Neutral Citation: [2014] IEHC 9

THE HIGH COURT

JUDICIAL REVIEW

[No. 2009/227/J.R.]

BETWEEN

P. M.

APPLICANT

-AND-

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND FERGUS O'CONNOR, REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 14th day of January 2014

1. This is an application for judicial review of a decision of the Refugee Appeals Tribunal refusing a recommendation of refugee status. Leave to seek judicial review in this matter was granted by Clark J. on the 18th December 2012.

2. The applicant is a Zimbabwean national from Harare who was born on 5th December 1970 and who came to Ireland on 26th September 2002. The applicant was granted leave to land in the State on her arrival as citizens of Zimbabwe did not require an Irish visa at that time. The applicant was granted permission to remain in the State on conditions that she would not take up employment or engage in any business or profession and not remain later than 10th November 2002. However, on her arrival the applicant took up a position working as a child-minder and au pair for a family in Dublin. Having worked for this family for nearly 6 years and following their departure from the State, the applicant made application for asylum on 2nd July 2008.

3. The applicant claims to fear persecution because of her political opinion related to her involvement with the Movement for Democratic Change ('MDC') and says that the opportunity to come to Ireland and work as a child minder presented an easy way for her to escape her fears. She states that she did not claim asylum on her arrival in Ireland as she was safe with this family and only applied for asylum when the family returned to South Africa in December 2007. She claims that while she originally left Zimbabwe due to her involvement with the MDC, the political and human rights situation in Zimbabwe has deteriorated since her departure and that she has thus become a *refugee sur place*.

4. The applicant's claims were assessed by the Office of the Refugee Applications Commissioner who refused a recommendation of refugee status and also made a finding pursuant to s. 13(6)(a) of the Refugee Act 1996 that the applicant showed either no basis or minimal basis for the contention that she is a refugee. Such a finding deprives an applicant of an oral hearing on an appeal. The applicant appealed the decision to the Refugee Appeals Tribunal which conducted a 'papers only' appeal. The Tribunal decision dated 29th January 2009 affirmed the recommendation given at first instance and it is this decision which the applicant seeks to have quashed in these proceedings.

5. The applicant was granted leave to challenge the decision on the grounds that: (i) the Tribunal Member erred in making a credibility finding that the applicant had not provided a reasonable explanation for failing to claim asylum when she came to Ireland in 2002; (ii) the Tribunal erred in making a credibility finding that the applicant could have claimed asylum in a country she transited through en route to Ireland; (iii) there was no country of origin information supplied or reasons provided for the determination that the applicant would be safe in Zimbabwe now that the Zanu-PF and MDC parties were now in power; (iv) the Tribunal erred in failing to put any country of origin information in support of the above finding to the applicant if such information was sourced; (v) the Tribunal failed in its obligations to consider all the relevant facts as they relate to the country of origin pursuant to the EC (Eligibility for Protection) Regulations 2006; and (vi) the Tribunal failed to consider the applicant's credibility in the context of the political and human rights situation in Zimbabwe over the two years previous to the decision.

6. The Tribunal Member found that the applicant failed to provide a reasonable explanation for not claiming asylum immediately on arrival in the State. Such a finding triggers the operation of Section 11B(d) of the Refugee Act 1996 which provides:

> "the Tribunal…in assessing the credibility of an applicant for the purposes of….the determination of an appeal…shall have regard to the following:
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> …(d) where the application was made other than at the frontiers of the State, whether the applicant has provided a reasonable explanation to show why he or she did not claim asylum immediately on arriving at the frontiers of the State unless the application is grounded on events which have taken place since his or her arrival in the State

7. Mr. O'Dwyer B.L., counsel for the applicant, challenges the s. 11B(d) finding by claiming that the applicant did provide a reasonable explanation to the effect that she felt safe because she had a job working with a family here and that she initially believed that she would be able to return to her home country when the situation there improved. Counsel noted that the situation in Zimbabwe in fact worsened considerably while the applicant was living in Ireland and states that it is clear that a person can become a *refugee sur place* because of a deterioration of the situation in their home country. It was submitted that s. 11B (d) was not relevant to the assessment of the applicant's claim as it is expressly stated not to apply when an application is grounded on events which have taken place after arrival in the State. It is contended that the application for asylum in this case is based largely on events which occurred since she arrived in Ireland in 2002.

