

THE HIGH COURT

JUDICIAL REVIEW

2007 493 JR

BETWEEN/

A. S. O.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR

JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered on the 9th day of December, 2009.

1. By order of 27th May, 2009 this Court granted leave to the applicant to make the present application for judicial review of a decision of the first named respondent dated 20th March, 2007 ("the Contested Decision") which had affirmed a report of the Refugee Appeals Commissioner under s. 13 of the Refugee Act 1996, recommending that the applicant should not be declared to be a refugee.

2. The single ground upon which leave was granted to seek an order of *certiorari* in respect of the Contested Decision was as follows:

"The decision of the Tribunal of 20th March, 2007 was wrong in law in that the finding of the availability to the applicant of State protection was reached on the basis of an inadequate and flawed consideration of the evidence to that effect which was before the Tribunal and, in particular, was made upon a partial and selective appraisal of country of origin information including two items of such information in respect of which the applicant had not been afforded an adequate opportunity to comment or rebut, contrary to s. 16(8) of the Refugee Act 1996, and in breach of her entitlement to a fair procedure in the making of the decision."

3. The background to the application for refugee status can be briefly summarised as follows. The applicant fled Nigeria, her country of origin, and claimed asylum in the State on 31st July, 2006. She claims that she was forced to flee in order to evade attacks and threats that she would be killed by creditors of her late father. He had been a thrift collector and money lender and at his death three particular creditors had claimed that he owed them substantial sums of money which they looked to the applicant to repay. The applicant could not gain access to the account in which her father had held the money with Hallmark Bank and that bank subsequently failed. She claimed that at the instigation of the three creditors in question she had been attacked and threatened; her house had been set fire to in 2006 and one of her children died as a result. She further

claimed that at the behest of the creditors she herself had been kidnapped by a group known as the Oodua People's Congress ("OPC") and detained by them for five days. She says she convinced them that she had no money and managed to obtain her release. She says that she reported the kidnapping to the police but claims that they were unwilling to pursue the matter as they believe that the creditors were owed the money. Furthermore, although the police arrived at the scene of the house fire, she claims that the death of her daughter was never investigated or pursued.

4. In the section 13 Report dated 14th August, 2006, the authorised officer of the Commissioner sets out the background to the above claim and the history of events leading to the flight from Nigeria in greater detail. The personal history of the threats and attacks and their causes is then examined in some detail and the story is found to be incredible. In particular, a number of specific findings in that regard are made as follows:

(a) It is found incredible that the applicant's father would have conducted business in the way described and that at the time of his death in a car crash he would have had a total of 300,000 naira out on loan while having 7.8 million naira unused in a bank account;

(b) The involvement of the failure of the Hallmark Bank as a cause of the difficulties is also considered incredible;

(c) The officer doubts the truth of the claim that her house was destroyed by fire, that her daughter died in the fire and that the police were unwilling to investigate it;

(d) The notion that a particular creditor would have sought to kill the applicant when she was his only means of gaining access to the father's deposits with Hallmark Bank is found incredible.

The officer concludes:

"For the reasons set out above which undermine the credibility of the applicant's claim, it is not credible that the applicant would experience persecution were she to return to Nigeria."

5. It is thus clear that the Commissioner's officer arrived at the negative recommendation in this case upon the basis that the entire substance of the applicant's claim to a fear of persecution was not believed. Even insofar as the officer includes a subsidiary conclusion to the effect that State protection would have been available she clearly does so on the basis that she believes police protection and investigation was never actually sought as the applicant claimed, because country of origin information confirms that the incidents in question were the types of crime that the Nigerian police will investigate. In this regard, the present case can be distinguished from others emanating from Nigeria where the fear of persecution is based upon the absence of state protection against threats of violence and ritual sacrifice carried out by traditional cults which are frequently claimed to be ignored by the authorities.

6. As mentioned, the section 13 Report and negative recommendation were appealed to the Tribunal and in the notice of appeal the Commissioner's assessment of credibility was expressly challenged.

7. In the Contested Decision, the Tribunal member again sets out in some detail the personal history given by the applicant as the basis of her fear of persecution. The applicant's evidence is set out in a straightforward manner without comment and questions asked and answers given during the course of the hearing before the Tribunal are recorded without comment. The Tribunal member then duly notes the statutory

requirements of s. 11B of the 1996 Act with regard to assessing credibility and with regard to the standard of proof.

8. The Contested Decision is, however, somewhat remarkable in view of the approach adopted by the Commissioner and the conclusion reached in the section 13 Report, in that it expresses no specific finding on the issue of credibility. One can perhaps detect in some of the language used the signs of "an eyebrow being raised" as counsel for the respondents put it, but the Contested Decision is devoid of any express conclusion as to whether the basic personal history and foundation for the claim to fear of persecution was believed or disbelieved.

