

**THE HIGH COURT
JUDICIAL REVIEW**

[2012/ No. 888 J.R.]

BETWEEN

S.K. (MAURITIUS)

S.S. (MAURITIUS)

S.S. (a minor suing by her mother and next friend S.K.)

S.S. (MAURITIUS) (a minor suing by her mother and next friend S.K.)

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL

MINISTER FOR JUSTICE AND EQUALITY

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 12th day of January, 2016

1. This is a telescoped hearing seeking certiorari to quash the decisions of the Refugee Appeals Tribunal (RAT) to affirm the decisions of the Refugee Applications Commissioner (RAC) that the applicants not be declared refugees, and an order remitting the matter for *de novo* consideration by a different tribunal member.

Background

2. The first named applicant is a Mauritian national born on 28th February, 1988, and the mother and next friend of the third and fourth named applicants. The second named applicant, the father of the third and fourth named applicants, and the partner of the first named applicant, is a Mauritian national born on 12th December, 1982. The third and fourth named applicants, the children, were born in Ireland on 3rd October, 2010, and 24th December, 2011, respectively. The first and second applicants met in Ireland. The children's applications were joined to that of their mother; the father made a separate application for refugee status.

3. The first named applicant arrived in Ireland on 9th February, 2008, on a student visa. Upon arrival in this State she studied information technology at Euro College on Parnell Street, Dublin 1. She worked as a cashier in a shop for one and a half years. The applicant states that she was sick while pregnant with her second child in 2011 and could not continue her education or employment. Her visa expired on 7th February, 2012, and the applicant could not apply for renewal of her student visa because she had ceased education. The applicant presented at a local social welfare office and was informed that the office would only be in a position to provide assistance if she regularised her situation in the State. The applicant and her two children presented at the Offices of the Refugee Applications Commissioner on 17th February, 2012, and completed an ASY1 form. The applicant completed the asylum questionnaire on 27th February, 2012, and attended for an oral interview on 9th March, 2012.

4. The first named applicant stated in her s.11 interview, in regard to her fears if returned to Mauritius, at pp. 66-67 of the booklet as follows:-

"My mother died six years ago. My father married another woman. I was not happy about this. She came to my house and kept me away from my father. She had two children with my father. Then I came here and was still fighting with my father about why he married her. She was young, she was twenty five and my father was forty. I could not live there with them. I came here. She left my father with the two children in 2009. My father did not have enough money as he was working as a labourer in the sugar fields. She came back for the children and my father did not want to give them to her. My father killed his father in law. My father was in jail and is now out and has to go to the police station every day to sign and the case is going on in the courts. He may have to go to jail. He is retiring from working."

The applicant continued at q. 29:-

"Life in Mauritius is very poor and very difficult now. It is very hard to get a job there. Life is very expensive there. My father does not know about one of my children. My boyfriend and I are from different religions. My father is Hindu and I am Hindu and my boyfriend is Muslim. The two do not match in Mauritius. My father is not happy with that. I am bringing my daughters up as Hindu. Nobody in my family has ever gone against the religion."

When asked about the possibility of internal relocation, away from her father, the applicant stated the following at q. 30:-

"We come from poor families and I only have my father in Mauritius. Over there we would not have a house or support. Here you get free food and things but there you can die on the street if you do not have food. I want my daughters to have a better life and better education here in Ireland."

5. By cover letter dated 30th May, 2012, the RAC issued a negative decision in respect of the first, third and fourth applicants' claim for a declaration of refugee status. In the decision, at p. 83 of the booklet, the authorised officer of the RAC stated the following:-

"The applicant has not identified any past persecution in Mauritius and has not established any forward looking fear of persecution in Mauritius. The applicant has been in Ireland, on student visas, for four years and did not claim asylum until she was unable to obtain a further extension to her student visa in February 2012 and she was told by 'the social people if we wanted to get help we needed to be legal here'. Accordingly it is considered that the applicant has no basis for the contention that she and her two daughters are refugees."

The decision-maker goes on to make findings on the feasibility of internal relocation, the availability of state protection, a lack of convention nexus and a finding pursuant to s.13(6)(a) of the Refugee Act, 1996 (as amended), namely, that the application "*showed no basis or a minimal basis for the contention that the applicant is a refugee*". As a result of the latter finding, any appeal to the Refugee Appeals Tribunal would be a papers-only appeal, without an oral hearing. The applicants issued a form two, notice of appeal dated 13th June, 2012 to the Refugee Appeals Tribunal.

