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THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 91 J.R.]

BETWEEN

B. J. C. [South Africa]

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL.

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

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 31st day of July, 2012

1. This case is one of a number of cases heard in succession in conjunction with the case of *N v. Refugee Applications Commissioner and Others* (Unreported, High Court, Cooke J. 30th March 2012) which had as their common denominator the fact that the applicant's country of origin was South Africa and that that country was designated as a "safe country" pursuant to s. 12(4) of the Refugee Act 1996.

2. In its judgment (No.2) of the 30th March 2012, in the *N.* case, the Court decided two issues. First, it held that s. 13(5) of the Act of 1996, falls to be interpreted as conferring on the Commissioner a discretion as to whether one or more of the findings identified in subs. (6) of that section are included in a report upon an application for asylum made under s. 13 of the Act. One of those listed in s. 13(6) at para. (e) is a finding that the applicant is from a country which is designated as a safe country of origin by the Minister pursuant to s. 12(4) of that Act. Secondly, the Court held that in a case where the negative recommendation on the asylum application was based exclusively or primarily upon a finding of personal lack of credibility of the applicant, there is an obligation to ensure that the appeal against the negative recommendation to the Refugee Appeals Tribunal provided an "effective remedy," in the sense of Article 39 of Council Directive 2005/85/EC of the 1st December, 2005. This may require that such a finding ought not to be included in order to avoid depriving the applicant of an oral hearing on the appeal by reason of the combination of the provisions of s. 13(5) and (6) (e) and of the designation of the country of origin as a safe country.

3. In this, as in the other associated cases therefore, the essential issue before the Court is whether the relevant applicant has been or will be deprived of an effective remedy in the appeal to the Tribunal by reason of the fact that the inclusion in the s. 13 Report of a finding that the applicant is from South Africa as a designated country of origin has deprived the applicant of an oral hearing on the appeal.

4. In the present proceeding leave is sought to apply for judicial review of several decisions namely, the first instance determination of the asylum application in the s.13 report of the Commissioner dated 16th November 2009, the decision of the Tribunal on appeal against that report dated 3rd November 2009, and the decision of the Minister under s.17(1) of the Act of 1996 refusing a declaration of refugee status.

5. The applicant arrived in the State from South Africa in August 2009, and claimed asylum. It was accepted that he was a national of South Africa. He claimed that his parents were born in Zimbabwe and that his parents and two siblings had been killed in xenophobic attacks during which their home was burned in May 2008.

6. The report of the Refugee Applications Commissioner dated the 10th September, 2009, expressed doubt as to the credibility of the applicant's claim that, if returned to South Africa, he would be at risk of persecution upon the ground that his parents

had been from Zimbabwe. The authorised officer was clearly concerned at the credibility of the claim and begins the appraisal of the "Well Founded Fear" in part 3.3 saying: "It is necessary to examine whether the applicant has a well-founded fear of returning to South Africa as well as to evaluate the credibility of the alleged persecution that the applicant has allegedly faced in South Africa." She then examines a number of "issues ... relevant with regard to the credibility of the applicant's claim". The report finds that the applicant had not provided sufficient evidence of actual harm or persistent harassment which could amount to persecution. The authorised officer states: "With regard to assessing the risk of future persecution for Convention reasons were the applicant to return to his country of origin, it is asserted that there are material credibility issues in relation to the applicant's testimony as detailed above and he hence cannot be given the benefit of the doubt." There was accordingly an express finding of lack of personal credibility which forms part of the basis for the negative recommendation.

7. It is also the case, however, that the negative recommendation in the s. 13 Report is based upon the finding ins. 3.4 that protection would be available to the applicant in South Africa by relocating internally to either Cape Town or Johannesburg. The report states: "It is deemed that the applicant has not provided a reasonable explanation for why he could not relocate to safety within South Africa or a reasonable explanation as to why he could not explore further available protection options before travelling to Ireland. The applicant has the alternative of obtaining assistance from a human rights organisation or NGO in South Africa".

8. In the judgment of the Court, this is not a finding which goes to the personal believability of the applicant as such. It is rather the non-acceptance of the applicant's proposition that, if returned to South Africa, he would be at risk because everyone would know that his parents had been from Zimbabwe and that he would be attacked as a result.

9. In the judgment of the Court, that is an issue which turns upon relevant country of origin information as to the current prevalence of popular animosity in South Africa towards individuals whose parents were known to be from Zimbabwe. It turns also, to an extent upon the plausibility of the applicant's proposition that if he relocated to Cape Town or Johannesburg upon return, he might be identified as the son of parents from Zimbabwe. Again, that is not an issue which necessarily turns upon the applicant's personal credibility as such but upon relevant country of origin information as to the existence of such a phenomenon and a common sense appraisal of the plausibility of that proposition. Nevertheless, it is reasonably clear that the authorised officer's finding that the explanation is implausible was influenced by the earlier finding of general lack of credibility.

10. Notice of Appeal was filed against the s.13 report and in several of the grounds issue was taken with its negative credibility findings. In addition, the finding on relocation was challenged on the basis of the applicant's evidence that he would always be identifiable as someone of non-South African ethnicity because of his accent and the tribal markings which he bears.

