Neutral Citation Number: [2009] IEHC 215

THE HIGH COURT

2006 875 JR

BETWEEN/

T. T. A.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE REFUGEE APPLICATIONS COMMISSIONER

RESPONDENT

RESERVED JUDGMENT of Mr Justice Cooke delivered on the 29th day of April, 2009.

1. In a judgment given on the 8th May, 2008, in this case Herbert J. granted leave to the applicant to apply for an order of *certiorari* by way of judicial review to quash the report and recommendation given by the Refugee Applications Commissioner on the applicant's asylum application on the 27th June, 2006.

2. Leave was granted on the four grounds which will be quoted later in the present judgment. An appeal was taken to the Refugee Appeals Tribunal against that report and recommendation of the Commissioner but has been left in abeyance pending the outcome of this judicial review proceeding. This is a case in which a full oral hearing will be available to the applicant on that appeal.

3. At the opening of the hearing of this application the Court invited counsel to make submissions on the issue as to whether this was a case in which, in the light of the grounds for which leave had been granted, the Court would or should exercise its discretion to issue an order of *certiorari* against the Commissioner when an appeal was available and had been commenced. It did so because this issue has now been considered by this Court in a number of judgments and on the 28th January, 2009, the issue was the subject of a judgment given in the Supreme Court in an appeal certified to it by the High Court under s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000 in the case of *A.K. v. The Commissioner*. In that judgment the Supreme Court reaffirmed its earlier view of the issue as given in *The State v. Dublin Corporation* [1984] I.R. 381 and more particularly, in the context of asylum cases, in its judgment in *Stefan v. The Minister for Justice* [2001] 4 I.R. 203. In his conclusion to an ex tempore judgment in the *A.K.* case Murray C.J. held that the appeal available was a more appropriate remedy where the issue raised by the applicant principally (but not exclusively) related to the quality of the decision of the Commissioner.

4. This issue appears to have been adverted to on the application for leave before Herbert J. in this case but that appears to have been on the limited basis that the mere commencement of an appeal was the exercise of an option which could operate as a procedural estoppel because he disposes of the point at p. 10 of his judgment by saying simply:-

"In the instant case the applicant has delivered a notice of appeal to the Refugee Appeals Tribunal but I am satisfied that this was done out of caution and to prevent an issue of time being raised in the future and nothing further has been done on the foot of the notice of appeal. In these circumstances I am quite satisfied that the applicant should not be estopped from seeking judicial review."

5. Herbert J. was also, of course, ruling on that leave application well in advance of the other judgments which have since highlighted this issue in asylum cases, not only the Supreme Court judgment in the *A.K.* case, but the important detailed consideration of the issue by Hedigan J. on the 9th October, 2008, in the case of *N. v. The Refugee Applications Commissioner* and my own judgments in the *Diallo* and *Mhlanga* cases of 27th January, 2009. (In passing I would make the observation that in the versions of my own judgments as downloaded from the Court's website they are described as being "ex tempore" judgments. In fact those cases were heard respectively on the 20th and 21st January, 2009 and the judgments were reserved precisely because of the coincidence of the issues raised and given on the 27th January, and they were, I hope, somewhat more considered in their deliberation than the designation "ex tempore" might imply.)

6. It follows from this case law in the Court's view, and it is accepted by both sides in the present case, that *certiorari* can, in principle, issue to quash the report and recommendation of the Refugee Applications Commissioner under the Act even where an appeal is available and has been initiated in good time. However, it is now equally clear that this Court should only intervene in exceptional and clear cases where it is necessary to do so. Once again, I express my agreement with the appraisal by Hedigan J. in his description of the circumstances which can call for such intervention given at para. 45 of his judgment in the *N* case where he says:-

"It is clear that it is only in very rare and limited circumstances indeed that judicial review is available in respect of an ORAC decision. The investigative procedure with which ORAC is tasked must be properly conducted but the flaw in that procedure that entitles an applicant to judicial review of an ORAC decision must be so fundamental as to deprive ORAC of jurisdiction. The Courts, the applicants themselves and the general public have a right to expect that no such fundamental flaw should ever occur in such an application. An applicant must demonstrate a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal to the Refugee Appeals Tribunal. When such a clear and compelling case is not demonstrated, the applicant must avail himself of the now well established procedure that has been set up by the Oireachtas which provides for an appeal to the Tribunal."

7. In my own judgment in the *Diallo* case I endeavoured to summarise the applicable criteria when I said at para. 21:-

"It follows accordingly from this case law, that leave to apply for judicial review to quash a report and recommendation of the Commissioner should only be granted in exceptional cases and that to bring an application within the category of such cases it is necessary to advance substantial grounds for the existence of some fundamental flaw or illegality in the Commissioner's report such that a rehearing upon appeal before the Tribunal will be inadequate to remedy it."