6. The second named applicant's asylum claim was considered separately to the first, third and fourth named applicants. The applicant worked as a farmer and sold marijuana in Mauritius. The applicant moved to Kuwait from 2002 to 2003, where he worked in a café but returned to Mauritius because of the Iraq conflict in 2003. He arrived in Ireland on 21st December, 2006, on a study visa and was enrolled in a human resources management and business administration course. His stated purpose for enrolling in the course was to enable him to reside and work in Ireland. The applicant worked in Dublin as a metal fabricator; in a hotel; and as a mechanic. In his s.11 interview, at p.77 of the booklet, the applicant is asked as follows:

"Q.39: Did you try to renew your last study visa in Ireland?

A.39: I had no job and nothing saved. I had two kids and I worked as a mechanic. I tried my best to be successful. I am trying to fight for my rights. I did not attempt to renew my study visa as I did not have the money.

Q.40: When did you apply for asylum in Ireland?

A.40: On February 17th 2012. I am not really an asylum seeker but I want to legalise myself in the best way possible.

Q.41: Did you delay in making an application for asylum here in Ireland?

A.41: No. I applied as soon as I was informed by the social worker of the asylum process.

Q.42: What led to you applying for asylum in Ireland?

A.42: I applied on the recommendation of the social worker. This was a way to legalise myself and remain in the Irish state.

Q.43: You arrived in Ireland on December 20th 2006. Your study visa last expired in July 2011 and did not make an application for asylum until February 17th 2012. Do you wish to account for this delay in applying for asylum or not knowing about the asylum process here?

A.43: I was not thinking about asylum and I had no money and my girlfriend was dependent on me. It got harder and harder. I wanted to fight for my rights here in Ireland."

7. The s. 11 interview continues as follows:-

"Q.49: Looking forward, what would happen to you if you were returned to Mauritius right now?

A.49: What I have spoken about already. I would be doing misdeeds. I don't want to live like this at all. There is nothing for me in Mauritius. I would not get money to buy a house and land in Mauritius.

Q.50: What are your family members doing in Mauritius today?

A.50: I was looking after my siblings. My sister works in a call centre and my brother was working in construction until he injured a limb. Everybody is working and life is tough.

Q.51: Have you been affected by any particular situation within Mauritius?

A.51: They have been affected by the general situation in Mauritius.

Q.52: Could you avail of the assistance of the International Organisation on Migration?

A.52: I approached them as I was sent by the social worker. I went to the IOM and I said I refused voluntary repatriation. After I refused this I was directed towards ORAC.

Q.53: Have you any evidence that work would be denied to you on the basis of your ethnicity in Mauritius?

A.53: It is based on my experiences in Mauritius. I do not have other reports.

Q.54: Why would your situation be any different to that of other Mauritian Muslims who, according to recent estimates, form 17% of the population of the country?

A.54: My situation would be the same as other Mauritian Muslims. They would all say the same thing as me.

Q.55: The Mauritius Ministry of Labour has worked on the elimination of discrimination in employment in the workplace following a ratified convention. Have you any evidence that you would suffer adverse discrimination on account of being a Muslim in Mauritius?

A.55: I do not have any written documents and this is what I am saying. I am fighting to be successful in my life.

Q.56: Information from the International Religious Freedom Report in 2011 reveals the government respected religious

freedom with no reports of abuses within the country. Do you wish to comment?

A.56: I have said everything and there is nothing to add apart from this much.

Q.57: The World Economic Freedom Report (Index of Economic Freedom) states Mauritius leads Sub Saharan Africa and is ranked 12th worldwide in terms of economic infrastructure and openness. Do you wish to comment?

A.57: In this case Mauritius has open economic freedom. But why would I invest in Mauritius when I have nothing? Nothing has changed and there has been no progression.

Q.58: Have you told me all your reasons for leaving Mauritius?

A.58: Yes. I don't want to live there anymore. I don't want uncertainty. I have to ask myself questions every day.

Q.59: Is there anything else you wish to add in support of your application?

