Neutral Citation Number: [2010] IEHC 93

THE HIGH COURT

JUDICIAL REVIEW

2008 756 JR

BETWEEN

FRED ALIEMEKA OBUSEH

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE GARDA NATIONAL IMMIGRATION BUREAU

RESPONDENTS

JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 14th day of January, 2010

1. The applicant claims to be a national of Nigeria from the Niger Delta region whose activities with the Delta Youth Movement included the murder of at least one Nigerian soldier in 2004. The Refugee Applications Commissioner found that his asylum application contained major credibility issues and the Refugee Appeals Tribunal found that he was not a credible witness. In 2006 he was refused a declaration of refugee status and he has since made unsuccessful applications for leave to remain in Ireland on humanitarian grounds and for subsidiary protection. The Minister for Justice, Equality and Law Reform ("the Minister") made a deportation order against him in April, 2008.

2. By order dated the 9th May, 2009, Cooke J. granted the applicant leave to seek judicial review of the Minister's refusal to grant him subsidiary protection, dated the 16th January, 2008, on two grounds which may be summarised as:

> a. The Minister erred in law and / or acted ultra vires and / or in breach of the *European Communities (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006) ("the Protection Regulations") by imposing the requirement that the applicant *conclusively* prove the facts relating to his application for subsidiary protection; and
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> b. The Minister erred in law and in the interpretation of the Protection Regulations by failing to investigate and consider adequately or at all whether there would exist a "*serious and individual threat*" to the applicant's life or person within the meaning of Regulation 2 of the Protection Regulations.

3. The substantive hearing took place on the 11th December, 2009. Mr Anthony Lowry B.L. appeared for the applicant and Mr Anthony Moore B.L. for the respondents.

Background

4. The background claimed by the applicant is that he was born in 1965 in Delta State, Nigeria. He arrived in Ireland in January, 2006 and applied for asylum. He said he was a member of the Ijaw tribe and a Christian. He grew up in Agbor, Delta State but after he finished secondary school in 1984 he lived in Warri where he owned a food store. He married his wife in 1993 and their son was born in 1995.

5. Following exposure to an incident of police heavy handedness when he was detained for two months and mistreated sustaining a broken tooth and loss of hearing, he joined the Delta Youth Movement, an armed militant group operating in Delta State. They were engaged in stealing and selling oil from the pipelines. The military was deployed to the area to prevent tampering with the oil pipelines and the youths engaged in guerrilla warfare with the army. At his s. 11 interview the applicant revealed for the first time that he himself had killed some soldiers but does not remember how many. In August or September, 2004, he went out at night with other youths, armed with a machete. He crept up on some soldiers who were asleep while guarding a pipeline; he disarmed one and killed him with a gun he had taken from the ground. He did this because he was angry at the government. Other soldiers were also killed on that night.

6. As a result of the killings a state of emergency was declared and on the 2nd September, 2004 the federal government declared the applicant a "wanted" man although the newspapers did not mention him by name. He left Warri with his mother, brother, sister and son and moved to another town. His wife remained behind in Warri but threats were made against her and their shop was destroyed. In December, 2004 the Youth Movement organised for her to travel to Wales and the following month she gave birth to their daughter there. Meanwhile the applicant went to Lagos where he lived with friends for one year and one month before coming to Ireland via Amsterdam in January, 2006, again with the help of the Delta Youth Movement. His son remained in Delta State with the applicant's mother. The applicant was refused entry at Dublin airport because his passport contained a false visa. At the airport he gave a false date of birth and said his wife and child were with him, which he later retracted saying that the agent had told him to lie. He said that if returned to Nigeria he would be charged with murder and could face a firing squad. He then disclosed that his wife and daughter live in Wales.

7. The Refugee Applications Commissioner found that the applicant's account contains some major credibility flaws which were outlined in the s. 13 report. It was found that he was fleeing from punishment for a crime as opposed to persecution and it was noted that he had relocated to Lagos for over a year without being harmed. The applicant appealed to the Refugee Appeals Tribunal (RAT) and at the oral appeal hearing he repeated the account of killing the disarmed soldier. He furnished a SPIRASI report which stated that he suffers from high blood pressure and had a broken tooth and decreased hearing in his right ear which the examining physician stated "*could be as a result of the ill-treatment that he reports sustaining*" while imprisoned in Nigeria. Like the Commissioner, the RAT found that if the applicant's account was true, he was fleeing prosecution and not persecution, that a number of unanswered questions remained and that he did not present as a credible witness.

