Neutral Citation [2015] IEHC 380

THE HIGH COURT

JUDICIAL REVIEW

[2011 No 558 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED) AND

IN THE MATTER OF THE IMMIGRATION ACT, 1999 AND

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000 AND

IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT, 2003, SECTION 3 (1)

BETWEEN

E.O. [NIGERIA]

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL, MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 23rd day of June, 2015

1. This is a telescoped hearing seeking an order by way of judicial review in respect of the decision of the Refugee Appeals Tribunal (hereinafter referred to as the RAT) to affirm the decision of the Refugee Applications Commissioner (hereinafter referred to as the RAC) that the applicant not be declared a refugee and further seeking an order remitting the matter for *de novo* consideration by a different tribunal member.

BACKGROUND

2. The applicant was born in Nigeria on 14th February, 1980. He worked in an unofficial capacity as a driver, under the previous governor of Enugu state, who was succeeded by Governor Chime Sullivan in 2007. He claims that a gang, directed by Governor Sullivan, engaged in the killing of persons who had previously worked unofficially for the outgoing governor. He claims that two of his brothers and a friend were killed and he claims that he feared for his life and fled Nigeria. The applicant stated that he spent approximately ten days in England before travelling onwards to Ireland arriving here on 14th August, 2008. He did not claim asylum upon arrival in Ireland.

3. The applicant was arrested by members of the Garda Síochána on 30th October, 2010, and was detained until 12th November, 2010. He lodged an application for asylum on 12th November, 2010. The applicant completed an ASY1 Form on 16th November, 2010, and completed the questionnaire on 30th November, 2010. The applicant was interviewed pursuant to s.11 of the Refugee Act 1996 (as amended) on 25th January, 2011, and a report pursuant to s.13 of the Refugee Act 1996 (as amended) was completed on 9th February, 2011. The RAC made adverse credibility findings in respect of the applicant and found that the applicant had failed to demonstrate that he has a well-founded fear of persecution in Nigeria. Further, the RAC made a finding pursuant to s.13(6)(c) of the Refugee Act 1996 (as amended) that the applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State. As a result of the said s.13(6)(c) finding any appeal by the applicant to the RAT would be by way of a papers-only appeal.

4. A notice of appeal was completed in respect of the applicant on 28th February, 2011, and forwarded to the RAT by the Refugee Legal Service on that date. The appeal was dealt with by an accelerated papers-only appeal and a decision in respect of the said appeal was delivered by the RAT on 12th May, 2011. The tribunal member affirmed the original recommendation of the RAC to the effect that the applicant not be declared a refugee.

SUBMISSIONS

5. Both the applicant and the respondents filed written submissions in respect of the hearing of this telescoped judicial review application. Further, oral submissions were made to the Court at the hearing of the application. Mr. Michael Conlon S.C., on behalf of the applicant, complained that by simply repeating findings contained in the s.13 report, the tribunal failed to abide by the fundamental duty to hear the application de novo as required by *F.U. (Afghanistan) v. Refugee Appeals Tribunal* [2015] IEHC 78. The applicant also relied on the decision of *M. v. Refugee Appeals Tribunal* (Unreported, High Court, MacEochaidh J, 20th June 2013) and *E.P.A. v. Refugee Appeals Tribunal* [2013] IEHC 85. Further, the applicant complained that the tribunal failed to adhere to extreme care when determining a documents-only appeal, and that the making of further adverse credibility findings was in breach of natural and constitutional justice and relied on the decisions of the Court in *S.U.N. (South Africa) v. Refugee Applications Commissioner & ors.* [2012] IEHC 338; *V.M. (Kenya) v. Refugee Appeals Tribunal & ors.* [2013] IEHC 24; *B.Y. (Nigeria) v. Refugee Appeals Tribunal & ors*. [2015] IEHC 60; and *S.K. v. Refugee Appeals Tribunal & anor.* [2014] IEHC 520.

6. In relation to the decision of the commissioner, the applicant submitted that it is interesting to reflect on the reasons that an oral hearing was denied to the applicant and asserted that the commissioner, and subsequently the tribunal member, followed through on what was described at hearing as a textbook mistake. The commissioner, and by extension the tribunal member, had erred in law in that the applicant has not at any stage claimed that the State was the first safe country in which he arrived. Further, the applicant submitted that the s.13(6)(b) was not relevant to the definition of a refugee, which was based on whether or not the person seeking refugee status had a well-founded fear of persecution. It does not follow automatically that a person does not have a well-founded fear of persecution from the fact that a person does not apply immediately. This, in the circumstances, the applicant submitted is *non sequiter.*

7. In respect of the alleged well-founded fear of the applicant, the passage from the s.13 report contained at p. 63 at the booklet of appeal was opened to the Court.

