[2009] IEHC 21

THE HIGH COURT

JUDICIAL REVIEW

[2006 No. 1361 J.R.]

BETWEEN

V. O.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Ms. Justice Clark delivered on the 23rd day of January, 2009.

1. This is an application for leave to apply by way of judicial review for an order of *certiorari* of the decision of the Office of the Refugee Applications Commissioner (ORAC), dated the 3rd November, 2006, recommending that the applicant should not be declared a refugee.

2. The applicant relies on two grounds:-

   a. That the authorised ORAC officer erred in law in coming to his decision without first consulting country of origin information. The applicant argues that it is mandatory for ORAC in every case to consult country of origin information even if the applicant himself calls no such information; and

   b. That the ORAC officer erred in law in failing to take into account the provisions of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006). The applicant argues that

there is a mandatory obligation to do so and that failure to take the Regulations into account renders the decision invalid.

3. The applicant argues that as a result of the failure to consult country of origin information the applicant has not had a fair hearing and the decision should therefore be quashed.

4. The respondents argue that the applicant's complaints relate to the ORAC decision and not to the conduct of the hearing and that the appropriate step therefore would be to appeal the decision to the Refugee Appeals Tribunal. They further rely on the argument that the European Communities (Eligibility for Protection) Regulations 2006, which they say are known as "Subsidiary Protection Regulations", have no application here and are merely a red herring.

Factual Background

5. The **facts of the case** were found not to be credible and the application for refugee status was rejected on the basis of the applicant's application form and ORAC interview. Those facts are that the applicant is a citizen of Nigeria and lived in Lagos. His wife and four children are already in Ireland, his youngest daughter having been born in the State on the 31st October, 2003, shortly after the arrival of her mother. The applicant's children travelled to Ireland separately in 2006 in the company of an agent.

6. In his ORAC application form, the applicant stated that he was employed as an estate surveyor and valuer in Nigeria and had been in such employment for the previous sixteen years. He holds a Higher National Diploma in Estate Management and attended the Federal Polytechnic for five years. The basis for his application for refugee status is "*because of a death sentence passed on him by the Ogboni Aboriginals for failure to sacrifice his last daughter in consonance with the wish of*

his late father in law, Chief Okawara by facilitating his wife to leave Nigeria in 2003, thereby aborting the traditional rites incidental to the above". He asserted that "*more recently they gave me an option of joining the group or death. As a Christian I abhor such group hence my distress, movement to the Republic of Ireland for protection and to be re-united with my family and to build the future for my children and generation yet unborn.*"

Procedural Background

7. The applicant was interviewed on the 23rd October, 2006, very shortly after he made the application to be considered a refugee. His interview was in English and he did not require the services of a translator. The interview was based on his answers in his ORAC questionnaire and some issues were clarified. He stated that his three older children had left Nigeria to come to Ireland in August, 2006 and were brought over by an agent following arrangements made by his wife's uncle. Again he stated that he came to Ireland because of an imminent threat of death from the Ogboni Aboriginals, a secret society or cult, and also to be re-united with his family. His life was under threat because he had prevented the cult from carrying out the last wish of his father in law that the applicant's fourth child should be sacrificed to the cult. Because of that threat the applicant insisted that his wife travel to Ireland. His father in law died in 1993 but he and his wife were not married until the 17th February 1996, when they had a church wedding. The applicant first realised the threat to his fourth child when his wife was pregnant in 2003 and her elder brother, who was a member of the cult, came to her and said that she should come and sacrifice the child. His wife left Nigeria with an agent between the 5th and 10th October, 2003, and "*when she left she actually got the protection and she was O.K.*."

8. The applicant says a form of conversation took placed between him and the cult, in which it was suggested that he should join the cult or face imminent death for soliciting his wife to travel. This conversation did not take place for some time after his wife had left and he thought it was about a year previously, say 2005. Again it was his brother in law who recommended that the applicant join the cult. The applicant had no problems in Nigeria between the date of his wife's leaving and 2005. However, he moved here and there trying to avoid the cult. Because of his apprehension, he moved from his house once in a while and as he said *"it is only a tree that stands in one place and gets caught"*. He said it was probably in the previous year that he started getting messages from his brother in law recommending that he do something quickly and that the best option was to join the cult or risk death. He did not report the threats to the police as the evidence was only circumstantial and because the police justice system goes to the highest bidder.

9. Even though the applicant was threatened with imminent death, he did not leave Nigeria until October, 2006. He says this was because travelling was not easy and his children were still with him. He did not feel the impact of the threats against him until May or June, 2006 when a group of men with guns came into the neighbourhood where he was drinking with his friends and put a gun to his head, *"saying that he should obey and do what they told him to do"*. He *"read a lot of meaning into that"*. The men who threatened him also took all the money and handsets of the applicant and his friends. While the applicant had no evidence that the robbers were involved with the cult, he believed that they were involved.