I illustrated the distinction by reference to the *Stefan* case where only a written appeal was available and the flaw alleged lay in the failure of the Commissioner to

take account of an allegedly material piece of documentary evidence because it was in the Romanian language and had not been translated. I concluded at para. 22 of my judgment in that case, after referring to Denham J.'s judicial aphorism in the *Stefan* case about "a fair appeal not curing an unfair hearing", by saying:

"While such a judicial aphorism has considerable attraction it does not offer an immediate solution for all these cases. It depends on what is meant by 'fairness'. An applicant may well consider it is unfair that part of his account has been judged incredible or that some contrary evidence is attributed more weight than his own. It is clear, however, from the case law already cited that unfairness in this sense means some fundamental error or irregularity at first instance amounting to a clear infringement of the right to fair procedures. The procedure at first instance must be shown to have been so flawed that, in the words of Lynch J. in *Gill v. Connellan* [1987] I.R. 381 describing the defectiveness of a District Court hearing, 'On appeal to the Circuit Court, therefore, the appeal could hardly be said to be by way of rehearing. The case would be more truly heard for the first time.'"

That appeared to me to be precisely the situation in the Stefan case where the translation of the document would only first be considered before the Tribunal.

8. The judgment of Hedigan J. is not mentioned by the Chief Justice in his ex tempore judgment in the *A.K*. case and clearly my own judgments of the previous day would not have been known to the Court or to counsel in that case, nevertheless it seems to me that the criteria indicated in the above judgments of Hedigan J. and myself appear to be entirely compatible with the law as stated by the Supreme Court in the *A.K*. case. This Court must therefore address the issue of the exercise of its discretion in cases where it is sought to quash a report and recommendation of the Commissioner in lieu of availing of the remedy of the statutory appeal.

9. It is in the light of those criteria that it is necessary to determine whether the appeal available to the applicant in the present case is adequate or whether the illegalities alleged in the Commissioner's decision are incapable of being remedied because they are such as must have continuing adverse effect upon the applicant in the course of the appeal.

10. The first ground upon which leave has been granted and which it is proposed to advance is as follows:

"(A) Insofar as the Refugee Applications Commissioner found that State protection might reasonably have been available to the applicant, such finding was made without any or any sufficient evidence to sustain it in circumstances where such apparent finding was material to the Commissioner's conclusion."

11. There must be some doubt as to whether there is in the relevant passage in the report any actual finding as alleged, as opposed to an expression of doubt as to credibility on the part of the Commissioner together with the expression of a view that, if true, the applicant's claim that he fled because he feared arrest for membership of the NDPVF was a flight from prosecution and not from persecution. There does not appear to be any reason, however, why that ground is not eminently suited to being canvassed and decided on appeal before the Tribunal. The applicant is in effect saying that there was no evidence that State protection in such circumstances is available in Nigeria; that the police are corrupt; that the Itsekiris are members of the police and that the country of

origin information produced by the Commissioner contradicts the alleged finding. Indeed, the applicant's position is probably stronger before the Tribunal because he is entitled now to produce new country of origin information which contradicts the Commissioner and proves his own assertion.

12. The second ground on which leave is granted is as follows:

"(B) The finding by the Refugee Applications Commissioner that the applicant was outside his country of nationality because he was fleeing prosecution for lawful punishment and not, as claimed by him, due to persecution because of his political opinion was based on hearsay, speculation and conjecture."

13. Again, if it is assumed that the decision does contain such a finding, there is no obvious reason why it cannot constitute the subject of a rebuttal and disproof before the Tribunal. If that was, on the part of the Commissioner, a misconstruction or misunderstanding of the evidence given in the interview, it can be corrected by the applicant's fresh testimony.

14. The third ground is as follows:

"(C) The failure of the Refugee Applications Commissioner to disclose to the applicant and to put to him the relevant contents of documents containing country of origin information specifically in relation to his membership of the NDPVF was contrary to fair procedures and natural and constitutional justice."

15. It is true that reliance on a document not disclosed to an applicant can be a breach of fair procedures but it depends on the nature of the document and the use made of it in reaching the conclusions in the report. There was an example of that in the *Mhlanga* case which was the subject of one of my judgments on the 27th January, 2009. One undisclosed document described as "Appendix 4 – Citizenship Laws of the World" contained extracts from the citizenship laws of Mozambique. Leave was granted in that judgment on the ground that, because of the importance attached in the conclusion to the finding of an entitlement to Mozambique nationality, it was arguable that the nondisclosure of the source of information about entitlement to nationality could infringe the right to fair procedures. However, another alleged undisclosed document in that case did not fall into the same category. It was a U.K Home Office document entitled "Zimbabwe Bulletin-Nationality Testing" which had been used merely as a crib for questions to be put by an interviewer in testing knowledge of Zimbabwe - telephone codes, the words of the national anthem and so on. That was something that any interviewer could have devised for himself. The Court considered that it did not constitute an arguable case of breach of fair procedures so that even though the document was undisclosed, it did not form a basis for granting leave to seek judicial review to quash the decision of the Commissioner.