> "3.3 Well founded fear

> The applicant was asked why he didn't claim for asylum in England as he was there for 10 days before coming to Ireland and it was the first safe country he arrived in after he left Nigeria. The applicant's response was that he wanted an education. The applicant was then asked if he left Nigeria for educational purposes only. He stated *"Not for that but it was the fear of the situation…"*

It was submitted on the applicant's behalf that the reason he left Nigeria was the fear that he had of persecution and just because somebody aspires to an education, i.e. has economic reasons also, does not automatically disqualify that person from qualifying for refugee status based on a well-founded fear of persecution. The applicant further opened passages from Professor Hathaway's book '*The Law of Refugee Status'* in regard to same.

8. The applicant submitted that the manner in which the tribunal member dealt with the country of origin information in the analysis section of the tribunal decision was not an acceptable way to deal with such information; the tribunal member is not entitled to simply dismiss country of origin information in the manner in which he did and relied, in this regard, on the *L.R.C v Refugee Appeals Tribunal & ors*. [2014] IEHC 500 (Chen case) at para. 50 thereof and *S.K. & anor. v. Refugee Appeals Tribunal & ors*. [2014] IEHC 520 at para. 51 thereof.

9. The applicant further contended that what happened in this case is in breach of the principles set out by Cooke J. in *I.R. v. Refugee Appeals Tribunal & anor*. [2009] IEHC 353 at para. 11(4) thereof and that the conclusion arrived at by the tribunal member is based on conjecture and no cogent reasons are given for the rejection of the country of origin information. Counsel on behalf of the applicant conceded that, at least in the past, the applicant has not come across as a particularly nice person. However, the question that both the RAC and the RAT have to answer is whether or not the applicant qualifies for refugee status not as to the type of person he presents as. Equally this Court, in determining the judicial review, has to decide whether or not the decision of the tribunal member was lawful or unlawful and not whether the applicant is a nice person or not. The applicant further pointed out that certain persons are excluded from a grant of refugee status in accordance with the provision of s.2(c) of the Refugee Act 1996 (as amended), which sets out categories of persons who are not deserving of refugee status. However, no such finding was made pursuant to s.2(c) in the applicant's case. The applicant submitted that if the RAT wishes to exclude the applicant because he is not worthy of protection, it must do so on lawful grounds in accordance with s.2(c)

10. With regard to the applicant's stated fears in respect of voodoo in his country of origin, while his claims may be subjective, they are nevertheless (a) a fear, and (b) real, as far as those who hold such a belief in voodoo are concerned. The fact that persons with other beliefs say that it is nonsense is irrelevant if the applicant believes it is real. Counsel referred to a decision of Eagar J. *C.A.D.N. (Cameroon) v. Minister for Justice, Equality and Law Reform & ors.* [2015] IEHC 83 wherein the requirement for humility from the tribunal member is set out.

11. The tribunal member, the applicant submitted, does not take into account what the applicant's function or job was, and also fails to take into account the country of origin information in relation to political violence. The applicant submitted that the tribunal member repeated the RAC mistake, which was made in relation to a failure to apply for asylum at the earliest opportunity. The fact that the applicant felt that he could, and in fact did, live illegally in this jurisdiction for a number of years, does not automatically mean that he does not qualify for refugee status. It is submitted on behalf of the applicant that there is nothing incredible about what the applicant says: his story is credible, albeit not painting an attractive picture. The difficulty presented with the tribunal member's decision is, the applicant asserted, that the tribunal member did not consider the picture painted by the applicant at all.

12. The applicant argued that tribunal member's decision in relation to internal relocation was not in compliance with the principles set out by Clark J. in *K.D. (Nigeria) v. Refugee Appeals Tribunal & anor.* [2013] IEHC 481 and further asserted that it fails to comply with article 7 of European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518 of 2006). The tribunal member states that the applicant was evasive and counsel for the applicant quoted extensively from the s.11 interview at p.40 onwards in the booklet of pleadings, submitting that the applicant did answer the questions that he was asked. It is notable that although the interviewer, on a number of occasions, asked the applicant to answer the question directly, he did not in fact repeat or reformulate the previous question, which, it would appear to the interviewer, went unanswered. The applicant contended that he did in fact answer the questions fully and that the applicant did his best to tell his story, even if his story was not a very attractive one. The applicant further complained that, in addition to upholding the adverse credibility findings of the commissioner, the tribunal member went on to make further fresh credibility findings against the applicant, in particular in relation to his incredulity in relation to what the governor would or would not do in respect of employees of his predecessor. The tribunal member, in the conclusion of his report, states:

> "The Tribunal has considered all the papers on file and all relevant documentation in connection with this appeal including the notice of appeal, country of origin information, the applicant's asylum questionnaire and the replies given in response by or on behalf of the Commissioner on the report made pursuant to s. 13 of the Act."

