Neutral Citation Number: [2011] IEHC 144

THE HIGH COURT

JUDICIAL REVIEW

2007 1189 JR

BETWEEN

U. S. I.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 7th day of April 2011

1. By order of the 19th May, 2010, the Court (Clark J.) granted leave to the applicant to seek judicial review of a decision of the second named respondent dated the 29th August, 2007, which affirmed the negative recommendation on her asylum application made by the Office of the Refugee Applications Commissioner under s. 13 of the Refugee Act, 1996 of the 6th February, 2007.

2. The ground upon which leave to apply for judicial review was granted is as follows:-

> "The Tribunal member failed to deal with sufficient clarity what (sic) her ultimate conclusions on credibility were and failed to adequately explain her reasons for finding that police protection was available to this applicant."

3. The applicant is national of Nigeria, born in October 1987, who arrived in the State in January 2007 and gave birth to a baby daughter in Dublin on the 9th April, 2007. She applied for asylum shortly after arrival and was interviewed under s. 11 of the Act of 1996 on the 5th February, 2007.

4. She claimed that her mother had died in September 2005 and that shortly afterwards her father had brought a woman into the house to help look after the applicant's younger sister. Soon afterwards she was told that this woman was to be her new mother. The woman in question ran a restaurant and told the applicant that she would have to work in the restaurant selling food and drinks to customers. The applicant claimed that the woman began forcing her to become familiar with customers and to force her into prostitution with them. Her stepmother beat her when she refused the advances of customers. She ran away to a friend's house and later to her friend's family home in Abia state some two or three hours away. Her stepmother came for her and took her back and is alleged to have threatened to kill her unless she engaged in prostitution.

5. In October 2006, a man called Joe, whom she had met in the friend's village, came to visit her in the restaurant. When he learned of how she was being treated he said he would help and he arranged for her to escape and paid her fare to get to Ireland.

6. The s. 13 report was based on a detailed analysis of the applicant's story and concluded in very explicit terms that the story was not credible. The following particular points were made:-

> - The applicant made no attempt to avail of the protection of the Nigerian authorities nor did she submit any credible explanation that would suggest that they would not have dealt with the applicant's accusations regarding such alleged serious matters as physical assault, enforced prostitution and threatened killing in an appropriate manner;
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> - She claimed that her stepmother's "men are everywhere" but did not credibly convince that her stepmother had considerable undue influence with Nigerian authorities nor did the applicant submit any documentation in relation to this;
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> - The applicant admitted that she did not even properly inform her father about her stepmother's alleged constant attempts to force her into prostitution nor the constant threats to kill her;
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> - The applicant did not submit any medical documentation in relation to the bruises she is alleged to have received during the beatings by her stepmother;
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> - The applicant failed to credibly convince that her stepmother would kill her if she were to return to her country of origin considering that the applicant's stepmother was unable ultimately to force the applicant into prostitution despite her constant efforts;
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> - Given that the applicant's account of having suffered persecution in Nigeria was deemed to lack credibility, the internal relocation option was not regarded as being a particularly relevant one in this instance;
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> - In conclusion the applicant failed to credibly prove that her stepmother would possess both the ability and the inclination to track the applicant down to any location across Nigeria and subsequently kill her due the applicant's refusal to become a prostitute.

7. The reason for the particular formulation of the leave ground lies in the approach to the issue of credibility adopted by the Tribunal member in Part 6 of the decision: "Analysis of the Applicant's Claim". She starts by defining the purpose of the analysis by saying that if the applicant has reasons to fear returning to Nigeria, what the Tribunal must decide is whether the fears are well founded and based upon proper Convention grounds. She says: "in accessing (*recte* assessing) any application the Tribunal must have regard to the credibility and the coherence of the account given by the applicant". This, in effect, anticipates an analysis of credibility in what follows.

8. The analysis then makes a number of particular observations as follows:

> (a) The applicant never made any report to the police of the threats, beatings or attempts to force her into prostitution. The Tribunal member says: "While the Tribunal accepts that there may be police in Nigeria who took money and may accept bribes, it does not accept this to be a reasonable explanation for the applicant failing to seek protection of the police at any stage . . .".

(b) "The applicant's assertions that she did not know if there were any women's organisations who would assist her or how she would go about seeking their help is difficult to believe . . .".