A.59: I want to stay in Ireland. My wife has no mother. I have two children. She had no-one to look after her for 15 years. I am happy to have someone like her in my life. I want to have a good life in Ireland. I want happiness in my life."

8. By cover letter dated 30th May, 2012, and decision dated 28th May, 2012, the RAC issued a negative decision in respect of the second named applicant's claim for refugee status, exhibited from p. 131. The authorised officer set out the applicant's claim, stating that the discrimination in employment was the crux of the applicant's claim. The authorised officer then stated that this would not amount to persecution. The decision-maker then stated, under the heading 'section 13(6) findings', as follows:-

"The applicant's primary fears in Mauritius are connected with him being denied adequate employment opportunities by a Hindu dominated administration on account of him being part of a Muslim minority group. Whilst it is understandable that the applicant may fear he would face difficulties upon his return to Mauritius in accessing employment, there is no reason or available evidence to suggest that he would be persecuted.

Having regard to the finding made above, I find that Section 13(6)(a) of the Refugee Act 1996 (as amended) applies to this application."

As a result of this finding any appeal to the Refugee Appeals Tribunal would be by way of a papers-only appeal. The second named applicant issued a form two, notice of appeal to the Refugee Appeals Tribunal on 13th June, 2012.

The impugned decisions

9. The decisions in the first, third and fourth named applicants' case and that of the second named applicant issued separately, both dated 17th September, 2012, and both decisions were undertaken by the same tribunal member.

10. The decision in the first, third and fourth named applicants' case stated, under the heading 'analysis of the applicants' claim', exhibited from p. 196, that claims made in the notice of appeal regarding tensions between Muslims and Hindus were not substantiated by country of origin information. Secondly, the tribunal member analysed the claim that the applicants had become refugee *sur place* by virtue of the parents' different religions, accepting that familial disapproval would be a feature of Mauritian society but that this would not amount to persecution. Lastly, the tribunal member set out the family difficulties with the first named applicant's father and stepmother, but stated that this would be matters for a criminal court rather than a claim for international protection.

11. At p. 215 of the booklet and under the heading 'analysis of the applicant's claim', the tribunal member, in the second named applicant's case, analysed the claim presented by the applicant. First, the tribunal member describes the applicant's vocational background as well as that of his family. Then the tribunal member analyses the applicant's claim that racism in Mauritius could potentially prove to be a barrier for the applicant in securing employment. The tribunal member does not accept that this would amount to persecution and further, the tribunal member points to a pending criminal charge that the applicant may have to face if returned to Mauritius.

12. The tribunal member concludes in all of the applicants' cases that the applicants do not fall within the definition of convention refugee, thereby affirming the negative recommendation of the RAC.

Applicant's submissions

13. Counsel for the applicants, Mr. Michael Conlon, S.C., with Mr. Garry O'Halloran, B.L., submitted that because the applicants' appeals were by way of papers-only, the tribunal member should have taken extreme care when dealing with the appeals. This, the applicants argued, was not done in the decisions herein impugned.

14. The applicant submitted that the finding, "there is no evidence that the applicant, her partner or her children would be at risk of persecution in Mauritius as a result of their relationship", is wrong and constitutes a failure on the part of the tribunal member to make a lawful assessment of the evidence. The primary evidence was that as a result of breaching societal mores by entering a mixed ethnic and religious relationship, they were exposed to discrimination which, the applicants argued, was immediate and permanent and this was supported by country of origin information. The applicants argued that the evidence before the tribunal was of serious human rights abuse that is at the core of the notion of being persecuted, thereby creating a convention nexus.

15. The applicants argued that having accepted that the second named applicant was exposed to discrimination, the tribunal member failed to consider the provisions of the UNHCR handbook, which states at para. 54:-

"Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities."

16. The applicants contended that the tribunal member selectively relied upon country of origin information and failed to have proper regard to certain information contained in the detailed notice of appeal and appended documentation, and thereby failed to have proper regard to the personal circumstances of the applicants' case. The applicants argued that this was contrary to reg. 5(1)(a), (b)

and (c) of the European Communities (Eligibility for Protection) Regulations 2006. The applicants argued that there has not been an adequate investigation of the claim at appeal because the appeal to the RAT is *de novo* and the applicant is entitled to enter new evidence, the statements made by the applicants in the notice of appeal are, effectively, new evidence. Therefore, the applicant contended, the new evidence has not been given the appropriate consideration and dealt with in the tribunal decision. Counsel pointed to the notice of appeal where it states as follows:-

"The applicant is fearful that her partner, being Muslim will not be accepted by her family and may come to some harm at the hands of her family members. She is also concerned that her daughters may be at risk."