10. The applicant had no explanation for why, if the cults were very dangerous, they did not threaten his children, who remained in the family home after their mother had left. He was unable to give details of dates when he was away from the family home

or how long or when he stayed in Port Harcourt. He said that it was impossible for him to move to a different city or place in Nigeria to get away from the cult as they had members spread out over the whole country. His evidence was that members of the cult would trace you no matter where you were. He travelled to Ireland through an agent whose name he could not remember. He paid him seven or eight hundred thousand Naira and the only documentation that he had was provided by the agent. He could not recall the name on the passport which he used. He believed that it was a European passport. He did not use his own passport out of necessity and it was the agent who made all the arrangements. When asked to explain why he had no documentation to prove his identity whether by way of driving licence, passport, marriage certificate or otherwise, he said that he travelled without documentation out of necessity and did not think of bringing documents with him because all he was thinking of was getting over to Ireland. It was his wife's uncle who made the arrangements for the children to travel to Ireland in September, 2006, and the applicant knew little about those arrangements as he had little contact with his wife during that period. If he were to be returned to Nigeria he would face imminent death or have to join the secret cult whose practices were against humanity.

The ORAC decision

11. A report pursuant to s. 13(1) of the Refugee Act 1996, as amended, was furnished on 3rd November, 2006. In that report, the Commissioner recited the facts and found that there are a number of issues which serve to undermine the credibility of the applicant's claim. It was found not credible that the dangerous cult would threaten the applicant to join the cult or to die, but still leave him free to move around Nigeria and to leave Nigeria. The Commissioner found that it would be expected that

if a dangerous cult was looking to kill the applicant or to have him join them, they would capture him without warning and either he would agree to join their cult then and there and then be initiated into the cult or he would be killed outright.

12. The Commissioner also found that it was not credible that someone who feared for his life would continue to return to a place where he could be apprehended by the cult and killed. As the applicant himself stated, "*your residence and the office is a sure place to get you if they want to get you*". It was found that the applicant's assertion that he continued to live at his house, only leaving for short periods at a time, despite claiming his life was under threat by a dangerous cult, undermined the credibility of his claim. It was found not credible that a dangerous cult involved in human sacrifice and who would threaten to kill a person for not joining them would not make use of every opportunity to get their way, in this case using the applicant's children and mother in law against him. It was found not credible that the applicant would not remember the date on which his life was first threatened by the cult, and it was also found that the applicant's lack of detail in relation to key dates and periods in his life, despite claiming that these took place only in the last year, undermined the credibility of the applicant's claim.

13. The Commissioner stated that Nigeria is a country with a population of more than 116 million people. It was found not credible that the cult which the applicant claimed wanted him to join them or die would have the resources to locate him if he relocated elsewhere in Nigeria. The applicant himself claimed that he moved around to different locations in Nigeria but did not claim to have been contacted or been found by the cult when he was moving around. The Commissioner found that with the applicant's claimed Higher Diploma in Estate Management, it would be expected that he could relocate elsewhere in Nigeria with his family, and would be able to get

employment and provide for his family's welfare in this new location. For these stated reasons, the Commissioner concluded that the applicant's evidence as a whole lacked credibility and that his alleged persecution was not sufficiently serious by its nature or repetition to constitute a severe violation of his basic human rights.

14. In the s. 13 report, the Commissioner stated that due regard had also been given to the European Communities (Eligibility Protection) Regulations 2006 in the assessment of the application. Further on, at paragraph 4.1 under the heading "Well-founded fear", the Commissioner stated that "*to examine the well-founded nature of the applicant's claim it is necessary to detail the applicant's personal situation which allegedly places him in harm's way and to examine the credibility of his account with reference to relevant country of origin information*". In fact, no country of origin information was submitted by the applicant in support of his application. Instead, he relied entirely on his personal account and responses at his s. 11 interview.

THE COURT'S ASSESSMENT

15. I have listened to the arguments made with some force by Mr. Ian Whelan B.L., counsel for the applicant, and I note that he makes no complaint about the hearing itself or of any undisclosed use of country information as occurred in *Idiakheua v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Clarke J., 10th May, 2005). Rather, counsel for the applicant asserts that the Commissioner must consult country of origin information, and that not to do so is both unlawful and unfair.

16. There was a great deal of argument in relation to the application of the European Communities (Eligibility for Protection) Regulations 2006, which counsel referred to as the "subsidiary protection regulations". It was debated whether it was sufficient for the Commissioner to state that due regard had been had to the said

Regulations without actually applying the Regulations, and whether, when the applicant's application for refugee status was made, the ORAC was obliged to also consider his entitlement to subsidiary protection at the same time.

