Neutral Citation Number: [2009] IEHC 463

THE HIGH COURT

2008 673 JR

BETWEEN/

G. O. I.

APPLICANT

AND

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

RESPONDENTS

EX TEMPORE Judgment of Mr Justice Cooke delivered 15th day of October, 2009

1. In this application for leave the primary issue before the court is not so much whether the grounds proposed to be raised in the statement of grounds are substantial grounds in the sense of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, but whether, if one or more of them are substantial grounds, they go to such fundamental illegalities in the s. 13 report, which is the subject of this challenge, that they can and ought to be remedied by *certiorari* prior to the completion of the asylum procedure in the pending appeal before the Tribunal.

2. This is a case in which the applicant's claim to a fear of persecution if returned to Nigeria was negatively assessed by the Commissioner's authorised officer upon the basis of the availability of state protection and internal relocation. The applicant is a 22 year old woman from Nigeria who says that she was offered a job by an acquaintance of her family in Nigeria, a "Mama G", but then found herself trafficked to Ireland and put into prostitution. She managed to escape after two weeks and then claimed asylum. She fears that if she returns to her family in Nigeria Mama G will

find her and target her for reprisal. The factual aspects of that account are not put in question in the s. 13 report of the authorised officer, Ms. Bell. She does, however, rely on certain documentation by way of country of origin information to reach the view that the applicant's expressed fear is not well founded because, if returned, state protection would be available to her and that she could also avoid the reprisals of Mama G by relocating elsewhere in that country.

3. The documentation in question was apparently consulted by the authorised officer at or prior to the s. 11 interview because it is referred to as being put to the applicant in the s. 13 report. The documentation is referred to at s. 3.3.1 of the report.

4. This is not, therefore, a case in which it is claimed that there was a breach of fair procedures in that country of origin information was consulted after the interview and that the applicant was deprived of an opportunity to comment on it or to rebut it. The case made here is that the authorised officer chose to rely selectively on and to cite in the report only those extracts from the documentation which supported the negative conclusion. It is argued that any balanced view of the documentation could only conclude that the document in question supported rather than contradicted the applicant's assertion that state protection and internal relocation would not be available or feasible.

5. It must be said that, on this point, counsel for the applicant, in the written submissions, makes a forceful case by identifying specific passages in the document in question which run counter to those chosen for quotation by the officer in the report. To quote but one example:

> "In some cases the trafficked persons may possibly be at risk of ill treatment or revenge if the trafficked person returns to Nigeria before the Madam or agent has been satisfied with payments."

6. It is arguable, therefore, that if this was a challenge to a conclusion contained in a Tribunal appeal decision it might well be a substantial ground for arguing that the conclusion flew in the face of the country of origin information and was sufficiently unbalanced or irrational as to require annulment; but that is not the issue now before this Court.

7. The issue is whether, notwithstanding the force of the attack on the assessment of the country of origin documentation, it is necessary to intervene by way of judicial

review and to interrupt the completion of the asylum process by deciding that the Refugee Appeals Tribunal ought to be dispossessed of the pending appeal.

8. Clearly, in so far as the grievance advanced is directed at the use and appraisal made by the authorised officer of the country of origin documentation and to the extent that it is argued that a different conclusion ought properly to have been reached, the matter is eminently apt for appeal. It is a matter of urging a new decision maker to take a different view. However, as in the other cases of this kind, counsel for the applicant submits that the report, as such, is unlawful for failing to comply with the mandatory duty on the authorised officer as a "protection decision maker" under the European Communities (Eligibility for Protection) Regulations 2006 to take into account and, if necessary, actively to seek out for that purpose and to investigate, the matters listed in Regulation 5(1) (a) to (e) and especially those matters identified in paragraphs (a) and (c).

9. The precise argument in this respect seems to be as follows:

   A. Both the authorised officer and the Tribunal member are designated as "protection decision makers" in the definition of "protection decision" contained in Regulation 2. As a result, each has, as it were, a joint and several investigative responsibility to consider those relevant matters, so as to ensure that each of the decisions complies with the minimum standards of Directive 2004/83 EC, which the Member States are required to achieve;
   B. If the authorised officer, at the first stage, errs in complying with those minimum standards by failing to take into account the mandatory considerations in Regulation 5(1) including, where appropriate, failing to actively search out such information and assess it, the report is unlawful;
   C. Furthermore, that deficiency is incapable of being cured by the statutory appeal because under the 1996 Act the Tribunal member has no equivalent investigative obligation; and
   D. In addition, the appeal is inadequate and incompatible with requirements of the Regulations and of the Directive because under the 1996 Act there is a shift against the applicant of the burden of proof, which amounts to a presumption that the appellant is not then to be considered a refugee. (See 11 A(3) of this Act.)