9. The court must therefore proceed on the basis that the applicant's evidence was accepted. Indeed, it is logically necessary to do so because the Contested Decision bases its rejection of the appeal and affirmation of the section 13 Report and negative recommendation upon two explicit findings namely, that State protection would have been available to the applicant against the alleged threats and attacks; and secondly, that those threats and attacks could have been avoided by internal relocation within Nigeria. As regards the former the Contested Decision says: "The country of origin information, which is of recent vintage, informs us that the applicant would be entitled to rely on the State to protect her vital interests." As regards the latter the Tribunal member concludes: "There is no evidence before me to suggest that this applicant could not have relocated successfully in Nigeria."

10. As is frequently pointed out in these cases, this Court is not concerned when exercising its function of judicial review to determine whether the decision under review is good or bad or a right or wrong decision on the merits. It is concerned with the legality of the process by which the conclusion upon which the decision is based has been reached.

11. In this case, the conclusion as to the availability of State protection to the applicant upon return to Nigeria in the face of the threats of attack and of violence is contained, in effect, in three paragraphs on the fifth page of the Contested Decision. The first paragraph refers to a "Report on Human Rights Issues in Nigeria" of a joint British/Danish fact finding Mission in 2004. The Tribunal member relies on that report for the proposition that the Nigerian police are required to investigate all complaints made to them and that if a person is not satisfied with the result of a complaint to the divisional police the matter can be appealed to the A.C.A. Commanders. If still not satisfied, the case can be taken to State police headquarters and further; "If still not satisfied the person can take the matter to the Force Headquarters." The Tribunal member then observes: "It is surprising that, considering that her daughter had been allegedly murdered, she (the applicant) did not press her claim by renewing her complaint to more senior levels of the police force."

12. The court accepts the argument made by counsel for the applicant that this does not constitute a finding that state protection is available in these circumstances in Nigeria. It is a reference to the existence of a hierarchical complaint structure against the failure of local police officers to pursue the investigation of reported crimes. As the well settled-case law in this regard makes clear, whether or not State protection is available does not depend upon the existence of a police complaints procedure but upon a determination that there exists in the country of origin as a matter of current practice, an effective system for the detection, investigation, prosecution and conviction of crimes of the kind which form the subject matter of the complaint. (See also the definition of "protection against persecution or serious harm" in Regulation 2 of the European Communities (Eligibility for Protection) Regulations 2006). ("the 2006 Regulations")

13. The third paragraph of the passage referred to above in the Contested Decision deals with the alleged kidnapping by the Oodua People's Congress. The Tribunal member says:

"The Oodua People's Congress is a Yoruba based association. It is partly seen as a vigilante group and also is regarded as a form of society for Yorubas who wish to integrate into the more influential parts of Yoruba culture and tradition. The Oodua People's Congress is a non-state actor and has carried out numerous human rights abuses in the past. According to a Home Office (U.K.) Operational Guidance Note on Nigeria (2005) the Nigerian police force takes appropriate action against cults such as the Oodua's People Congress. Despite this conclusion the applicant never followed up her complaint to the police."

14. This Home Office Guidance Note is referred to for the first time at this point in the Contested Decision. It features nowhere else. It was not a document available to the Commissioner's officer nor, apparently, was it explicitly used at the hearing before the Tribunal. It appears to be a document which is the result of the Tribunal member's own researches. It is accordingly, a document which was not put to the applicant at the appeal hearing or one upon which the applicant was afforded an opportunity to comment or in respect of which rebutting information might have been adduced. The court is accordingly satisfied that there has, in this regard, been an infringement of the requirement in s. 16(8) of the 1996 Act which requires that the Tribunal shall "furnish the applicant with ... an indication in writing of the nature and source of any other information relating to the appeal which has come to the notice of the Tribunal in the course of an appeal ...".

15. It is argued on behalf of the respondents that the Act does not specify at which point in time the indication has to be given and that it is therefore sufficient that a source of general information of this kind when relied upon by the Tribunal member is sufficiently notified if the indication of its nature and source is given in the Tribunal's decision. The court accepts that there might well be some force to this argument where it relates to information of a general nature confirming the existence of particular social, political or administrative conditions in the country of origin. However, in this instance the reliance placed upon the Home Office Guidance Note is more significant in that it is directed at a specific and important incident in the applicant's personal story namely, her kidnapping by the Oodua People's Congress. It is important to bear in mind that this issue is unique to the Contested Decision. The kidnap incident was not one of those points in the personal history identified by the Commissioner's Report as a basis for doubting credibility. The court is therefore satisfied that this is an instance in which, prior to finalising the decision, the Tribunal member was under an obligation, if not to reopen the hearing, at least to furnish the Home Office Guidance Note to the applicant's representatives and afford them an opportunity of commenting upon it or rebutting it by contrary information in the light of the reliance that the Tribunal member proposed to place upon it.