13. However, the applicant argued, it is not sufficient for the tribunal member to simply recite the documents which he claims he has referred to and it must be clear from the report that they have actually been considered and if they are to be rejected reasons must be clearly stated. The applicant relied on the decision of Barr J. in *L.R.C.* and the decision of Faherty J. in *S.K.* at para. 51 where in respect of country of origin information she stated as follows:

> "I am also satisfied that a mere statement in the Decision that the Tribunal Member had considered country of origin information was not an appropriate treatment of the country information relied on by the first named applicant in aid of her appeal."

14. Ms. Catherine Duggan B.L., on behalf of the respondents, stated that the s.13(6) finding by the RAC was legitimate and that finding was not the subject of this review. Ms. Duggan submitted that it was very obvious that the core issue for the RAC and the tribunal member was the credibility of the applicant and the applicant had the opportunity in the notice of appeal to deal with those issues. The respondents submitted that the core of the applicant's claim was dealt with by the authorised officer, repeated questions were put to the applicant and he was given ample opportunities to answer. These answers were ultimately considered by the tribunal member and the applicant had ample opportunity by way of the submissions in the notice of appeal to deal with those issues. In that regard, the respondents submitted, the core claim of the applicant was dealt with.

15. In respect of the fresh credibility findings asserted by the applicant, the respondents contended that these were not fresh credibility findings as they were effectively dealing with the core aspects of the applicant's claim. The respondents further pointed out that the commissioner is not required to refer to every piece of evidence and the s.13 report is not at issue in these proceedings. The Court was referred to a decision of Noonan J. on 14th January, 2015, in *N.E. v. Refugee Appeals Tribunal & ors*. [2015] IEHC 8 at para. 17 where he states as follows:

> "The applicant complains of the fact that the RAT decision introduced a new ground for rejecting the claim, namely that Mr. A was fleeing prosecution. I am not at all certain that this was an entirely new ground. Although not explicitly adverted to in the ORAC decision, the latter decision did make clear that the application was rejected at least partly on credibility grounds. If the grounds advanced were not credible, it seems to me that one could readily infer that the real reason for the application was a desire on Mr. A's part to avoid arrest and trial in Pakistan whether explicitly stated or not. Therefore, the RAT conclusion can hardly be said to be novel or come as a surprise to the applicant. In any event, the RAT was on appeal free to arrive at its own conclusions and was not obliged to slavishly follow those of ORAC."

16. The respondents sought to distinguish the decision of this Court in *B.Y. (Nigeria) v. Refugee Appeals Tribunal (supra)* as in the *B.Y.* case there had been a finding by the commissioner that the applicant was not a member of the police force in a particular region of Nigeria and the tribunal member had found that she was a member of that police force. The respondents also contended that there were substantial differences in relation to the manner the robbery at issue in the *B.Y.* case was dealt with by the commissioner and the tribunal member; on the basis of those two points it was contended that the *B.Y.* case can be distinguished from the facts at issue in this case, where the respondents alleged there are no further fresh findings. According to the respondents, it is quite clear that the authorised officer had issues with the credibility of the applicant. The respondents further sought to distinguish the decision of Faherty J. in *S.K. v. Refugee Appeals Tribunal (supra)* as in that case the applicant had claimed to be fleeing persecution because of her renunciation of her Islamic faith. However, she was subsequently found to have a visa stamped on her passport which authorised her travel to Saudi Arabia for religious purposes. This information was not contained in the s.13 report.

17. The respondents contended that the applicant did not avail of the opportunity available to him in the notice of appeal to explain the vagueness in his answers. In this regard they relied on *K.M. v. Refugee Appeals Tribunal & ors*. [2007] IEHC 300 at p.30 thereof.

18. In relation to the applicant's stated fear of the practice of voodoo on behalf of his opponents, the respondents stated this is subjective but in order to qualify for refugee status the applicant must demonstrate an objective element to that fear. The respondents stated that the applicant could not refer to any country of origin information that could satisfy the tribunal member as to an objective fear. The respondents contended that the tribunal member was not in any way disrespectful of the applicant's fear but the tribunal member was not satisfied that there was any objective basis to that alleged fear and nothing was put forward to prove otherwise.

