Neutral Citation [2015] IEHC 731

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 1208 J.R]

BETWEEN

B.E. (NIGERIA)

V.D. (NIGERIA)

(a minor suing by her mother and next friend B.E.)

E.D. (NIGERIA)

(a minor suing by his mother and next friend B.E.)

M.D. (NIGERIA)

(a minor suing by her mother and next friend B.E.)

APPLICANTS

AND

REFUGEE APPEALS TRIBUNAL

MINISTER FOR JUSTICE AND EQUALITY

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 19th day of November, 2015

1. This is a telescoped hearing for judicial review seeking *certiorari* to quash a decision of the Refugee Appeals Tribunal affirming the negative recommendation of the Refugee Applications Commissioner that the applicants should not be declared refugees, dated 25th November, 2011, notified to the applicants by cover letter dated 30th November, 2011, and remitting the appeal of the applicants for *de novo* consideration by a different tribunal member.

2. The proceedings were issued on 20th December, 2011, thereby outside the 14-day timeframe for issuing judicial reviews of this nature. The first named applicant explained the delay on affidavit and in light of the explanation provided, I am satisfied in this case, there are good and sufficient reasons provided and I do thereby extend the time.

BACKGROUND

3. The applicants are a mother and her three children and are Nigerian nationals. The mother, and first named applicant, was born on 23rd April, 1975; the second named applicant, her daughter, was born on 3rd May, 2007; the third named applicant, her son, was born on 28th November, 2008; and the fourth named applicant, her daughter, was born on 28th November, 2010. As the second, third and fourth named applicant are all minors, the first named applicant, their next friend in this set of proceedings, spoke for the family unit at the s.11 interview. The following is her account of the events that gave rise to the alleged persecution, which led to her claiming international protection in Ireland.

4. The first named applicant lived with her parents in Kaduna. He father was a senior pastor of an Evangelical church. When Goodluck Jonathan, a Christian, became president of Nigeria in 2010, the first named applicant stated that problems began with local Muslims. At her s.11 interview, the first named applicant was asked, at question seventeen: "why did you leave Nigeria and come to seek asylum in Ireland?" The first named applicant replied as follows:

> "I left Nigeria because there was a problem when Muslims came to my church after a Christian became president of Nigeria. The Muslims were angry and they came to my church and were beating people. They hit my father in his church and they continued to beat him until they killed him. My friend who lives in Kaduna came to assist me and helped me to run away and we moved to the southern part of Nigeria. We stayed there for about three months and two weeks. Then I tried to come back and see how things were in Kaduna. I tried to return to Kaduna and returned there where I met a woman. When we got down from the bus, this woman was shocked and said people were looking for my family. The woman told me that people from my church went and killed the head of the mosque. She said people were looking for us and she said she would help us. She brought us to a man who was my father's friend. He was shocked and he heard [about] the death of my father and he would help us to find a place to go. He took us to a place to hide. He took us to a faraway place and brought food for us. From there, he did everything and took our pictures and prepared our travel. On 20th August, 2011, he came and told us that everything was ready. This man arranged our travel out of Nigeria and he told us that we were moving to Ireland on August 28th, 2011. For me, it is a miracle to be saved and we are free. We then came to Ireland."

5. The applicants arrived at Dublin airport on 29th August, 2010, and presented at the offices of RAC that same day, and completed a s.8 interview. The first named applicant was interviewed pursuant to s.11 of the Refugee Act 1996 (as amended) on 20th September, 2011. The s.13 report in respect of all four applicants was issued on 26th September, 2011, which was sent to the applicants by cover letter dated 12th October, 2011. The authorised officer found, *inter alia* , as follows:

a) The applicants did not provide any evidence to substantiate the claims made, which affected credibility;

b) The applicants returned to Kaduna after having safely relocated, which affected credibility;

c) The first named applicant lacked a basic knowledge of the city of Kaduna, where she claimed to have resided for her entire life;

d) The first named applicant did not provide a true and accurate account of her travel to Ireland;

e) There was no objective information provided regarding the group that might be targeting her and she had never been directly targeted, by her own account;

f) There is no objective evidence that she could not move elsewhere to avoid the group she perceived to be targeting her nor is there any evidence that she could not have sought the assistance of the state authorities.