At p.196 of the decision, the tribunal member states:

"The Notice of Appeal states that the Applicant is fearful that her partner will not be accepted by her family and may come to some harm at the hands of the family members. It further goes on to state that she is concerned that her daughters may be at risk. I cannot find any statement from the Applicant on the file to that effect apart from a statement at page 6 of the interview that her father is not happy."

The applicants argued that because the appeal is a *de novo* hearing, the applicants are entitled to reasons as to why this newly submitted evidence is being ignored. The applicants relied upon the decision of Clark J. in *V.M. (Kenya) v. Refugee Appeals Tribunal & anor.* [2013] IEHC 24; and the CJEU in *M.M. v. Minister for Justice, Equality and Law Reform* (Case C-277/11, 22nd November, 2012) in relation to fair procedures.

17. The applicants submitted that there was an inadequate investigation of the claims of persecution made by each of the applicants where there was an over-reliance on the fact that the applicants had come to this State to seek a better life, and were also economic migrants. The applicants argued that the tribunal member had erroneously excluded the applicants from the convention definition of refugee because the persecution that they faced emanated from economic deprivation, which, the applicant submitted, could bring them within the ambit of the convention-refugee definition.

Respondent's submissions

18. Counsel for the respondents, Mr. Niall O'Hanlon, B.L., argued that the applicants' submissions amounted to an appeal of the tribunal decision rather than a review. The respondents contended that the decisions, impugned herein, are being criticised by the applicants because of the conclusions reached, and not because of an error of law, jurisdiction or any other judicial review ground. The respondents argued that it is not necessary for this Court to decide whether the same conclusion would have been reached.

19. In regards to the applicants' submission that statements in the notice of appeal amount to evidence, and have not been appropriately dealt with, the respondents argued that the applicants have an advantage in that they were legally represented throughout the process. Proofs have been advised and, therefore, if any statement in the notice of appeal were to be taken as a statement of fact, the applicants, particularly in a papers-only appeal, would be advantaged. The respondents argued that this could not be the case and the tribunal member is entitled to balance the evidence and submissions made throughout the process. The respondents relied upon the *ex tempore* decision of Birmingham J. in *Chukwuemeka v. Minister for Justice, Equality and Law Reform & anor.* (Unreported, High Court, Birmingham J., 7th October, 2007).

20. The respondents submitted that the second named applicant's evidence was that of alleged discrimination and of his own criminal activities of drug dealing (cannabis) in his country of origin, where he stated that he is not really an asylum seeker but that he wants to regularise himself in the best way possible. The respondents submitted that when considering the second named applicant's case, the tribunal decision does not rest on his statement that he is not really an asylum seeker. The tribunal considers at some length the issue of whether he could be said to be a refugee. First, the employment circumstances of various members of the said applicant's family are considered. Secondly, the tribunal member notes that country of origin information indicates that there are some reports of societal abuses and discrimination based on religion. Thirdly, the tribunal member notes that the applicant makes an allegation of corruption against the Mauritian authorities but that he does not substantiate same. Fourthly, the tribunal member refers to the proposition that denial of employment opportunities may constitute persecution and notes the allegation that there is some discrimination against Muslims in the higher echelons of the Mauritian civil service. The tribunal member concludes that this does not impact upon the second named applicant in view of the level of his educational attainment. The respondents argued that having considered the second named applicant's case, the tribunal member concludes that he is not a refugee based upon all of the evidence before him.

21. The respondents submitted that it is also apparent that the tribunal member has considered the first named applicant's case in some detail. The tribunal member notes that the notice of appeal states that the first named applicant is fearful that her partner will not be accepted by her family and may come to some harm at the hands of family members and she is concerned that her daughters may be at risk. However, the respondents contended that the tribunal member states clearly in his decision there is no statement from the first named applicant on the file to that effect apart from a statement at p. 67 of the booklet, in her s.11 interview that her father is not happy about her relationship with a Muslim.