8. Ms. Farrell B.L. for the respondent, states that the Tribunal found that the applicant had provided no evidence, other than her own account, of membership of the MDC; that she lacked credibility; that she had not given a reasonable explanation for failing to apply for asylum for almost six years after she entered the State; and that her claim to be a *refugee sur place* was rejected. Counsel

asserts that the Tribunal Member was entitled to have regard to the provisions of s. 11B(d) Refugee Act 1996 and to reject the applicant's credibility. Further, counsel submits that the Tribunal was entitled to reject the explanation given by the applicant as unreasonable and to find that "This is not a credible explanation and it is considered that if the Applicant had the fear she relates at the time she came here that she would have applied at an earlier stage". The respondent accepts the applicant's contention that the majority of applicants for asylum do not make their applications at ports or airports ("at the frontiers of the State" as provided for in the subsection) but states that the Tribunal Member did not make an adverse credibility finding pursuant to s. 11B(d) as an automatic consequence of the breach of that section. Rather, the respondent submits that the Tribunal Member simply did not accept that the applicant's explanation for the delay in making her application was reasonable. The respondent notes that while the applicant's Notice of Appeal referred to the *sur place* issue, the Tribunal found that "the Applicant herself claims that at the time she left the Country she was forced to flee out of fear for her life" and that as such it is clear that the Tribunal did not accept the argument that her application was grounded on events which had taken place since she entered the State.

9. The Tribunal Member also makes an associated credibility finding to the effect that the applicant could have applied for asylum in either South Africa or France, those being the countries which she travelled through en route to Ireland. The Tribunal noted that the applicant stated that she was in need of protection at the time she travelled through these countries, that strictly there is no obligation on her to seek asylum in the first safe country she encounters but that if she was fleeing persecution she would have claimed asylum at an earlier stage and, at the very least, at the time of her arrival in Ireland. Counsel for the applicant submits that this finding by the Tribunal is entirely unreasonable in the circumstances. It is contended that in 2002 when the applicant travelled to the State she was coming to take up a job and was visa exempt. Further, the applicant had only stopped in the countries en route to change planes and regardless of this the applicant indicated that she did not intend to claim asylum when she first came to Ireland as she believed the situation would improve in Zimbabwe post-elections. It is also stated that the fact the applicant failed to claim asylum en route to Ireland has no bearing on the *sur place* element of her claim which relates to more recent events in Zimbabwe in 2008. Counsel for the respondent notes that while the applicant was entitled to enter the State as a visitor, she had no entitlement to enter employment and that if this fraudulent basis for entering the country was detected she could have been refused leave to land. The respondent notes that, when asked, the applicant replied that she "needed protection" at the time of her coming to Ireland and that as such while she now relies on a *sur place* argument to undermine the Tribunal's finding in line with s. 11B(b) it is not open to her to so do having regard to those representations made in the course of her asylum claim.

10. The Tribunal Member also makes a finding that the country of origin information attached to the ORAC s. 13 report does not establish that the applicant would have difficulties in Zimbabwe in circumstances where both the MDC and Zanu-PF parties are now in power. The applicant contends that there was no country of origin information or other evidence before the Tribunal Member to support this finding. On the contrary, the applicant claims that the MDC were not in power in Zimbabwe at the time the Tribunal reached its decision in January 2009. Rather the applicant claims that the country was still in turmoil as a power sharing agreement between the two parties had not been implemented. As such, it is submitted that there was no rational basis for the finding that the applicant would be safe in Zimbabwe.

11. The applicant states that the Tribunal Member did not provide reasons for the finding that members of the MDC were now safe from the Zanu-PF militia simply because of a partial success in an election. Further, counsel claims that the Tribunal Member does not state where the country of origin information that showed that the MDC were in power and that a person associated with them would be safe came from. It is stated that no such information came with the s. 13 report made by ORAC but rather that the information attached to that report was supportive of the applicant's claim, highlighting as it did the violent activities of the Zanu-PF militia ousting MDC members from rural towns. As such, the applicant claims that the Tribunal finding that the applicant would be safe in Zimbabwe is unreasonable, irrational and unsupported by evidence before the Tribunal.