(c) "It does not seem capable of belief that the applicant, an educated lady would not have inquired about any internal means of redress available to her before travelling to a strange country to seek asylum".

(d) "The Tribunal believes that the applicant's failure to seek state protection about her own problems at any stage in Nigeria defeats her claim".

9. While these observations might be read as indicating a belief on the part of the Tribunal member that the applicant lacks credibility, there is no explicit statement that a finding to that effect is being made. The reader is thus left to infer that the Tribunal member doubted the applicant's general credibility, particularly having regard to the fact that the conclusion at the end of the decision refers explicitly to the s. 13 Report of the Commissioner and affirms the negative recommendation.

10. On the other hand, the analysis makes a number of observations which are consistent with the finding that state protection would have been available to the applicant had she made reports to the police in Nigeria, thus raising the possible inference that she had established a need for such protection. The Tribunal member says:-

(a) The Tribunal is aware that assaults and threats to kill are criminal offences punishable in accordance with the law of Nigeria;

(b) Country of origin information from May 2006 confirms that while membership of secret cults is not illegal, illegal acts performed by those cults are treated as criminal offences by authorities;

(c) The alleged actions and threats by the stepmother who is not related by blood to the applicant were those for which police protection would be available;

(d) As already mentioned, the applicant's failure to seek state protection about her own problems at any stage in Nigeria defeats her claim;

(e) State protection would have been available to the applicant in relation to the alleged illegal actions of her stepmother including the threats to her life if she had sought to avail of it;

(f) The Tribunal member concludes "the Tribunal is of the opinion that as the applicant failed to seek the protection of the police; she is not in a position to say that the state was unable or unwilling to provide her with police protection."

11. The decision therefore contains an express finding to the effect that the applicant, if returned to Nigeria, would not have an objective basis for fearing the harm she complained of at the hands of her stepmother because the Nigerian police authorities would afford her protection. Furthermore, the finding is not stated to be made as an alternative or out of an abundance of caution on the basis; "even if the account was accepted as being true…". The difficulty which this poses is that logically, an examination of the availability of state protection is only appropriate where it is accepted or found

that a need for protection has been established on the basis of the claim made. That would be at variance, therefore, with a reading of this decision to the effect that the Tribunal member found the basis of the claim lacking in factual credibility. In the normal course the Court would have been inclined to read the earlier parts of the analysis in this decision as containing an implied finding similar to that of the s. 13 report on the issue of credibility. In this case, however, counsel for the respondents has maintained strongly and unambiguously that the decision is to be read as containing or, at least, clearly implying an acceptance of the facts and events recounted by the applicant as being true namely, the mistreatment at the hands of the stepmother. If, however, that is the correct way in which to read the decision, the Tribunal member must be taken as departing in an important way from the analysis made of the application by the Office of the Refugee Applications Commissioner and doing so without any express finding or explanation.

12. In this regard, it must be borne in mind that although the appeal before the Tribunal is a full appeal on all relevant matters of fact and law and that the Tribunal member is entitled to make a full re-examination of the application in the form of a *de novo* hearing, it constitutes the second stage examination and determination of the asylum application. When the matter comes before the Minister for his decision under s. 17(1) of the Refugee Act 1996, he has before him both the s. 13 report of the Commissioner and the appeal decision of the Tribunal. Where each decision contains the negative recommendation it is important both for the information of the Minister and for the benefit of the asylum seeker, that the basis upon which each decision has been reached is clearly evident and that there is a coherence in the reasons given.

13. In its judgment on a similar issue in *A.S.O. v R.A.T. and Another* (Unreported, High Court, 9th December, 2009) this Court put the matter in the following way:

> "28. In the present case, had there been no application for judicial review, the Minister would have been required to make a determination under s. 17(1) on the basis of a s. 13 report in which the applicant's entire story has effectively been discredited as untrue; and an appeal decision which appears to accept the story as true but which bases the affirmation on the availability of State protection and the possibility of internal relocation.
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> 29. While that might not pose any practical difficulty for the Minister in making the determination, it does not appear to be compatible with the clarity of explanation and the transparency of decision making expected of asylum procedures that a claimant should be left at the end of the process unable to identify the precise ground upon which the application for refugee status has failed. Furthermore, the fact that the applicant cannot tell whether the account of having suffered persecution or threats of serious harm has been accepted or rejected as untrue may create disadvantages for the applicant at subsequent stages when subsidiary protection is sought or when representations are made against a deportation order with a view to obtaining temporary leave to remain in the State upon humanitarian grounds. Accordingly, in the court's view, where a s. 13 report makes a negative recommendation based entirely or predominantly upon detailed and cogent findings of lack of credibility, it is undesirable, particularly where there has been an oral hearing on appeal, that the issue of credibility should be left hanging in the air without any specific comment in the appeal decision of the Tribunal."

14. For the same reasons the Court considers that the first part of the twofold ground for which leave was granted has been made out in the present case. Indeed, it might well be said that the difficulty is rendered more acute in this particular case, because of the

submission made on behalf of the Minister to the effect that the decision is to be read as fully accepting the core elements of the applicant's claim. For the Minister to proceed to refuse the declaration under s. 17(1) on this basis creates uncertainty as to whether the refusal is based upon that reading by the Minister of the appeal decision or upon an acceptance of the negative analysis of credibility made by the Commissioner. Clearly, as it is the Minister who must make the determination of any subsequent application for subsidiary protection and leave to remain, (including in the latter respect the assessment of refoulement,) the unavoidable uncertainty on this issue constitutes a prejudice to the applicant.

15. The Court does not accept, however, that the second aspect of the ground has been sustained. In the judgment of the Court there is no room for ambiguity as to the reasons why the Tribunal member concluded that state protection would be available to the applicant if returned in these circumstances. The source of the claimed persecution was clearly identified as being the applicant's stepmother and, as such, a non-state actor. The persecution in question was clearly found to involve threats and acts which constituted criminal offences in Nigerian law. That was a finding which the Tribunal is entitled to make based upon its specialised general knowledge of a country from which a very large number of asylum applications are received in this jurisdiction. Furthermore, the reports relied upon by way of country of origin information clearly provided a basis for holding that such criminal acts would be such as to entitle the applicant to seek police protection.

16. The primary relief claimed in this application is an order of *certiorari* to quash the appeal decision of the 29th August, 2007 but the Court is asked also to remit the decision to be reconsidered by a different member of the Tribunal. The part of the ground upon which the applicant has succeeded is essentially directed at the adequacy of the explanation given in the appeal decision for the negative recommendation and the affirmation of the s. 13 report. The applicant has not established the existence of any substantive error of law on the part of the Tribunal Member in reaching the conclusion upon which the resulting recommendation is based. In the Notice of Appeal which was the basis of the proceeding before the Tribunal, the finding of lack of credibility in the s.13 report had been put in issue in Ground No. 4:" The Appellant does not lack credibility". It also contained Submission No. 6: "The Appellant has presented a claim which is coherent and plausible not contradicting generally known facts and is, on balance, capable of being believed". In essence therefore the Tribunal Member has failed to state or to state adequately a reason for rejecting that ground. A question arises for the Court therefore as to what relief is necessary and appropriate in these particular circumstances?

17. In the statement of grounds the applicant seeks an order in the event that *certiorari* issues, remitting the matter " to a re-hearing by a member of the Refugee Appeals Tribunal other than Susan Nolan in accordance with such directions as to the Honourable Court may seem just or appropriate". Given that no fault is found or alleged in the conduct of the appeal before the Tribunal member in question and her understanding of the evidence is not impugned, is it necessary or appropriate to require that this stage of the asylum process be fully reversed so that it be recommenced with a new hearing before a different decision-maker when only the Tribunal member's explanation is wanting? This is of particular concern having regard to the overriding imperative of expedition in asylum procedures. The Court considers that it should, so far as possible exercise its jurisdiction in judicial review in a manner which avoids causing unnecessary delay and duplication of litigation.

18. That the High Court has jurisdiction to remit the matter to the Tribunal for reconsideration is not in doubt. Order 84, r. 26(4) of the Rules of the Superior Courts provides:

> "Where the relief sought is an order of *certiorari* and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the Court, Tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court."

It is the precise basis upon which the Court should remit the matter which requires to be determined in this instance.