6. The authorised officer made a s.13(6) (b) finding, namely:

> "The applicant made statements or provided information in support of the application of such a false, contradictory, misleading or incomplete nature as to lead to the conclusion that the application is manifestly unfounded."

The effect of this finding is that any appeal to the RAT would be by way of the papers-only, and no oral hearing would be held. The applicants appealed the negative recommendation to the RAT by form two, notice of appeal on 26th October, 2011.

IMPUGNED DECISION

7. The decision, dated 25th November, 2011, affirmed the negative recommendation of the RAC. Under the heading 'analysis of the applicants' claim', exhibited from p.114 of the booklet of pleadings before this Court, the tribunal member scrutinised the applicants' claim. The tribunal member found as follows:

a) The first named applicant could not specify the group she was afraid of, beyond stating that she feared Muslims.

b) None of the four applicants "were hurt or traced in the attack on the church".

c) The applicants managed to move to another region for over three months without being traced, as the first named applicant had stated might happen.

d) The applicants returned to Kaduna after having claimed to have safely relocated.

e) Nothing occurred after the applicants returned to Kaduna and the first named applicant decided to leave the country on the direction of a woman and Mr. John.

f) The first named applicant did not have a basic knowledge of Kaduna when questioned at her s.11 interview.

g) The first named applicant has no objective basis for her subjective belief that state protection would not be available to her.

h) Over two pages, the tribunal member made findings in relation to internal relocation, with the caveat at the beginning: "Even, if it were the case that the Applicant and her children were refugees, which the Tribunal has decided they are not, the issue of internal relocation can be referred to". The decision-maker then goes on to analyse the particulars of the applicants' circumstances and the viability of internal relocation.

8. The tribunal member concluded by affirming the recommendation of the RAC and denying the applicants a declaration of refugee status.

APPLICANTS' SUBMISSIONS

9. Counsel for the applicants, Mr. Michael Conlon S.C. with Mr Garry O'Halloran B.L., submitted that the decision does not adhere to the standard of extreme care that is necessitated in papers-only appeals, and particularly in this case because three of the applicants are small children.

10. The applicants submitted that there was a breach of fair procedures in that the tribunal member made fresh credibility findings, without giving the applicants an opportunity to respond, and further, according to the applicants' submissions, the notice of appeal was completely ignored by the decision-maker. The applicants argued that because the notice of appeal is the final form of communication between the tribunal member and the applicants in a papers-only appeal, not taking the document into account is a serious breach of fair procedures. Moreover, the applicants contended the tribunal member was obliged, if something needed to be addressed, to revert to the RAC to make further enquiries before finalising her decision, maintaining that this was in breach of art. 39 of the Procedures Directive (Council Directive 2005/85/EC), that is, the right to an effective remedy.

11. The applicants further submitted that the tribunal erred in failing to make an assessment of the claims with reasonable regard to the country reports and the notice of appeal submissions, contrary to fair procedures and the European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518 of 2006), reg. 5(1)(a).

12. The applicants argued that the issue of internal relocation was erroneously evaluated by the tribunal member. The applicants relied, *inter alia*, upon the decision of Clark J. in *K.D. [Nigeria] v. Refugee Appeals Tribunal & anor.* [2013] IEHC 481, claiming that the tribunal member should have applied the principles set out therein, and without such a lawful assessment being carried out, the decision should not stand.

13. The applicants referred to the decision of *Idiakheua v. Minister for Justice, Equality and Law Reform & anor.* [2005] IEHC 150, in relation to the issue of state protection. The applicants submitted that the test for assessing state protection was not undertaken in its appropriate form in this case.

14. Counsel for the applicant also argued that the children's claims were dismissed without due regard to the Convention on the Rights of the Child and the Supreme Court decision of *Nwole & ors. v. Minister for Justice, Equality and Law Reform & ors.* [2007]

IESC 44.