19. In regard to the manner in which the tribunal member dealt with the country of origin information, the respondents submitted that the requirement to deal with the country of origin information arises when the applicant's story has been accepted by the tribunal member, which was clearly not the case here. The applicant relied on p.15 of Cooke J. in *I.R.* (supra) and submitted that it is hard to comprehend where the applicant fits in to these provisions. In reply Mr. Conlon S.C., on behalf of the applicant, pointed out that the respondents were correct in saying that the decision of the RAC was not under review in these proceedings. However, he submitted that the commissioner's findings are significant because it is part of the process by which the tribunal member arrived at his decision. The tribunal member is required to have regard to the s.13 report and also required, pursuant to the provisions of s.16 of the Act, to have regard to the s.11 interview. Therefore, the applicant maintained that they are relevant to his decision and must be taken into account. Counsel on behalf of the applicant accepted that Hedigan J., in *B.N. v. Refugee Applications Commissioner & anor*. [2008] IEHC 308, has in general found that applicants should not judicial review the RAC decision unless there is a jurisdictional problem. This position has been softened somewhat by the recent decision of MacEochaidh J. in *P.D. v. Refugee Applications Commissioner & ors*. [2015] IEHC 111; however, the substantial principle remains. Clark J. in *V.M. (Kenya) (supra)* pointed out that the Court is in as good a position as a tribunal member to look at the answers given at the RAC stage.

20. Mr. Conlon pointed to p.72 of the booklet of pleadings, at p.2 of the tribunal decision, para. 3 thereof, where the tribunal member states as follows:

> "The applicant claims to have worked as an unofficial driver for the Governor of Enugu State in 2007. He then goes on to claim in 2007 that an individual by the name of Sullivan took over as Governor and due to a fall out with the previous Governor it appears the latter tried to have all unofficial worker affiliated with the last Governor killed."

21. It was pointed out that while the tribunal member recites this claim on behalf of the applicant, the tribunal member does not say whether or not he believes that story. As is set out by MacEochaidh J in the *E.P.A.* case, the key question to be answered is as follows: Is the applicant who he says he is?

22. With regard to the notice of appeal Mr. Conlon S.C. said that the only influence the applicant can have on an appeal hearing on a papers-only basis is by virtue of the notice of appeal. The summary of the claim sets out the facts in which the applicant was relying on; the grounds set out the concerns the applicant has with regard to the s. 13 report.

23. Mr. Conlon submitted that the core claim is whether or not what the applicant says happened to him, did happen to him, and if he is who he says he is. The applicant submitted that the respondents cannot hide behind the RAC report and then say to the Court at hearing that the matter complained of was in the RAC report and it has nothing to do with the tribunal member's decision. Further, at p.83, p.6 of the report at para.2 thereof, the tribunal member clearly sets out that he has taken into account the s.13 report. The applicant submitted that he is entitled to look at the entire process, though fully accepts that this Court cannot be now asked to review or quash the s.13 report. Ultimately, the applicant contended that the test which applies with regard to papers-only appeals is that set out by Clark J. in the *V.M. (Kenya)* case and which was accepted by this Court in the *B.Y.* case.

24. Finally, Mr. Conlon pointed out that there are no contradictions in the applicant's evidence in his s.11 interview and, to the contrary, the applicant was tellingly stellar in his evidence.

FINDINGS

25. It is worth reiterating that these are judicial review proceedings and as set out by Cooke J. in *I.R.* (supra) at 11 (2) thereof:

> "On judicial review the function and jurisdiction of the High Court is confined to ensuring that the process by which the determination is made is legally sound and is not vitiated by any material error of law, infringement of any applicable statutory provision or of any principle of natural or constitutional justice."

26. In the decision of this Court in *B.Y. (Nigeria) v. Refugee Appeals Tribunal* [2015] IEHC 60, at para.30 thereof I stated:

> "It is important to point out that this is of course a judicial review application so this Court is not concerned with the merits or otherwise of the decision of either the Commissioner and/or the tribunal member. The function of this Court is to satisfy itself as to whether or not fair procedures were adhered to and that the applicant has been heard."

27. It seems to me, it is now established law, on a papers-only appeal a level of extreme care and diligence is required by the decision-maker. Further, there are certain matters which the tribunal member is required to have regard to pursuant to the provisions of s.16 of the Refugee Act 1996 (as amended). These are the s.13 report, the s.11 interview and country of origin information. With regard to country of origin information, Faherty J. in *S.K. (supra)* held that a mere statement that country of origin information was considered was not an adequate treatment of same. I would share this view. Further, a listing of documents which it is alleged has been considered by the tribunal member is insufficient to establish that the documents were in fact considered by the tribunal member. It seems to me, the tribunal decision appears to quote verbatim from the s.13 report in parts. In my view, it appears that this is where the difficulty lies. The s.13 report states at 3.2 thereof under the heading 'Persecution': "The applicant claims to have worked as an unofficial driver for the Governor of Enugu State, Chimaroke Nnamani, back in 2007."