22. Further, the respondents submitted that other assertions made in the notice of appeal regarding religious tensions in Mauritius are not substantiated by country of origin information. The respondents argued that the tribunal member assessed whether the first named applicant was a refugee *sur place* because she had entered the relationship and had children since leaving her home state and the tribunal member records incidence of inter-ethnic marriages in Mauritius, noting that whilst it would appear that there may be some family disapproval of such marriages, there is no evidence that the first named applicant, her partner or her children, would be at risk of persecution in Mauritius as a result of their relationship. The respondents further submitted that the tribunal member fully considered the applicant's personal circumstances as an educated woman that could find employment. The issues with the first named applicant's father and stepmother, the respondents submitted, are criminal matters and do not provide a convention nexus.

Decision

23. The applicants argued that the tribunal member failed to engage with fresh evidence submitted at appeal stage, submitting that the notice of appeal amounts to evidence by an applicant, where the applicant is not afforded an oral hearing. An applicant is entitled to re-plead the case at appeal stage. An appeal to the Refugee Appeals Tribunal is a *de novo* appeal. In the context of a papers-only appeal the applicant does not have the opportunity to present evidence by way of oral testimony before the tribunal. A simple statement made in a notice of appeal does not automatically constitute new evidence. This Court cannot accept the proposition made by the applicants to this effect. This could potentially amount to an applicant rectifying the deficiencies identified in the s.13 report. In *Chukwuemeka (supra)*, Birmingham J. stated on p. 4:-

"While this might not always be the case, I have no doubt that at the appeal stage the applicant and his legal advisers in

the present case will be considerably advantaged by having had the ORAC report, highlighting as it does perceived weaknesses and inconsistencies, and thereby providing an opportunity for these issues to be addressed. In effect, the applicant has had his proofs advised."

Where, effectively, proofs have been advised in the s.13 report and any deficiencies in the claimed are shored up by assertions in the notice of appeal, these assertions do not amount to evidence. The tribunal member recounted the claims made in the notice of appeal, and could not find evidence in the country of origin information or the first named applicant's questionnaire or interview to substantiate the claims. I do not accept that these were fresh credibility findings. I am satisfied that the Tribunal member engaged sufficiently with the assertions made in the notice of appeal.

24. The second named applicant made a statement at interview that he was not really a refugee and wanted to regularise himself in the best way possible. This, the applicants stated, was overly-relied upon by the tribunal member and resulted in the applicant's case not being properly considered as a result. The second named applicant presented a case based upon discrimination in securing employment and generally the perceived discrimination against Muslims in Mauritius. The tribunal member engaged with the country of origin information before him. The applicant's assertion that life would be difficult if he were to be returned was referred to in the decision. The tribunal member decided that this does not bring the fourth named applicant within the convention refugee definition and this is a decision for the tribunal member, not this Court upon judicial review. The tribunal member deals with the applicant's claim and engages with the information before him. The statement made by applicant during his s.11 interview was not determinative of his case.

25. Upon reading the decision as a whole, it is clear that the tribunal member engaged with the material before him and the cases presented by the applicants. The applicants would, no doubt, face challenges in their country of origin and in my opinion the tribunal member undertook an analysis of those challenges, deciding that they did not amount to persecution as per the refugee convention. The conclusions reached by the tribunal member are within the jurisdiction of the tribunal as delegated by statute and it is not open to this Court to disturb those findings unless there has been some flaw in the decision-making process. I do not find that there is any such flaw in the decision-making process in the applicants' cases. The requirements of the Qualification Directive 2004/83/EC of 29th April, 2004 (S.I. 518 of 2006) set out, under the heading 'assessment of facts and circumstances', as follows:-

"1. Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.

2. The elements referred to in of paragraph 1 consist of the applicant's statements and all documentation at the applicants disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.

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

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

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

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

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

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

4. 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."

It seems to me that the tribunal member did consider the evidence before him and the claims made by each of the applicants, in accordance with the Qualification Directive. In my view, the decision-maker was entitled to arrive at the conclusions he so did and there is no reason for this Court to interfere with those findings.

26. For the reasons set out above, I therefore refuse leave.