17. The latter argument is, I believe, based on a confusion of the Council Directive of 2004/83/EC of 29th April, 2004, as incorporated into domestic law by S.I. No. 518 of 2006, and an application for subsidiary protection. The Council Directive generally seeks to ensure a common policy on asylum within the European Community for those who legitimately seek protection and to ensure that nobody is sent back to persecution or serious harm. The Directive also introduces the concept of subsidiary protection as a common approach to the grant or refusal of a form of protection that is alternative or complementary to refugee status. Chapter 2 of the Directive deals with the assessment of applications for "international protection", which includes applications for refugee status and applications for "subsidiary" or complementary protection. Article 4 of the Directive outlines how to carry out an assessment of facts and circumstances in relation to applications for international protection:-

> "1. Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.
>
> 2. The elements referred to in of paragraph 1 consist of the applicant's statements and all documentation at the applicants disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship."

18. Article 6 of the Directive states that its main objective is to ensure that Member States apply common criteria for the identification of *"persons genuinely in need of international protection"* and to ensure a minimum level of benefits is available to those persons in all Member States. Article 17 states that it is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning

of Article 1 of the Geneva Convention, and Article 24 states that minimum standards for the definition and content of subsidiary protection status should also be laid down.

19. Subsidiary protection is stated to be complementary and additional to the refugee protection enshrined in the Geneva Convention. In the definitions contained in Article 2(e) of the Directive, a person eligible for subsidiary protection is:

> *"a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 and and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country".*

20. The various provisions of Council Directive 2004/83/EC were brought into Irish law by Statutory Instrument No. 518 of 2006. Regulation 2 of that Instrument re-states the information contained in Article 2(e) of the Council Directive that a "person eligible for subsidiary protection" means a person:-

> (a) who is not a national of a Member State,
>
> (b) who does not qualify as a refugee, and
>
> (c) in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin would face a real risk of suffering serious harm, as defined in Regulation 2. .
>
> (d) to whom regulation 13 of the Regulations [the equivalent of Article 17(1) and (2) of the Directive, relating to exclusion] does not apply, and

(e) who is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

21. The Articles referable to the assessment of applications for international protection are re-stated almost verbatim in the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) ("the Regulations of 2006"). The Regulations re-state the law which has been applied and is currently applied in relation to the assessment of refugee status in this country. The provisions of Article 4 of the Directive are transposed into domestic law under Regulation 5.

22. There can be no doubt therefore that while the Regulations of 2006 apply to all stages of the assessment of whether a person qualifies for refugee status or is otherwise in need of international protection, an application for subsidiary protection can be assessed only after a person has been refused a declaration of refugee status; the definition of a person eligible for subsidiary protection provided in Regulation 2 expressly states as much. It is no part of ORAC's statutory functions or powers to consider subsidiary protection. Indeed Regulation 3 expressly states:-

> "2. *Nothing in these Regulations shall be taken to extend or reduce the functions of the Refugee Applications Commissioner or the Refugee Appeals Tribunal (within the meaning of the 1996 Act) in determining whether a person is a refugee."*

23. My reading of the Regulations of 2006 and the Council Directive is that nothing has changed in relation to the method of assessment of credibility of refugee applicants. The authorised ORAC officer was correct to state in the s. 13(1) report that he had had regard to the Regulations of 2006, as he was bound to.

24. Counsel for the applicant argues that the requirement to consider the matters set out in Regulation 5(1) (a) to (e) is mandatory in all circumstances. He attaches no

importance to the word **"relevant",** and argues that in order to comply with Regulation 5(1)(a), ORAC can never make an assessment of credibility without consulting country of origin information and the laws and regulations of the country of origin. I am afraid that I cannot agree with this proposition.

25. While prior to the transposition of Council Directive 2004/83/EC into domestic law through the Regulations of 2006, the best practice in the assessment of credibility in asylum claims was to consult country of origin information to establish whether the applicant's story, as outlined, could be true in the context of the situation prevailing in his country of origin, this was not a hard or invariable rule. There are always circumstances where a decision on credibility can be arrived at without consulting country information. This has been referred to on several occasions by Peart J., among others. In *Imafu v. The Refugee Appeals Tribunal* [2005] I.E.H.C. 416, Peart J. held as following with respect to the well accepted principle set out in *Horvath v Secretary of State for the Home Department (UNHCR Intervening)* [1999] INLR 7 and accepted by Finlay Geoghegan J. in *Kramarenko v The Refugee Appeals Tribunal* [2005] 4 IR 321:-

> *"In my view, while accepting as a general proposition that the Horvath principle is a good one and in many if not most cases might be appropriate, it does not mean that there cannot be an exceptional type of case where the Tribunal Member can quite adequately and completely assess and reach a conclusion on the personal credibility of the applicant, such that there would be no possible benefit to be derived from seeing whether the applicant's story fits into a factual context in his country of origin."*

26. I refered to the same situation in *C M.* (Unreported, High Court, Clark J., 26th November, 2007), where I held as follows:-

"If an applicant is found not to be credible in the basic story told then it makes little difference whether persecution occurs in the particular country."