RESPONDENTS' SUBMISSIONS
15. Counsel for the respondents, Ms. Cindy Carroll B.L., submitted that the complaint that the applicants were denied an effective remedy because of a lack of an oral hearing is misconceived because the decision to apply the s.13(6) findings was made by the commissioner and not by any of the respondents in this set of proceedings. The applicants did not challenge the s.13 report and can, therefore, not seek to challenge that decision now.

16. The respondents further argued that the credibility findings were made in line with the *I.R.* decision (*I.R. v Minister for Justice, Equality and Law Reform & anor*. [2009] IEHC 353) and *R.O. & anor. v. Minister for Justice and Equality & anor.* [2012] IEHC 573, and were not based upon conjecture.

17. Regarding the applicants' submission that the tribunal member failed to take into account relevant country of origin information, the respondents submitted that the tribunal member is obliged to weigh the information before her and decide upon the probative value to be attributed to such pieces of information.

18. In the legal submissions filed, the applicants placed great emphasis on the provisions of the European Communities (Eligibility for Protection) Regulations, 2006; however, the applicants submitted that the contents of the regulations did not represent a new departure for Irish law in so far as refugee assessment and/ or judicial review thereof was concerned: the contents of reg. 7 merely codified existing practice in the assessment of internal relocation. The respondents submitted that the findings on internal relocation were properly decided and accorded with the principles identified by Clark J. in *K.D. (Nigeria)*.

19. The respondents submitted that conclusions in relation to state protection are rational and in accordance with the law. In the case of *Rasheed Ali v Refugee Appeals Tribunal* (Unreported, High Court, 26th May, 2004) Peart J cited the case of *Rajudeen v The Minister of Employment and Immigration*, wherein Hearld J stated:

> "An individual cannot be considered a "Convention refugee" only because he has suffered in his homeland from outrageous behaviour of his fellow citizens. To my mind, in order to satisfy the definition, the persecution complained of must have been committed or been condoned by the State itself and consist either of conduct directed by the State towards the individual, or in it knowingly tolerating the behaviour of private citizens, or being unable to protect the individual from such behaviour."

The respondents further argued that, in any event, these findings can be severed from the substantial credibility decision if they were found to have been made erroneously, which the respondents did not accept.

20. The respondents submitted that the applicants' claim of persecution was fully dealt with, and in a situation where the first named applicant, the mother, was given the option of having her children included in her claim, it is misconceived for the applicants to now rely on the *Nwole* case for the proposition that the children's situation was not given due consideration when the children's claim was inextricably linked to that of their mother.

DECISION
21. The applicants submitted that without an oral hearing, the applicants are much less likely to succeed at appeal and sought to rely on both *U.P. v. Refugee Applications Commissioner & ors.* [2014] IEHC 567 and *N.T.P. (Vietnam) v Refugee Applications Commissioner & ors.* [2015] IEHC 234, wherein the statistical likelihood of success at RAT stage without an oral hearing was set out. Both of these decisions involved a challenge to the first instance decision, where the oral hearing was the result of a s.13(6)(c) findings, that is: 'the applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State'. This is entirely distinguishable from this case where the applicant's case was deemed manifestly unfounded at first instance, pursuant to the terms of s.13(6)(b) of the Refugee Act 1996 (as amended). Further, where an application is deemed to be manifestly unfounded by the first instance decision-maker, these applications are logically less likely to succeed at appeal than an application which did not have a similar finding attached.

22. As regards the imposition of the s.13(6) finding, and the lack of oral hearing, I would refer here to the decision in *N.E. & anor. v. Refugee Appeals Tribunal & ors.* [2015] IEHC 8, where at para. 14 Noonan J. states:

> "Dealing first with the applicant's complaint that he was not afforded an oral hearing of his appeal, it was the decision of ORAC that determined that issue, not the RAT decision challenged here. The applicant did not seek to impugn the ORAC decision in this respect and on the contrary, in making submissions to the RAT, made no reference to it. If a complaint were to be made, as in the *S.U.N.* case, the appropriate respondent to that complaint is ORAC, and the complaint ought to have been made before any appeal to the RAT was taken. Accordingly, it seems to me to be beyond argument that this issue cannot be raised in these proceedings."