11. It is of significance of course that the appeal was taken because the present judicial review proceeding was not commenced until 1st February 2010 some four months after the expiry of the 14 day time limit fixed by s.5 of the Illegal Immigrants (Trafficking) Act 2000. The period in question cannot be extended unless the Court is satisfied that there is good and sufficient reason for doing so. It can only be so satisfied if it has before it evidence upon which a conclusion to that effect can be reached including an explanation as to why the time limit was missed. In the grounding affidavit in this case no explanation is sought to be given as to

why judicial review of the report was not commenced at the appropriate time although the steps taken in December and January after receipt of the Tribunal decision are described. The delay is sought to be attributed to a decision by the applicant to change solicitor, the need first to concentrate on putting in an application for subsidiary protection and then delay on the part of counsel in drafting papers and the intervention of the Christmas break. There is accordingly no evidence before the Court by way of explanation of delay in respect of the proposed challenge to the report. The reality is that no intention was formed in September/October 2009 to seek judicial review of the report because, with the benefit of legal advice, the logical course of appeal to the Tribunal was adopted. In these circumstances there is no good and sufficient reason to extend the period in that regard and leave to seek judicial review of the s.13 Report cannot be granted.

12. So far as concerns the proposed challenge to the validity of the Tribunal decision the issue now before the Court is whether a substantial ground has been made out to the effect that the applicant has been deprived of an "effective remedy" in the appeal to the Tribunal as the result of the inclusion in the s. 13 Report of the statutory finding that the applicant originates from a "safe country" with its consequence that there was no oral hearing on the appeal and there was a presumption that he was not a refugee.

13. As already indicated, the s. 13 Report did deal with the issue of credibility and contained negative findings in that regard. As a result of the question marks over his credibility, he was not accorded the benefit of doubt.

14. The decision of the Tribunal relies in its appraisal on the replies given by the applicant to questions put to him during the s. 11 Interview before the Commissioner. One of the key conclusions reached by the Tribunal is that the applicant's responses to questions put to him "do not suggest that he has a well founded fear of persecution by reason of his Zimbabwean lineage. These responses do not suggest that the applicant has a well founded fear of persecution by reason of his Zimbabwean lineage. His responses were extremely vague, unhelpful and even confusing".

15. The Tribunal decision also contains a material paragraph explicitly headed "Credibility" in which doubts are expressed as to the plausibility of other evidence given by the applicant as to how he went to Mozambique and then to Nigeria although in a state of penury.

16. It is clear, accordingly, that credibility was at the heart of the decision taken by the Tribunal member. It must also be said, however, that to some extent the conclusions reached by the Tribunal member are not necessarily based upon the personal credibility of the appellant, but upon the plausibility of the description he gave of his travels to Mozambique and Nigeria. Nevertheless, the Tribunal member expressly states: "The (UNHCR) Handbook tells us that the benefit of the doubt should only be given when the Tribunal is satisfied as to the applicant's general credibility. The statements must be coherent and plausible and must not run counter to generally known facts".

17. In the judgment of the Court, the possibility cannot be excluded that these conclusions might not have been arrived at had there been an oral hearing before the Tribunal member at which he would have had an opportunity of assessing personally the responses of the applicant to pertinent questions on all of these issues and events. Instead the Tribunal member has concluded that the applicant in

evidence was vague, unhelpful and confusing based on his reading of the transcript of the interview.

18. The Court is accordingly satisfied for the purpose of the present application that a sufficiently substantial ground has been raised as to the impact upon the appeal decision of the absence of an oral hearing and the presumption created by the designation of South Africa as a safe country of origin to justify the grant of leave. That is all that the Court decides. It may well be that upon closer examination at a substantive hearing, the Court will conclude that the issues of credibility were not material to the overriding conclusion based upon country of origin information namely, that it was improbable that the applicant would be at risk of persecution or serious harm upon return because of the lack of plausibility in his assertion that he would always be identified as somebody with a non-South African lineage and therefore exposed to animosity on the part of the general population in South Africa no matter where he went.

19. Accordingly, leave will be granted to the applicant to apply for judicial review but limited by reference to the statement of grounds dated the 1st February, 2010, as follows. Leave will be granted to seek the reliefs sought in part 4 of the statement of grounds at paras. (a), (f), (h), G) and (k). For that purpose an extension of time until 1st February 2010 will be allowed. The Court will grant leave first on the basis of a ground formulated in the light of the arguments advanced to the Court having regard to the issues considered in the N. case as follows:-

"The decision of the first named respondent on the applicant's appeal is unlawful in that, in the absence of an oral hearing, the Tribunal member has relied predominantly upon responses to questions in the s. 11 Interview which depended upon the personal credibility of the applicant with the result that the applicant has been deprived of an 'effective remedy' by way of an appeal before the Tribunal."

20. In addition the grounds at paras. (vii) (viii) (ix) and (x) of part 5 of the statement of grounds will be included in the leave order. In the judgment of the Court no other grounds have been made out as substantial for the purpose of granting leave.