27. The authorised ORAC officer considered all the facts presented by the applicant in the context of an applicant from Nigeria, and referred to commonly known information of Nigeria as a large and populous country. The general credibility of the applicant was not established. He presented absolutely no documents, and sought to explain that situation by saying that he had no opportunity to obtain documents or bring them with him. This explanation was considered in the context of his assertion that pressure was being put on him to join the secret cult for approximately one year and that his children had left Nigeria for Ireland at least one month before his departure.

28. Consulting country of origin information in this case could not assist in making the applicant's story of persecution more credible to the Commissioner. Information from Nigeria relating to the existence or otherwise of a secret society which demands human sacrifice would not add anything to the applicant's story that his wife's father, who died before the applicant and his wife were even married and more than three years before their first child was born, had on his deathbed required that his daughter's fourth child should be offered in human sacrifice. Country of origin information could not have made more credible that the assertion that the applicant's wife had fled Nigeria when expecting her fourth child, leaving the applicant and three other children, and that the applicant and the children were unmolested from the date of her flight in 2003 until sometime in 2005. Country of origin information may well have disclosed the existence of dangerous secret cults but this could have affected the narrative - found not credible - that this cult's activities were dangerous enough to

amount to persecution but that the cult made no contact and no threat to the applicant or his children for more than two years.

29. The applicant was found not credible on the basis of his own story that the cult was a dangerous and determined organisation. The assessment of the applicant's story was not founded on a rejection of the existence of a secret society or cult known as the Ogboni Aboriginals but rather on the detail of the applicant's story. The authorised ORAC officer had an opportunity to meet the applicant over an extended period to deal with his responses to questions and to form his own views on the applicant's demeanour and conduct. The officer was not persuaded that the applicant was credible and that his story was believable. As the story of alleged persecution was found to be simply not credible, there was no obligation on the Commissioner to seek out country of origin information, especially in the extraordinary situation where the applicant produced absolutely no documentation himself.

30. This is not a case where the Commissioner found that the story might possibly be true and that country of origin information would be capable of confirming the context of the applicant's story. I therefore do not find that the applicant has made out an arguable case on the facts of this case and I adopt Peart J.'s dictum in *B.F. v. The Minister for Justice, Equality and Law Reform* [2008] I.E.H.C. 126 that:

> *"no amount of country of origin information would assist in assessing credibility in this case since the facts asserted by the applicant are personal to her and family related. In so far as the applicant relies on an absence in the decision of reliance on country of origin information, I find no basis for arguing that as a ground of objection in this case."*

31. Hedigan J. held likewise in *P.I.E. v. The Refugee Appeals Tribunal* [2008] I.E.H.C. 339, at paragraph 25:-

> *"In the great majority of cases, it is incumbent on a decision-maker to adhere to the* Horvath *principles and to assess credibility in the light of country of origin information. Exceptional cases do arise, however, and it is my view that this is one such case: the circumstances of the present case compare to those of* Imafu *and* B.F. *rather than those of* Kramarenko *[2004] I.E.H.C. 101 and such cases. This is because such doubts were cast on the applicant's personal credibility by the inconsistencies in his account of events that no matter how much objective evidence the Tribunal Member could have considered, it was open to him to disbelieve the subjective impact upon the applicant. There would be "no possible benefit to be derived" - to use the words of Peart J. in* Imafu *- from seeing whether the applicant's story fitted into a factual context in his country of origin."*

32. I believe that it should be drawn to the attention of ORAC that it is inappropriate in circumstances such as this one, where country of origin information was not presented or consulted, to make a comment of the nature made at paragraph 4.1 of the s. 13 report:-

> "To examine the well-founded nature of the applicant's claim it is necessary to detail the applicant's personal situation which allegedly places him in harm's way and to examine the credibility of his account with reference to relevant country of origin information".

33. To include such a paragraph in every decision suggests a formulaic style decision that is not adapted to the particular aspects of the case. It is not appropriate to refer to the necessity to examine country of origin information when no such information is consulted or received.

34. I accept the argument of the respondent that this is a matter which properly should be brought before the Refugee Appeals Tribunal and is not an appropriate case for judicial review. The application is refused.

M. Clark

Approved

23.1.09