12. Counsel for the respondent raises objection to the use of a quotation from a U.S. State Department country report for Zimbabwe for 2008 by the applicant. Counsel notes that this report is not before the court and was not before the Tribunal as it was published on 25th February 2009, four weeks after the Tribunal made its decision. While the respondent accepts that the Tribunal did not furnish the applicant with country of origin information in relation to the power sharing agreement which had been reached between MDC and Zanu-PF in September 2008, counsel notes that the Notice of Appeal called upon the Tribunal Member to have regard to the situation in Zimbabwe which "was widely publicised in the media". In this regard, counsel relies on the ex tempore decision of Birmingham J. in *Akintepede v. Refugee Appeals Tribunal* (High Court, Birmingham J., 2nd April 2008) that where the country of origin information stated little more than was common sense or universally known, fair procedures did not require the disclosure of that document. Finally, the respondent notes that the submissions of the applicant in this regard are predicated on the acceptance that the applicant was in fact a member of the MDC whereas the Tribunal made it clear that the applicant was not found to be credible and that she had provided no evidence of her membership or involvement with the MDC.

13. Section 11(b)(d) of the Act requires the decision maker to have regard to whether the applicant has provided a reasonable explanation for not having claimed asylum immediately on arriving at the frontiers of the State. If no reasonable explanation is offered, the section requires the decision maker to weigh this in the balance when assessing credibility. In the event that the application for asylum is made *sur place*, the rule is disapplied.

14. Counsel for the applicant says that a reasonable explanation was offered as to why the applicant did not seek asylum when she arrived at the frontiers of the State. Where complaint is made by an applicant in judicial review proceedings that a reasonable explanation was offered, the court's limited function is to check the Tribunal's decision rejecting the expalantion for rationality. It is not the court's function to offer its own view as to whether the explanation offered was reasonable. The court must ask whether the Tribunal's decision as to whether the explanation was reasonable offends commonsense or flies in the face of fundamental reason (see *State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] 1. I.R. 642 per Henchy J. "I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted ultra vires, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision.")

15. The applicant's explanation for not having sought asylum when she arrived at the frontiers of the State is that although she was fleeing persecution, she was travelling to the safety of a family who was to employ her as a childminder. However, the applicant had made clear statements that the reason she left her country of origin in 2002 was because her life was in danger and that she was in fear for her life. In response to Question 21 in the questionnaire she completed in order to apply for asylum, she said:

> "I left my country of origin because I fear for my life. My life was in danger due to my activities in the Opposition back in 2002 . . . at one time my elder brother and I were severely beaten . . . I was afraid to go anywhere because I was being threatened . . . I was afraid of being raped, being beaten again, abused or killed . . ."

16. At interview, the applicant stated that she left Harare in January 2002 because she had been beaten in November 2001 and because she had received threats in November and December 2001.

17. The applicant says that she was living and working with a family in Ireland and that she felt safe and this explains why she did not seek asylum. It was not unreasonable to reject this explanation because in the absence of an asylum application she might have been deported at any moment and returned to her alleged persecutors. The Tribunal Member's conclusion does not offend the rule which protects decisions such as these unless the decision making process reveals a result which offends reason or commonsense. His rejection of the explanation does not offend this standard.

18. The second complaint made by the applicant in relation to s. 11B(d) is that the rule ought to have been disapplied because this was a *sur place* application. Para. 94 of the 'UNHCR Handbook and Guidelines for Procedures and Criteria for Determining Refugee Status' says that "a person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee '*sur place*'". I interpret the exception in s. 11B(d) to mean that when a person arrives at the frontiers of the State for reasons completely unconnected with a flight from persecution, no explanation is required to be provided for not having sought asylum on arrival at the frontiers of the State if, at a later date, application is made *sur place*. Those circumstances do not apply to the applicant. There is no doubt that on her arrival in the State she was fleeing persecution in Zimbabwe. She says that the danger to her has increased during her six year stay in Ireland and that the recent persecution of her family members establishes her as a *sur place* applicant. I disagree. At best, part of her application for refugee status is grounded on events which have taken place since her departure. But the core of her claim relates to her past participation in a political party and past persecution related to that activity. On her own case, these were the factors which propelled her to the frontiers of the State. In those circumstances, the Tribunal Member quite correctly applied the provisions of s. 11B(d) of the 1996 Act, weighing her failure to provide an explanation for why she did not seek asylum when she arrived in the assessment of her general credibility. In my view, a person who claims that the source of persecution has become more serious since the time they left their country of origin is not a refugee *sur place*.