8. In May, 2006 the Minister issued a proposal to deport the applicant. The following month, the Refugee Legal Service (RLS) made an application for leave to remain on his behalf. The applicant furnished a personal statement restating the same basic facts that had grounded his asylum application. The Minister was informed that the applicant's wife and daughter were now residing with him in Ireland. It was submitted that he would be at risk of torture, inhuman or degrading treatment and would face a life of insecurity and uncertainty if returned to Nigeria. Appended to that application were three country of origin information (COI) reports A U.S. Department of State*Country Report -*

Nigeria (2005), an extract from the Human Rights Watch *World Report* (2006) and a Reuters news article from January, 2006 entitled "*Villagers flee Nigerian Oil Delta, troops move in*." and references attesting to the applicant's good character. Additional references and certificates were furnished in 2007. Meanwhile in October, 2006 the *European Communities (Eligibility for Protection) Regulations* (S.I. No. 518 of 2006) ("the Protection Regulations") came into force and in January, 2007 the applicant was invited to apply for subsidiary protection. This application was not successful and his leave to remain application was then considered by an officer of the Repatriation Unit. This too failed and a deportation order was made in April, 2008. That decision is not challenged; instead the challenge is to the manner in which the Minister considered the applicant's subsidiary protection application.

The Subsidiary Protection Application and Decision

9. The "serious harm" which the applicant asserts he faces if returned to Nigeria derives from his previous activities as a member of the Delta Youth Movement. In his application he claimed to be at risk within the meaning of Articles 15(b) and (c) of Council Directive 2004/83/EC of 29 April 2004 ("the Qualification Directive") which define serious harm as:-

> (b) Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
>
> (c) Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

10. It was argued that serious harm pursuant to Article 15(b) was established as the applicant had previously been "*beaten and detained by the authorities in Nigeria*" and that he is at risk of further torture if returned which is borne out by COI which indicates high levels of violence and corruption in the Delta region. It was further submitted that he suffers from chest pain for which he is receiving medical treatment which would not be available to him in Nigeria.

11. The applicant submitted that he is not excluded from subsidiary protection within the meaning of s. 13(1) of the Protection Regulations / Article 17 of the Qualification Directive (i.e. the exclusion clauses). It was also submitted that state protection would not be available to him within the meaning of Article 7 of the Directive because it is the Nigerian State which poses a risk of harm to him by failing to sufficiently protect him from violence and by the lack of access to medical treatment. It was submitted that the provisions of Regulation 7(1) of the Protection Regulations, which effectively sets out the internal flight alternative, do not apply to the applicant. Finally it was submitted that his identity and nationality had not been in doubt and that his account had been at all times coherent and plausible.

12. When in October, 2007 his subsidiary protection application was considered by an Executive Officer of the Repatriation Unit, the Officer synopsised the applicant's claim and referred to each of the COI reports furnished. He observed that while medical evidence confirmed a broken tooth and hearing damage in the applicant's right ear, he had not proved that he was detained or that he was wanted because of killing a soldier and he found no credible connection between the applicant's personal circumstances and COI relied upon. He went on to state that:

> "*Throughout the applicant's claim for asylum at first stage, at appeal and now at subsidiary protection stage, the applicant has at no time given any evidence that he is wanted by the police. The applicant stated that he*

lived in Nigeria for one year and a month following the alleged killing without incident. This undermines the applicant's claim."