16. The court is accordingly satisfied that the process by which the crucial finding as to the availability of State protection in this case was reached was sufficiently flawed to warrant the quashing of the decision.

17. It is argued on behalf of the Minister that the court ought not to quash the decision having regard to the fact that the Tribunal member made a separate and distinct finding to the effect that the applicant's source of the fear of persecution could have been avoided by relocating within Nigeria. No leave had been granted in respect of that finding and it is sufficient of itself to sustain the Contested Decision.

18. The court cannot agree. The possibility of relocation as a basis for determining that an applicant is not in need of international protection arises under Regulation 7 of the

2006 Regulations. As the Tribunal member pointed out in the Contested Decision, an applicant is not in need of protection if it is shown that the applicant "can reasonably be expected to stay in a part of his or her country of origin where there is no well founded fear of being persecuted or real risk of suffering serious harm".

19. The Tribunal member's conclusion on this issue was expressed in these terms:

"Finally, the applicants fear, as expressed in her evidence, is that internal relocation would not be an easy matter for her but she did not go so far as to say that she would be persecuted if she relocated from Lagos Island. Lagos is in the Southeast Nigeria which is the economic heartland of the country. The applicant's evidence is that she might not be safe outside of Lagos Island but there is no evidence to support this contention."

20. It is questionable whether Regulation 7 places the onus of proof as to the unavailability of relocation as a solution upon an applicant in these circumstances. The regulations are structured on the basis that regulation No. 7 permits a protection decision maker to enquire into and to determine whether a person who is otherwise eligible for subsidiary protection or a refugee, is nevertheless not in actual need of protection because of the possibility of relocation in the country of origin. To make such a determination the decision maker must be satisfied that there is no risk of the particular persecution feared or of the serious harm in question occurring in the locality to which relocation is postulated.

21. As indicated above, the key element in the reasoning of the Contested Decision in relation to State protection was that State protection is and would be available from Nigerian police against the threats of kidnapping by the Oodua People's Congress. However, if that reasoning is based upon an acceptance by the Tribunal member that the kidnapping recounted by the applicant did take place or may well have taken place, then a finding based on relocation would have required, if it was to comply with Regulation 7, some inquiry as to whether the OPC was active in and capable of threatening the applicant in the locality in which she was supposed to relocate on return.

22. In the particular circumstances of this case, therefore, the findings on State protection and relocation in the Contested Decision are not entirely distinct but are to a degree interdependent. The finding that relocation was a genuine possibility would appear to be necessarily dependent upon the proposition that the particular threats by non-state actors were amenable to State protection in Nigeria. It was the applicant's complaint that the police were unwilling to help because they, in effect, regarded the matter as one of financial debt or contract and that the creditors in question appeared to be legitimately owed their money. Why should that not be the position elsewhere in Nigeria?

23. The court is satisfied, therefore, that it is appropriate and necessary in the particular circumstances of this case that the Contested Decision be quashed in order to enable the appeal to be re-examined. One further general observation may, however, usefully be added by way of explanation of the significance which the court attaches to the flaw that is identified in this case.

24. It concerns the obvious discrepancy in the approach of the Tribunal member as compared with that of the Section 13 Report. It is undoubtedly the case that on appeal to the Tribunal under s.16 of the 1996 Act, the Tribunal member is free to fully re-examine the asylum application by way of rehearing and to come to an entirely different conclusion. Moreover, the Tribunal member is entitled to come to the same conclusion as the Commissioner but for different reasons or upon different grounds.

25. Nevertheless, sight should not be lost of the nature and objective of the statutory scheme for examination of asylum applications as entrusted under the Act to the Commissioner and the Tribunal. The purpose is to examine the asylum application and to carry out all necessary investigations and inquiries including the personal interview of the applicant, with a view to furnishing a report which is presented to the Minister and upon which the Minister must make the determination of the application for asylum under s. 17(1) of the Act. Where the report and recommendation are negative, the Minister is entitled, but is not obliged, to refuse the declaration of refugee status, as the permissive "may" in subs. 1(b) of the section makes clear.

26. Where a negative recommendation of the Commissioner is appealed to the Tribunal and is affirmed, the appeal decision does not cancel or replace the Commissioner's report. Pursuant to s. 16(17)(b) both the decision of the Tribunal and the s. 13 report of the Commissioner are placed before the Minister for the purpose of making his determination under section 17(1).

27. It is thus, in the court's view, unsatisfactory that there should be an outcome to the appeal before the Tribunal which presents the Minister with an unexplained discrepancy between the basis upon which the Commissioner has made a negative recommendation and the different ground upon which it has been affirmed by the Tribunal.

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 section 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.

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 been 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 section 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 specific comment in the appeal decision of the Tribunal.

30. The court will therefore order that *certiorari* issue to quash the Contested Decision for the reasons given above.