19. I am not of a view that the negative credibility finding based upon the failure to claim asylum in countries through which she was transiting was in any way unlawful. On the applicant's own evidence, she was fleeing Zimbabwe in fear of her life and it is not unreasonable to make a negative credibility finding based upon a failure to seek protection at the first available opportunity. As has often been stated, there is no rule requiring a person fleeing persecution to seek protection in the first safe country attained but decision makers are entitled the have regard to the failure to seek protection in a safe country for the obvious reason that if one was truly in fear one would be likely to seek the first available protection.

20. The explanation given by the applicant was that she came to Ireland with a promise of work and that is why she did not seek protection elsewhere en route. The rejection of this explanation does not render the Tribunal Member's conclusion on this point irrational.

21. The other principal controversy is whether the Tribunal was entitled to decide that the applicant could safely return to Zimbabwe. It is alleged that no reasons were given for this conclusion and that the result is not based upon external evidence which would support the conclusion as to the safe circumstances in Zimbabwe.

22. It must be recalled that the core of the applicant's claim is that her participation in opposition party politics is what caused her to suffer past persecution and fear future persecution.

23. The Tribunal Member addressed the situation in Zimbabwe in the following terms:

> "I have considered all of the country of origin information on file.
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> It was put to the applicant at interview 'it is claimed that you fear returning to Zimbabwe because of the political situation, but now that the MDC and the Zanu PF are both in power, what problems would you have?' The applicant replied 'my family are still involved. If I go back home, Zanu PF know me and they will identify me as one of my family. I am afraid that I'll be beaten, raped, tortured and put in prison unlawfully and used for sex'.
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> No country of origin information is submitted on this applicant's behalf and reliance is placed on the country of origin information attached to the Commissioner's section 13 report. This information does not establish that the applicant would have difficulties in Zimbabwe in circumstances where both the MDC and the Zanu PF parties are now in power. I have considered all of the documentation and country of origin information relied on in support of this applicant's claim.
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> Pursuant to section 11A(3) of the Refugee Act 1996, as amended, where an applicant appeals against a recommendation from the Commissioner in section 13, it shall be for him or her to show that he or she is a refugee. The standard of proof to be met must show that there is a reasonable degree of likelihood that he or she will be persecuted for a Convention reason. For the reasons stated, I am not satisfied that the applicant has discharged this burden. The applicant's credibility is cast in doubt by the matters already referred to, such that I am satisfied that she should not be afforded the benefit of the doubt in relation to her alleged difficulties and fears and the stated causes of same. In the circumstances, the applicant has not established her subjective fear. Neither is the objective basis of her fear established in circumstances where no country of origin information has been submitted on her behalf to demonstrate the current situation in Zimbabwe following the MDC and Zanu PF jointly taking power."

24. In my view, the grounds of complaint in respect of the circumstances in Zimbabwe which assert that these findings are not based on country of origin information; that such information was not put to or given to the applicant for comment and that there was a failure to take account of the facts in Zimbabwe, are based on a fundamental misconception of the Tribunal's finding. The Tribunal did not find that the applicant has a well founded fear of persecution but that the State security forces can protect her. The Tribunal did not believe that she ever had a well founded fear of persecution and inferentially that there is nothing from which she needed protection.

25. Separate to that finding, the Tribunal Member decided that the applicant had not submitted any country of origin information or any other evidence to suggest that the circumstances which caused her to flee Zimbabwe six years earlier still pertained. It was public knowledge that the MDC opposition party had enjoyed success in national elections, and though the Tribunal Member may have overstated the position by saying that, at the date of his decision, that the MDC were in power, in my view, it would be wrong to read his decision as a finding that State security was available to protect the applicant from an established fear.

26. I therefore dismiss the applicant's application for judicial review.