10. The court considers that this argument is unfounded because it is, in effect, based upon a misunderstanding of the relationship between the procedures of, on the one hand, the 1996 Act and on the other those of the 2006 Regulations and the 2004 Directive. The crucial flaw in the argument is the supposition that because both the authorised officer and the Tribunal member are "protection decision makers" by virtue of the definition in Regulation 2, such that each so called "decision" in the s. 13 report and recommendation of the Commissioner and the appeal decision of the Tribunal, must separately and fully comply with the requirements of Regulation 5(1) if each is to be lawful.

11. It must be borne in mind that the explicit objective of the Directive is to require the Member States to adopt a common policy and uniform standards in according refugee status. See in particular recitals 6 and 7 of the Directive which provide:

> "6. The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.
>
> 7. The approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movements of applicants for asylum between the Member States, where such movement is purely caused by differences in legal frameworks."

12. The Directive is concerned, therefore, with the adoption of common minimum standards for the identification and recognition of persons entitled to be declared refugees. In accordance with Article 249 (second paragraph) of the Treaty it leaves to the Member States the choice of form and method for the manner which that objective is to be achieved in the national administrative systems and procedures. The Directive is not as such concerned with harmonising the national administrative procedures for the asylum process. What is required of each Member State is that when an applicant is granted or refused international protection including refugee status, that decision is based upon the common criteria and minimum standards the Directive aims to achieve.

13. The scheme whereby Ireland has chosen to attain that objective in complying with the minimum standards is contained in the 1996 Act in conjunction with the Regulations in S.I. 518 of 2006, which transposes the 2004 Directive into Irish law.

That involves what is, in effect, a three stage procedure which leads to the final decision:

(i) The investigative stage of interview and the section 13 report and recommendation.

(ii) The possible appeal to the Tribunal with an affirmation or rejection of the appeal and;

(iii) The final decision on the grant or refusal of the declaration of refugee status made by the Minister under section 17.

14. Nothing in the Directive precludes a Member State giving effect to its common criteria and minimum standards by means of such procedures. The objective of the Directive is thus fully respected and accomplished in this Court's judgment once the decision on refugee status, which results from s. 17, is based on a process in which the requirements of Regulation 5(1) have been taken into account in arriving at the basis for the grant or refusal of the declaration. It follows, accordingly, that this Court must reject as misconceived an interpretation of the Directive which seeks to maintain that any s. 13 report which is deficient in complying with the requirements of Regulation 5(1) is necessarily unlawful. It is not incompatible with the Directive that such deficiencies are capable of being remedied by appeal to the Tribunal.

15. The duty addressed to the Member State by the Directive is one to adopt and apply at least the minimum standards laid down for " ... the assessment of an application for international protection". But it does not seek to harmonise or alter the national administrative procedures in place for that purpose. What is crucial, therefore, is that when the declaration which embodies that assessment is granted or refused under s. 17, the procedures which lead to that stage cumulatively attain and apply the minimum standards. In this Court's judgment that obligation is satisfied when any errors or misjudgements on the part of the Commissioner in the s. 13 report, including deficiencies in complying with the requirements of Regulation 5(1) are remedied by the appeal before the Tribunal.

16. It follows, therefore, that there is no reason in this case, based only on the provisions of the 2006 regulations, why the court should intervene by way of judicial review in the light of the complaints against the treatment of the country of origin information in this report. As mentioned, this is not a case where new evidence or information is being put to the Tribunal member for the first time. The impugned country of origin

documentation was before the authorised officer at the interview and what is required by the applicant is that a different more balanced appraisal be made of its contents and that is the function and purpose of the appeal.

17. Nor does the court consider that the stipulation in s. 11A (3) of the 1996 Act as to the burden of proof on appeal, is incompatible with the provision in the regulations or with the aim or standards of the Directive. It does not amount to a presumption that the appellant is not a refugee. It fixes a logical framework and procedural starting point for the appeal. Nor, on the other hand, does it necessarily relieve the Tribunal member from the obligation to take account of the matters required by Regulation 5(1) or of the need to investigate any new matters that arise and, if necessary, to do so by recourse to s. 16(6) of the 1996 Act by having any necessary further enquiries made.

18. As counsel for the applicant points out, the Tribunal member too is a "protection decision maker" for this purpose. This includes, if it is necessary and relevant, the taking into account of other matters pointed to by the applicant, such as the manner in which pertinent laws and regulations are applied in Nigeria, or more detailed consideration of the practicality and feasibility of internal relocation. These are matters capable of and more suitable to be dealt with by the appeal. The fact that they are alleged not to have been pursued or examined or researched by the authorised officer as fully as ought to have been done does not mean that the s. 13 report must now be quashed. It is at the point where the asylum procedure concludes, namely when the matter is finalised for the Minister's decision under s. 17(1), that it is appropriate to determine whether the assessment of the application for international protection has lawfully satisfied the minimum standards laid down.

19. That is why it is necessary and appropriate for the court to postpone any intervention in the procedure by judicial review until that point, save in the rare and exceptional cases where it is necessary to intervene as identified in the now well settled case law.

20. For these reasons, the court does not consider it appropriate to grant leave in this case.

Approved: Cooke J.