13. Of issue in these proceedings is that the Officer found:

"[…] on the basis of the applicant's personal circumstances and on the testimony that he provided and all the documentation on file and the findings of both the ORAC and Appeals Tribunal that there is no conclusive evidence to indicate that the applicant in this case is prevented from seeking protection from the authorities in Nigeria." (Emphasis added)

14. The Officer did not accept that the applicant had suffered serious harm in Nigeria. That question was assessed by reference to the medical evidence submitted by the applicant. The Officer concluded:-

"It is not accepted that a broken tooth and hearing impairment conclusively prove the applicant's assertions. There are multiple possible causes of such conditions." (Emphasis added)

15. It was correctly observed that the applicant's claim was rejected by the Commissioner and the RAT, that the Commissioner found that his account contained major credibility issues and that the RAT found that he did not present as a credible witness. It was found that even if his claim had been found to be credible, the applicant could have been liable to exclusion under the provisions of Regulation 13(1) (a) of the Protection Regulations because he murdered a soldier in Nigeria. The Officer's negative recommendation was affirmed by a Higher Executive Officer in November, 2007 and by the Assistant Principal of the Repatriation Unit in January, 2008.

16. As noted at para.2, there are two net issues in this case namely:-

a. The Minister applied the incorrect burden of proof; and

b. The Minister failed to investigate and consider whether there would exist a "*serious and individual threat*" to the applicant's life or person.

(a) Burden of Proof

17. It is contended that no applicant is required to conclusively prove his assertions and that the Minister therefore applied an unduly onerous burden of proof by finding that, because the medical evidence did not "*conclusively*" prove his assertions, the applicant had failed to establish that he had suffered serious harm in the past. Regulation 2(1) of the Protection Regulations requires an applicant to show "substantial grounds" for believing that he would face a real risk of suffering serious harm. Goodwin-Gill and McAdam in *The Refugee in International Law* (3rd ed) state that the facts on which an application is based should be proven "on the balance of probabilities".

18. Mr Lowry B.L., counsel for the applicant, argued this is relevant because Article 4(4) of the Qualification Directive suggests that if "serious harm" is found to have occurred in the past, there is a presumption that it will occur in the future unless good reasons are shown for believing the contrary. Article 4(4) provides:-

"The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated."

19. Mr Moore B.L., counsel for the respondents, argued that the Officer was at all times aware of the correct test as prescribed by the Protection Regulations as she had set out the definition of a person eligible for subsidiary protection as determined by Article 2(e) of the Qualification Directive and later referred to whether there was a "real risk of serious harm" to the applicant. He argued that in those circumstances the use of the description "*conclusively*" did not establish a material error.

The Court's Assessment of (A)

20. The Court commences its assessment of this aspect of the applicant's challenge by restating that the main objective of the Council Directive is to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and to ensure that a minimum level of protection is available for these persons in all Member States.

21. The Court accepts the respondents' submission that the decision to refuse subsidiary protection to the applicant did not contain a material error as it is clear that the applicant did not fail to be granted subsidiary protection because he was required to conclusively prove serious harm nor is the Court satisfied that the Minister actually imposed such a requirement. The applicant has fastened on to a particularly infelicitous word used twice in a lengthy consideration. Circumstances akin to what happened here have been dealt with by the Courts on many occasions and the Courts have frequently heralded the danger in selecting an undoubted error of phrase to impugn an otherwise valid decision. The respondent relied on the decision of *Tabi (G.T.) v. The Refugee Appeals Tribunal* [2007] I.E.H.C. 287 where Peart J. held:-

> *"It is not desirable that a decision be parsed and analysed word for word in order to discern some possible infelicity in the choice of words or phrases used […], unless the matters relied upon have been clearly misunderstood or mis-stated by the decision maker. […] If a decision maker makes a significant and material error in how the evidence has been recorded, or other serious error of fact, then of course the process by which credibility has been assessed falls short of the required to meet a proper standard of constitutional justice. But such an error must go beyond a mere possible ambiguity arising from the words used. The error must be clear and it must go to the heart of the decision making process, and fundamentally undermine it."*

22. At the heart of the decision to refuse subsidiary protection in this case was the finding that the applicant's narrative was not accepted. The same story was recounted throughout the asylum, leave to remain and subsidiary protection stages namely that he was arrested in early 2004 and detained and beaten for a two month period, following which he joined the Niger Delta Youth Movement and thereafter murdered an unarmed solider in cold blood and became a wanted man. The Refugee Applications Commissioner and the Refugee Appeals Tribunal both found that his story lacked credibility and also that if his account were true, then he was fleeing prosecution and not persecution. Even a brief perusal by this Court of the documents reveals that the applicant's account was vague and inconsistent and ran contrary to volumes of COI on the conflict in the Niger Delta. He presented no evidence other than his own narrative in support of his story and he presented no elaboration or elucidation on that narrative in his subsidiary protection application. In the circumstances, the Minister was perfectly entitled to have regard to the previous credibility findings when making the assessment in this application. Article 4 of the Qualification Directive states:

> "Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:
>
> (a) the applicant has made a genuine effort to substantiate his application;
>
> (b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;

(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;

(d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and

(e) the general credibility of the applicant has been established."(Emphasis added)

23. While the applicant is absolutely right that there is never any requirement on a protection applicant to conclusively prove his account, it seems to this Court that the applicant has seized on the examining officer's unfortunate use of the words "*conclusively prove*" as representing the test which was imposed regarding the likelihood of the applicant facing serious harm if he were returned. Having read the consideration of the application for subsidiary protection as a whole and in the context of the narrative presented and the previous findings, it is clear that the Minister's agent was merely stating what was already obvious. The applicant told a story which for many reasons itemised in the decisions of the Commissioner and the RAT was found not to be credible. The Court does not need to go into those reasons which were unchallenged by way of judicial review and were supported by well reasoned, cogent findings. Suffice to say many inconsistencies and knowledge deficits were identified.

24. When the officer was dealing with the objective medical findings of a broken tooth and hearing loss in one ear which could have been associated with mistreatment in detention, he stated that these findings did not prove that the injuries came from this source. The use of the word *conclusively* was unnecessary and added nothing to the previous assessment of this evidence by the RAT. The applicant never provided evidence of any medical finding that these injuries proved his assertion that he had been mistreated in detention; rather, the SPIRASI report simply stated that the injuries "*could*" be consistent with his story. It is noteworthy that the examining physician in this case did not use the language of the Istanbul Protocol which is commonly used by SPIRASI as a guide for the assessment of persons who allege torture and ill-treatment, when reporting findings to the judiciary and other investigative bodies.

25. The inappropriate use of the word "*conclusively*" did not affect the heart of the decision which was (1) that the applicant was found not credible and (2) if his story was true and he really had killed a disarmed soldier then he could be liable for exclusion from international protection under the provisions of Regulation 13(1) (a) of the Protection Regulations which provides:-

> "A person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she—
>
> (*a*) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes".

26. As the words used did not either import a wrong test or form the basis of the decision to refuse subsidiary protection, this aspect of the challenge fails.

(b) Article 15(c)

27. The applicant's next challenge to the legality of the refusal to grant subsidiary protection lay in the asserted failure to consider whether the well documented violence in Niger Delta amounts to a situation of internal armed conflict in which the applicant would be at risk of indiscriminate violence within the meaning of Article 15(c) of the

Qualification Directive. Mr Lowry argued that the applicant's situation should have been considered under Article 15(c), as elucidated in the judgments of the European Court of Justice in *Elgafaji v. Staatssecretaris van Justitie* (Case C-465/07, judgment of the 17th February, 2009) and the Court of Appeal in *Q.D. (Iraq) v. Secretary of State for the Home Department* [2009] EWCA Civ 620. While he accepted that on the applicant's evidence he may have been a combatant at one point, Mr Lowry argued that he could be considered a civilian if returned to Nigeria. The Minister's assessment of the subsidiary protection application should therefore have included an investigation as to whether the applicant would be at risk of serious harm from indiscriminate violence even if the applicant himself placed little emphasis on that issue in his claim for subsidiary protection.

28. Mr Lowry argued that the Minister is obliged to conduct a fresh assessment when considering an application for subsidiary protection and that while he may rely on previous negative findings made by the Commissioner and / or the Tribunal, he must also comply with his obligation to reach a fair decision which is *not* confined to assessing the submissions made by the applicant. The applicant's role is merely to assist the Minister in reaching his conclusion. Reliance was placed on *Neosas (Fr. N) & Others v. The Minister for Justice, Equality and Law Reform* [2008] I.E.H.C. 177, where Charleton J. held at paragraph 56 that:-