I would also refer here to a judgment of this Court in *H.J. [Zimbabwe] v. Minister for Justice, Equality and Law Reform & ors.* [2015] IEHC 471, where at para. 11, I specifically endorsed and applied the above.

23. The applicants maintained that the lack of an oral hearing resulted in breach of fair procedures where the notice of appeal was effectively ignored by the tribunal member. The applicants sought to rely, *inter alia*, on a decision of this court, *B.Y. (Nigeria) (supra),* where at para. 32 it stated as follows:

> "It is accepted that the applicant being heard does not necessarily entail her being present at the appeal hearing. However, if the tribunal member is to effectively ignore and/ or abandon the findings made by the Commissioner and upon which the s.13(6)(b) decision was arrived at and then proceed to make further adverse credibility findings in respect of the applicant, it seems to me that natural and constitutional justice, fair procedure and *audi alteram partem* require that the applicant should be afforded the right to be heard and/or have an input into the process prior to the matter being determined."

The applicants, at para. 13 of written submissions, stated:

> "The Tribunal also made a host of fresh credibility findings, that 'the fact that the Applicant and her children went to Kawo, in Benin city, for over three months and lived there safely with her friend's grandmother also undermines her claim of imminent persecution'; 'She does not specify which Muslims she is scared of and seems to make a blanket reference in this regard. It should be remembered that Muslim people reside all over Nigeria and indeed in Ireland and the Applicant's

> vague assertions, in this respect, do not assist her claim. The lack of specific detail, in fact, undermines it; 'When the Applicant went back to Kaduna, nothing happened to her or her children. It was only on the direction of a woman and Mr. John that she decided to leave. She confirmed, at Q47 of the interview, that there were no threats at this point. The Applicant's statements in this respect serve to attenuate her claim'; 'The Applicant was asked where the people, whom she feared, were, in Nigeria and she said that she did not know. She said she did not even know them, as they are a group, (Q49 of the questionnaire). The Applicant's answer, in this respect, utterly undermines her claim of persecution as she states that she does not know where her alleged persecutors are or, indeed, who they are'."

24. These are not directly addressable credibility findings, rather, they are findings that any subjective fears the first named applicant might have do not seem, to the tribunal member, to be objectively well-founded. The task of the tribunal member is to assess, as far as is practical and possible, the objective basis for a subjective fear. This goes to the heart of a claim for refugee status. All of these findings were put to the first named applicant at the s.11 interview and she was given the opportunity to address any issues. The tribunal member referred to the s.11 interview when reaching a decision. Therefore, I would reject the applicants' submission that these are fresh credibility findings.

25. The issue of state protection was taken into account by the decision-maker in a cumulative sense. The fact that the applicant had not sought the protection of the police when her claim of persecution emanated from a non-state group undermined the applicants' claim. There is no obligation for an applicant to seek state protection before seeking international protection but the decision-maker is entitled to take this into account when assessing the claim. The tribunal member is obliged to have regard to any reasons provided for not seeking such protection. I do not see a failure on the part of the tribunal member based upon the facts of this case.

26. Turning to the complaint made by the applicant that there were internal relocation findings made that did not take the personal circumstances of the applicants into account. The applicant relied upon the decision of Clark J. in *KD (Nigeria).* At para. 28 of the *KD (Nigeria)* judgment, Clark J. states:

> "(1) An inquiry into the availability of internal relocation is only appropriate where a protection decision-maker accepts that the applicant has a well-founded fear of persecution for a Convention reason in his country of origin but that risk is localised and does not extend to the whole of the state."

In the applicants' case, before analysing the feasibility of internal relocation, the tribunal member summarises:

> "As a result of lack of evidence of persecution and the lack of any evidence of a failure of state protection, the Applicant's claim must fail, at this juncture."

The tribunal member continued:

> "Even, if it were the case that the Applicant and her children were refugees, which the Tribunal has decided they are not, the issue of internal relocation can be referred to."