19. Under the second Schedule to the Act of 1996, the management of the case load of the Tribunal is entrusted to the direction of the Tribunal's Chairperson. (See paras. 13-16 of the Schedule). In the view of the Court, this managerial responsibility does not preclude the High Court directing or recommending to the Tribunal how the further consideration of an appeal ought to be handled when an existing appeal decision has been set aside by *certiorari*. In the judgment of the Court it is within the Court's power to direct or recommend how a flaw found in an appeal decision is to be remedied when a matter is remitted to the Tribunal. The question as to how the discretion of the Court under the Rule quoted above is to be exercised has been adverted to in a number of cases but primarily, it would seem, where the choice was between remitting and not remitting. (See for example *Sheehan v Reilly* [1993] 2 I.R. 81 and *Ahern v Kerry County Council* [1988] I.L.R.M. 392). The basis upon which directions or recommendations might be added to an order remitting a matter has, so far as this Court has been able to ascertain, been discussed, at least in recent times by reference to the above Rule, only in the judgment of Kelly J. in *Usk and District Residents Association v. An Bord Pleanála* [2007] 2 I.L.R.M. 378. That case arose out of a planning proceeding in which the planning inspector had recommended refusal of planning permission to the company Greenstar but An Bord Pleanála disagreed and decided to grant permission. That decision however, was found to be flawed and was set aside by the High Court. The applicant association, as objectors to the development, opposed the matter being remitted to the Board but Greenstar argued that in such an event, it would be obliged to start the planning process all over again. All the applicant's complaints related to matters which had occurred subsequent to the inspectors' report. Kelly J. held:

> "In these circumstances, it seems to me that it would be unjust not to remit the case for further consideration by the Board subject to certain conditions and recommendations. To refuse to remit would be disproportionate to the rights and entitlements of Greenstar, having regard to the limited complaints made and the even more limited basis upon which *certiorari* is being granted.
>
> Apart from the great expense and inconvenience which would be caused by sending the project back to the drawing board, it would also lead to an inevitable and disproportionate delay in having the matter finally decided."

Kelly J. proceeded, however, to make a number of recommendations. He said:

> "I strongly recommend that the Board exercise the power given to it to reopen the oral hearing. That will enable up-to-date information to be placed before the Board's inspector and for any other matter which is considered appropriate to be dealt with by the inspector and, ultimately, the Board. I also recommend that further consideration of this matter by the Board be dealt with by members of it who have not had a previous involvement in the case."

20. In other words, Kelly J. considered it within the competence of its discretion for the High Court to both recommend the reopening of an oral hearing and the identity of the composition of the inferior Tribunal by which the matter would be considered. By way of corollary therefore it is within the competence of the High Court to recommend that

further consideration be by the same decision-maker and that a new hearing is unnecessary.

21. In the judgment of this Court, equivalent considerations apply here. The reason for granting *certiorari* is that a flaw has been found in the appeal decision but it is an error of omission in that the appeal decision does not contain an element necessary for the complete examination of the asylum application by providing an explicit ruling upon an appeal ground which the decision obviously intended to reject. In these circumstances, provided the same Tribunal member remains in office and is otherwise available for the purpose, it would clearly be disproportionate and unnecessary to remit the matter for a full re-hearing before a different Tribunal member with the further delay and additional expense which that will occasion. The Court will therefore order that the matter be remitted to the Tribunal and strongly recommend that it be assigned to the same Tribunal member for the limited purpose of making a supplemental decision stating clearly the basis of the finding on lack of credibility and the reasons for it.

22. For the avoidance of doubt, however, the Court should make it clear that in the event that the same Tribunal member is unavailable to make such a supplementary decision, it is open to the Chairperson of the Tribunal to withdraw the decision of the 29th August, 2007 and assign the matter for a full re-hearing before a different Tribunal member.

23. The order of the Court will therefore be in the following terms:

> i) The decision of the second-named respondent dated 29th August 2007 is quashed to the extent only that it omits an express reasoned finding upon Ground No. 4 of the Notice of Appeal dated 5th March 2007;
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> ii) The appeal is remitted for further consideration by the Tribunal with the recommendation of the Court that it be considered by the second-named respondent by making a supplementary decision which remedies the above omission without reopening of the appeal hearing.