> *"In my view, the Minister is under a duty to act carefully and honestly in considering an applicant's entitlement to subsidiary protection. An applicant will, no doubt, make the best possible case that is available on the basis of country of origin information. That case may assist the Minister, it may be real in terms of what it puts forward, or it may be exaggerated. Any submission may be checked against what the Minister already has available to him and supplemented by any reliable additional reports. The receipt of submissions may assist in the process, but it does not relieve the Minister of his responsibility to make a fair decision."*

29. Mr Moore B.L. responded that where credibility is absent at the asylum stage and the same narrative is advanced at the subsidiary protection stage, there is no obligation to begin a credibility analysis anew. The applicant's narrative was substantially rejected by the Commissioner and the RAT and the Minister was entitled to apply the credibility findings made by those authorities in accordance with the decisions of Charleton J. in *Neosas*(cited above) and Birmingham J. in *Bamidele (G.O.B.) v. The Minister for Justice, Equality and Law Reform* [2008] I.E.H.C. 229. The applicant did not elaborate or particularise his claim within the meaning of Article 15(c) and he furnished no evidence in that regard. The Minister is not required to prove the applicant's case for him. A very high threshold was set by the ECJ in *Elgafaji* for the requirements of Article 15(c) to be fulfilled. This was affirmed in *QD (Iraq)* where the Court of Appeal found at paragraph 25 that an armed conflict will attract the protection of Article 15(c) only "*where the level of violence is such that, without anything to render them a particular target, civilians face real risks to their life or personal safety*." Mr Moore further argued that the applicant would not fall within Article 15(c) because he is not a civilian.

The Court's Assessment of (B)

30. This is a case where the second legal argument advanced on behalf of the applicant is, at first glance, interesting but on further examination it becomes apparent that the argument is flawed. This is because the argument ignores that there is no escaping the fact that the applicant's narrative of the events which brought him to Ireland was found not credible. The Court finds it difficult to envisage any circumstances where an asylum applicant is found not credible in his / her claim as to the existence of a well-founded fear of persecution will be granted subsidiary protection on the same facts. One has to ask oneself how, if a person's assertion relating to a fear of persecution is not believed, it can logically be possible that he /she might be eligible for protection on the basis of

the same story under the Qualification Directive and Protection Regulations. Subsidiary protection is exactly what it says it is – it provides complementary protection to those applicants who do not meet Convention requirements to establish persecution but who nevertheless require protection. A qualified applicant for such protection is a person defined by Article 2(e) of the Qualification Directive as a 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, would face a real risk of suffering serious harm as defined in Article 15, 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".*

31. If therefore the applicant has been rejected on credibility grounds for refugee status and he wishes to obtain subsidiary protection, he faces the unenviable task of establishing substantial grounds for believing that he will face a risk of serious harm from the death penalty or execution or torture or inhuman or degrading treatment on his return to his country of origin within the meaning of Article 15(a) or (b) of the Qualification Directive. Where, as in the applicant's case, he does not rely on Article 15(a) or (b) but seeks to rely on the terms of Article 15 (c), he has to show that he faces a serious and individual threat by reason of indiscriminate violence in situations of international or internal armed conflict, that state protection would not be available to him and that he / she could not reasonably be expected to stay in another part of the country of origin where there is no real risk of suffering serious harm. It is axiomatic that if a person who claims to face such danger cannot establish that he / she is actually from such a situation of international or internal armed conflict and further cannot show why he / she could not reasonably be expected to relocate, then he / she will not be eligible for such protection.

32. As whether a right to subsidiary protection exists depends on a fair assessment of the facts, such an assessment as a matter of law includes an examination of the factual matrix in which the applicant came to be a protection seeker. When Charleton J. was reviewing case law on subsidiary protection in *Neosas* (see para. 28 above), he held that the Minister's obligation to fully and properly consider any case as to additional rights which have not previously been considered, is tempered by the qualification that:-

> "Where, as a matter of substance, however, a contention as to the factual basis for such rights is the same as that which is already being processed under the Refugee Act, 1996, then the case law clearly establishes that the Minister is entitled to place some degree of weight on the failure of the applicant to succeed in persuading the Refugee Applications Commissioner and the Refugee Appeals Tribunal as to their entitlement to refugee status and as to their credibility."