This internal relocation assessment is not the type of equivocal finding as referred to by MacEochaidh J. in *E.I. (a minor) v. Minister for Justice for Equality and Law Reform* [2014] IEHC 27. At para. 9 of *E.I.* the judge states as follows:

> "[I]n my experience, most internal relocation assessments which follow negative credibility findings rarely follow clearly expressed comprehensive rejections of credibility. They are usually credibility findings such as those which appear in this case. In other words, they are equivocal. The Tribunal Member has doubts as to the credibility of the applicant but does not appear to be in a position to reject fully the applicant's narrative because of the weaknesses observed. In those circumstances, the decision maker, quite naturally, feels compelled to proceed to examine the question of internal relocation, if the facts and circumstances justify such a consideration."

The finding made by the tribunal member was not equivocal. There was no need for the tribunal member to consider the issue of internal relocation when the claim had been dismissed. This, however, does not vitiate this decision and it is not necessary for this court to embark upon a review of the internal relocation finding in this case, where the applicants' claim was unequivocally rejected by the tribunal member. This analysis was conducted separately and is severable from the decision.

27. The applicants submitted that the children's claims were summarily dismissed by the decision-maker. At p. 63 of the booklet of pleadings, and Q.1 of the s.11 interview, the authorised officer of the RAC asked the first named applicant if she was happy to have her children included as part of her application, and after the potential alternatives were explained, she answered, 'yes'. In *I.N.M. v. Minister for Justice, Equality and Law Reform & anor.* [2009] IEHC 233, Clark J. states as follows at para. 31:

> "When a parent seeks to include a dependent child in a claim for refugee status, then it is up to that parent to establish his/her claim first and to then establish whether the child has a separate and independent fear of persecution in its own right or whether the child's claim depends entirely on that of the parent. This is well trodden ground admirably elucidated by Peart J. in the High Court hearing in *Nwole* and followed in many judgments since then. His findings on the general principles applying where the parent brings an application on his/her own behalf but does not advance or bring to the attention of ORAC or the RAT any facts or circumstances relevant to that minor that are separate and distinct from the facts of circumstances relevant to the parent's application, were not considered by the Supreme Court in *N. (A) & Ors v Min for Justice & Commissioner of An Garda Siochana* [2007] I.E.S.C. 44. The question for determination by the Supreme Court related to the refusal of an asylum application. Finnegan J. decided that if the head of the family is not a refugee there is nothing to prevent any one of his dependants, if they can invoke reasons on their own account, from applying for recognition of their status as refugees. He determined that "there was no application by or on behalf of the minors" and accordingly there could have been no refusal of the minors' applications and that s. 3(2) (f) of the Immigration Act 1999 did not apply to them: "the basis upon which the Minister purported to make deportation orders in relation to the minors did not exist".
>
> Nothing in the decision of the Supreme Court in *N.A. and others* changed the principle that it is entirely appropriate that members of the same family units should make joint asylum claims as clearly, if the parent establishes a well-founded fear of persecution for a Convention reason, then the spouse and dependent children are also at risk and in need of protection. Protection to the family is ensured in section 18 of the Refugee Act 1996, as amended, and Council Directive 2003/86/EC of 22 September, 2003 on the right to family reunification. It will be highly unusual for a parent to fail to establish a fear of persecution and for a dependent minor child to succeed. It will be even more unusual for a toddler to

succeed where his mother fails."

28. Where no separate and distinctive fears are identified on behalf of the children, then the children's case has been considered as predicated on that of the mother's. The applicants submitted that because the children are wholly reliant on one carer, this should have been taken into account. The function of the tribunal member is to assess whether a person is to be granted refugee status. The tribunal member assessed the mother's claim, which was the same claim put forward on behalf of the children.

29. The decision-maker, in my view, exercised her function with due regard for the standard of extreme care required in papers-only appeals of this nature. I am satisfied, for the reasons detailed above, that there is no basis for interfering with the findings made by the tribunal member and I refuse leave.