interview has not been articulated in terms of a specific error, it is inherent in the argument that the outcome of the report would necessarily have been different had a correct approach to the best interests of the child been adopted. This is not a case however, in which a negative finding of credibility was made which determined the rejection of the claimed fear of persecution. The applicant's account of her personal history, her rape and its consequences, was fully accepted. For that reason, the question as to whether the content of the interview might have been different had some other approach been taken to the youth and vulnerability of the applicant, is in the court's view irrelevant.

10. The authorised officer clearly accepted that the applicant had fears for her future in South Africa - being pregnant and living with her grandmother and far from her own mother. The report's recommendation is based on a finding that the fear of persecution is not well founded because state protection against possible repeated rape was available to her. Contrary to the argument advanced, the Court considers that there is no evidence to suggest that the conclusion to the report was dependant upon or influenced by a wrong approach to the Section 11 interview on the part of the authorised officer or that the officer paid inadequate consideration to the applicant's young age and vulnerable condition.

11. It is always difficult and even dangerous to attempt to gauge the sense, atmosphere and tenor of an interview or a witness examination from a verbatim transcript and it is even less reliable to attempt to do so on a note made by an amateur note taker, however thorough the note text may appear. In this case, however, there is nothing in the note relied upon in evidence which indicates any obvious disregard of the applicant's youth or condition. The note conveys the impression of a tranquil and measured conversation. There is no obvious instance

of questions being repeated out of disbelief in the first response. There is no indication of pressure being exerted or even of contradictions or discrepancies being challenged. Nor can there be any doubt but that the officer was aware of the applicant's vulnerable status because the relevant facts are discussed in the interview and mentioned in the report. Moreover, the applicant was accompanied throughout by her mother who at no stage felt the need to intervene to shield the daughter from any untoward challenge or to correct or supplement any of the applicant's own answers. Indeed at page 21, the mother was asked if she would like to say anything on behalf of her daughter and she replied "No".

12. It goes without saying that in advancing a ground directed at the effective misconduct of a Section 11 interview, the onus of proof lies with the applicant and this Court considers that the ground thus advanced here is unsupported by evidence. In that regard, it must be pointed out that the applicant herself has sworn no affidavit in this proceeding and the affidavit of the applicant's mother and next friend relies throughout on what she "has been advised by the applicant's legal advisers" as to the requirements of the UNHCR guidelines and she says nothing whatsoever as to her own view of the way in which her daughter was interviewed in her presence, in support of the alleged disregard of her age and vulnerable status as a victim of rape.

13. It is true that at para. 17 of the grounding affidavit the applicant's mother swears that, "The authorised officer failed as is recommended in chapter two of the UNHCR Guidelines to open the interview in an appropriate manner and failed to outline to myself any background explanation or to advise or explain the process or to remind the applicant of her rights and observations." However, these averments and the further averments on this issue at para. 18 to 20 of the affidavit, while formally verifying the legal requirements set out on the point in the statement of grounds, do not amount to evidence of the fact that the interview was so misconducted as to fail to comply with requirements of the 1996 Act or with any general principle of law.

14. As indicated above at paras. 6 and 7 of this judgment, much emphasis has been placed on the proposition that para. 5.4 of the report contains a particular finding as to the applicant's possible other motives for coming to Ireland and on the appraisal given to this argument by McMahon J. as quoted above. However, in the Court's judgment it is questionable whether the statement of the officer can correctly be characterised as a finding as such. It is more in the nature of an observation on the explanation given by the applicant which is quoted in the same paragraph. It is also a wholly uncontroversial observation because the applicant herself gave as her reason for leaving South Africa and coming to Ireland "to be with my mother", (see the Asylum 1 form) and because "I was pregnant and I did not have a person to live with because my granny is old", (see p. 9 of the interview). For this reason, it cannot be argued that there was an unlawful failure to put the matter to the applicant. The remark is a comment upon something the applicant herself said. In any event, even if the remark could be said to amount to a finding, it is irrelevant to the validity of the report because, A) the existence of a mixture of motives does not exclude the possible possession of a well founded fear of persecution and B), in this case there is no negative finding of credibility which could be said to have been influenced by such a finding.

15. In the Court's judgment, the substantive basis of the conclusion in this report is that given in the earlier part of para. 5.4 where the officer says, "There is no disputing the gravity of the applicant's account of what happened to her. Indeed, country of origin information indicates there continued to be reports of

widespread rape, sexual abuse, sexual harassment and assaults of girls by school teachers, students and other persons in the school community." The officer then proceeds to consider country of origin information as to the steps taken by the South African authorities to tackle that problem. It is this consideration of the country of origin information which is the subject of the second ground of attack on the report but the position remains that so far as the first ground is concerned, the officer accepted the applicant's evidence as to the factual basis for her fear in its entirety. He concluded, however, having quoted paragraph 100 of the UNHCR Handbook that the fear, while genuine, was not well founded for the purposes of refugee status because national protection in South Africa was available.