33. In *Hila and Djolo v. The Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 277, Feeney J. held with respect to the Qualification Directive:-

> "The Directive does not impose any requirement to review earlier decisions either as regards subsidiary protection or refugee status. If it did it would have to have done so in express terms given the clear recognition of existing different practices within the Member State. There is no requirement for across the board reconsideration of earlier decisions as that could only arise if there was an unconditional and precise provision to that effect."

34. Apart from the fact that the Minister is not obliged to reconsider the same facts previously rejected, the applicant in this case simply did not make the case that there is a threat to his life or person by reason of indiscriminate violence in the Delta region such that he is eligible for protection under Article 15 (c). He furnished no particulars, documentation, information or evidence in relation to such a threat. His claim has always

been that he fears that he will be specifically and individually targeted by the Nigerian police and will be subjected to torture, inhuman or degrading treatment by reason of his activities in the past and COI was furnished to support this contention. His claim was therefore considered within the parameters of Article 15(b) and not Article 15(c). No submissions were made to the Minister or to the Court as to whether an "internal armed conflict" existed in Delta State, the meaning of a "civilian" in that context, the meaning of a "serious and individual threat" within the meaning of Article 15(c), or the question of whether the principles of international humanitarian law would apply.

35. The Court does not accept that the Minister has a free-standing obligation to investigate whether a person is eligible for protection within the meaning of Article 15(c) when that person has not identified the risk to his life or person because of armed conflict nor does it accept that the role of the applicant is merely to assist the Minister. The passage that the applicant opened from the decision of Charleton J. in *Neosas* (see paragraph 28 above) does not support the contention made by the applicant. The said passage must be read in context. Charleton J. held that "*a clear obligation is cast on the Minister to fairly consider an application for subsidiary protection both in terms of the situation of an applicant and the true situation on their country of origin*." Charleton J. then went on to consider the contention made in the *Neosas* case that a fair assessment required an engagement between the applicant and the Minister on any up to date COI relied upon by him. This was firmly rejected and it was specifically in that context that those arguments that Charleton J. made the statement relied on by the applicant in this case. There is nothing in that assessment which supports the applicant's contention in this case that the obligation on the part of applicants has been diluted and that the Minister is obliged to make a case for the applicant even if he does not do so himself.

36. The respective roles of the protection applicant and the protection decision-maker are found in Regulations 4 and 5 of the Protection Regulations. Regulation 4(3) imposes an obligation on the decision maker to consider the following matters:-

> "(*a*) all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, 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 protection applicant including information on whether he or she has been or may be subject to persecution or serious harm;
>
> (*c*) the individual position and personal circumstances of the protection 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 protection applicant's activities since leaving his or her country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for protection as a refugee or a person eligible for subsidiary 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 or she could assert citizenship."

37. While the Minister is expected and indeed mandated to have considered up to date information on the conditions on the ground in the applicant's country of origin which in this case was Nigeria and the Delta region, this is far from imposing a free standing obligation to go beyond that information and to investigate whether the applicant faces any unclaimed and unidentified risk. Regulation 5(3) restates verbatim Article 4 of the Council Directive, which is reproduced at paragraph 22 above. The protection decision maker is obliged to be informed of conditions in an applicant's home country and an applicant is obliged to make genuine efforts to substantiate his story and establish his credibility.

38. Another important aspect of the within case is that the applicant all but ignored the exclusion from international protection of any person where there are serious reasons for considering that he has committed a war crime, a crime against humanity or a serious crime, pursuant to Article 17 of the Qualification Directive. It would appear that the killing of a disarmed soldier in the circumstances described by the applicant could constitute such a crime. The situation here is that the applicant's story of being part of the Delta Youth Movement was found not credible. It may well be that if he had been found credible, his assertion that he killed the soldier in cold blood would render him ineligible for protection. This was a matter that was specifically noted by the Minister's officer.

39. While in light of the foregoing, the Court is ***not*** satisfied that the applicant is entitled to the reliefs sought, there remains the issue of the use of ill-chosen language on two occasions in the impugned decision. Those ill chosen words were not corrected by reviewing senior officers. The use of the words "*conclusively prove"* was the genesis of this application for judicial review and gave rise to the grant of leave to apply for judicial review. In the circumstances, the Court is satisfied that although the applicant fails in his application for an order of*certiorari* he should nevertheless be granted an order for a portion of his costs.

J.