16. In the present case the impugned document is the country of origin information in which the Commissioner obtained information about the activity of "bunkering" by members of the NDPVF. However, this issue, the applicant's knowledge of that activity and his and the NDPVF's involvement in it had been a subject of the interview and the applicant gave direct answers to the questions on it. If the applicant takes issue with any other aspects of that topic or contests other contents of the country of origin document in question, those matters are clearly capable of being addressed before the Tribunal on appeal. So far as concerns the content of the Commissioner's decision and the basis upon which

this conclusion, if such it be, was reached, the Commissioner does not appear to have relied on any factor drawn from the country of origin document which was not put to the applicant and dealt with by him before the Commissioner.

17. The fourth ground D is as follows: "The Refugee Commissioner made several adverse findings of fact against the applicant without putting any of his concerns in relation to them to the applicant in breach of fair procedures and natural and constitutional justice."

18. As I have said, it may be highly doubtful whether the matters suggested as findings of fact are such. The entire of Section 4 of the Commissioner's decision seems to be more properly characterized as a resumé of the applicant's own evidence for his claim to a well founded fear of persecution, into which the Commissioner interjects a series of observations or queries. These identify the doubts, implausibilities and inconsistencies which lead the Commissioner to an overall conclusion as to a lack of credibility in the description of the applicant's involvement in spying and other activities in the NDPVF and of his having to flee after the Itsekeris pursued him and broke into his house. If the challenge to the report on this basis is arguable, it is a challenge to the effect that the assessment of the applicant's story is mistaken and wrong and that another assessment should have been made. To so argue is to require another view to be substituted and that is precisely the function and the proper role of the Tribunal on appeal and not the role of the High Court in judicial review.

19. The case has been put to the Court on behalf of the applicant that he is entitled under the scheme of the Act to have his case fully and fairly considered at the first stage by the Commissioner, and that he should not have to go before the Tribunal, as it were, already handicapped by an unfair hearing and a defective report. This argument, in the Court's view, is unsound and is based on a mistaken view of the nature of the statutory scheme of the asylum process. That process is indeed in two stages, made up of an investigative stage before the Commissioner at first instance, followed by a second stage, an appeal review in which the Tribunal can either affirm or set aside the report and recommendation. In so doing, the Tribunal is fully entitled to substitute its own appraisal of the facts and evidence, including of any new evidence adduced by the applicant, and also of the credibility of the applicant himself in giving testimony when he appears in a case which has an oral hearing.

20. The full scope of that appeal and the latitude for the substitution of an appraisal which is the full opposite to that reached by the Commissioner in the report, is not in any sense restricted or impaired by the fact that the appeal's starting point and the procedural framework for the appeal is the Commissioner's report to which the Appeal Tribunal is required to have regard. Nor is it diminished or circumscribed by the change from an investigative forum to quasi adversarial procedure in which the Commissioner is represented before the Tribunal in order, as it were, to stand over the report. The Commissioner acts as a type of *legitimus contradictor* who provides the adversarial element which permits the Tribunal to test and tease out the issues, but this in no way inhibits the Tribunal in reaching a conclusion that the Commissioner has made mistakes; that he has relied on wrong or inadequate evidence; that he has misunderstood the applicant, or in deciding in the light of entirely new evidence submitted by the applicant that conclusions which might have been tenable before the Commissioner should, on balance, no longer be allowed, and that a new view of the case should be taken.

21. That is the statutory role of the Tribunal as a second stage to the Commissioner's investigation and it is because those roles are adapted to the nature and requirements of an asylum process with all of its complications, uncertainties, its urgencies, and the need for a special understanding of the complex disputes and conflicts in some of the world's most troubled and inaccessible areas, that this Court should be slow to trespass upon the function of the Tribunal. It should confine itself to the necessary correction of significant illegalities in the first stage investigation by the Commissioner when it is indispensable to do so in order to preserve the effectiveness, fairness and integrity of the appeal that is otherwise available to the Tribunal.

22. The Court is satisfied that this is not one of those cases. It is clear that the essential arguments to be advanced in support of the four grounds on which leave was granted are well capable of being dealt with by re hearing and the substitution of new view by a Tribunal member when the appeal is pursued.

23. For that reason the application for an order of *certiorari* and the other reliefs sought will be refused in this case.