16. Finally on this first ground, sight should not be lost of the fact that what is sought to be quashed here is not a formal judgment on an adversarial issue but a report of an investigation involving the collation of all information relevant to the asylum application together with the formation of an opinion which takes the form of the recommendation to the Minister. This Court should be slow to quash such a measure on the basis of criticism of the manner in which the report is expressed, unless it is clear that it reflects a fundamental error in the basis upon which the report has been compiled which potentially renders the opinion unsound. In this instance, the Court is satisfied that no such flaw is demonstrated here by reference to the manner in which the interview is conducted, notwithstanding the obvious youth of the applicant and her possibly vulnerable condition at the time. If anything, her responses throughout the interview seem to have been calm, considered and open, and betray no sense of her having difficulty or embarrassment in explaining her history or fears.

The second ground

17. Under the heading of the second ground the applicant claims that the Commissioner's authorised officer erred in law in the manner in which material information, and particularly certain country of origin information, was obtained, considered and relied upon in reaching the conclusion of the report. It is submitted that some such information was obtained and considered without the applicant's knowledge and without the applicant being permitted an opportunity to comment on or to rebut it. Furthermore, it is said that the available information was used and relied upon selectively in disregard of available information which was corroborative of the applicant's claim. The specific documents in this regard are identified in the affidavit of the applicant's mother and next friend at paragraphs 12 to 15.

18. The Court proposes to express no view as to whether this ground, as set out in more detail in the written submissions and as elaborated upon in oral argument, is well founded or not because it is a ground which is pre eminently suited to being examined first upon the statutory appeal to the Tribunal in conjunction with any other grounds which may be taken in the pending appeal against the substance and quality of the appraisal of the application made in the Contested Report. As has been held in a series of judgments of this Court and effectively confirmed by the Supreme Court in the *Kayode* case referred to above, this Court should decline to intervene by way of *certiorari* in the procedures of the statutory asylum process prior to its exhaustion by a decision of the Refugee Appeals Tribunal unless it is necessary to do so in order to rectify some significant defect at the investigative stage which will have continuing adverse consequences or which is incapable of being cured by the statutory appeal. (See in addition to the *Kayode* case, the judgments of Hedigan J. in *B.N. v. ORAC* (Unreported, 9th October, 2008) and my own judgments *Diallo v. ORAC* and *Mhalanga v. ORAC* (Unreported, 27th January, 2009)).

19. The second ground in the present case is adequately and more suitably dealt with by the statutory appeal because it seeks, in effect, to require that a different view be taken of the effect of the totality of the information as to conditions in South Africa in place of the allegedly selective assessment made by the authorised officer.

20. In that regard, it must again be recalled that this is a case in which no negative credibility finding was made against the applicant. Her account of her rape and its consequences and of her journey to be with her mother in Ireland was accepted. This is not a case therefore in which country of origin information was invoked and relied upon to contradict or put in doubt some factual element in the applicant's personal history. It was looked at, considered and relied upon by the authorised officer for the sole purpose of assessing whether protection would be available to the applicant if returned to South Africa against the possibility, as she put it, that it might happen again. As already indicated, it was argued that as a young girl she was a member of a particular social group highly exposed to the risk of sexual violence, which the South African authorities were unable to prevent.

21. This is an issue which can and ought to be dealt with in the first instance by appeal rather than by judicial review. This is so notwithstanding the absence of an oral hearing because it is an issue which turns upon the assessment of written material in the form of country of origin information and is in no way dependant upon the personal testimony, demeanour, or credibility of the applicant.

22. The fact that some country of origin information may have been relied upon without its having been put first to the applicant for comment does not render the appeal remedy less apt or unsuitable. Within the scheme of the asylum process, two stages of investigation and appeal have different but complementary functions and are therefore circumscribed by different procedural considerations.

23. The function of the Commissioner is to investigate and report upon the application for refugee status by collecting all relevant evidence and information including that provided by the applicant. That function does not preclude the Commissioner, having interviewed the applicant, from checking the basis of a claim to a fear of persecution by reference to country of origin information. Provided the information is consulted to confirm matters of general context such as prevailing political or social conditions in the country of origin, there may be no need for the purpose of satisfying fair procedures to reconvene the interview to obtain comments upon such information. That is why at s.11 (10) of the 1996 Act requires that such information be furnished "on request" with or following the report.

24. By way of contrast, at the adversarial stage of the Tribunal appeal, s. 16(8) requires reports and documents furnished by the Commissioner to the Tribunal to be given to the applicant prior to the appeal decision being taken, 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 in the course of the appeal.

25. There may well be circumstances in which recourse to country of origin information elicits information which directly contradicts some fact of direct personal relevance to the applicant and in such a case fair procedures may require that the applicant be afforded an opportunity to rebut or explain it before the report is finalised. The present case does not however fall into that category because of the purely general nature of the country of origin information which is now queried and of the use to which it was put in the report. If it is wrong or if it

was selectively used, the defect is capable of being put right by appropriate rebuttal and by the submission of new information on appeal. In that sense, the applicant now knows the exact case that has to be made if a different outcome is to be achieved and that is the precise function of the statutory appeal when the issue is one of reassessing available evidence and information.

26. In the exercise of its discretion therefore, the Court will decline to rule upon this second ground and will leave the applicant to her more appropriate remedy of appeal to the Refugee Appeals Tribunal.

27. As the first ground has been rejected as unfounded, the application for relief by way of judicial review must therefore be refused.