28. This is repeated almost verbatim by the tribunal member at p.2 of his decision, para.3 thereof where he states: "The applicant claims to have worked as an unofficial driver for the governor of Enugu State in 2007." However if one looks at the s.11 interview at p.43 of the booklet, q.14 thereof he was asked:

> "Q14 You claim to have worked here doing various jobs since you arrived in 2008 and even if you got or began your education here you would still be here illegally. What was your intention? Do you have any comment?
>
> A […] When there was a problem or when there was an election coming up, the Governor would not call on the uniforms, he would call on us, we were called the boys, others would call us thugs. We would do what was requested of us. Such as scaring the opposition, causing trouble, killing. I myself and my good friend were drivers. And it was easy money for us. For a job that day we could get 10,000 or even 50,000 naira, depending on the job. My mother wanted me out of that business because she knows you don't last long in it. She wanted me to better myself. After secondary I got into this activity and once you are in the click (*sic*) it is very hard to get out. I tried to use what money I was getting to some use. I would trade with it but back in 2006 I lost it all in a transaction. When buying a bulk of sims from Abuja, I deposited the money in the account but the plane with the cargo crashed in Port Harcourt, and in doing so I lost all my money. So I had to go back to working my unofficial job with the government. But my mother wanted me better myself, to get away from it all and get an education because I would not be able to do so if I stayed."

29. At p.45 of the booklet, q.19 thereof, the interviewer states:

> "You have mentioned that people in your business were involved in killings. Were you yourself involved in any killings?"

The applicant responds as follows:

> "I have not killed anyone directly by gun or anything. I was a driver. Back in 1999 there was this man who was in the national assembly, Nwabueze. Originally the governor at the time got were (sic) he was through the help of the Godfather. The Godfather would help get people to high profile positions. But there was a falling out between them. There were two brothers of the Nwabueze family, one was supporting the governor and one was being backed by the godfather. The Governor was trying to get his people accepted into the house of assembly with winning over certain areas by whatever means. Nwabueze was against this as he felt that these people were not qualified and went against them. The boys used the governors (sic) cars as transport to make the hit (assassin) on Nwabueze but by accident killed his brother. I was unaware of what exactly was happening as I was just the driver. After this tension grew and the Nwabueze family blamed the Governor and his people for what happened to their family member. They used charms and voodoos over caskets against us. Even when the governor wanted land to follow through with a project, he would have the person unwilling to sell murdered just to get his land. Again I was the driver and was unsure of the exact plans. I would drive the boys around to do whatever job they had to do. People saw us as the instrument for the governor to do his dirty work."

30. It seems to me that to refer to the applicant as an "unofficial driver" is to miss the point of the applicant's story as put before the authorised officer at the s.11 interview. To some extent the applicant's story has become lost in translation and the incredulity of the tribunal member in respect of the likelihood of the new governor taking out a contract on an unofficial driver of his predecessor can be explained if one was to look at the applicant as fulfilling the role simply as a chauffeur. That is not the story that the applicant has put forward. It is not my function to adjudicate on the veracity or otherwise of the applicant's story. However, it is my function to satisfy myself that the applicant's story was given due consideration by the tribunal member. I am not satisfied of same. As stated in the *B.Y.* decision and the decisions of my colleagues referred to earlier, the tribunal member must exercise extreme caution and diligence when conducting papers-only appeals. A bare recital that documentation has been considered is insufficient when it appears patently clear from the decision that the level of consideration and analysis required on a papers-only appeal is absent.

31. With regard to the country of origin information, a similar situation applies. Substantial country of origin information was submitted by the Refugee Legal Service on behalf of the applicant accompanying the notice of appeal. This country of origin information referred to political violence in Nigeria. Although the tribunal member recited that the country of origin information was considered, again there was nothing apparent from the decision to substantiate this assertion.

32. The applicant was out of time with regard to the commencement of the proceedings; however, the delay was explained on foot of the supplemental affidavit sworn by the applicant. No objection was taken by the respondents to the extension of time and in the circumstances I am satisfied that there are good and sufficient reasons to extend time and I do so.

33. For the reasons outlined above, I am not satisfied that the applicant's claim was given the proper and due consideration in the process of the appeal before the Refugee Appeals Tribunal. I therefore propose to grant leave and to grant an order of *certiorari* quashing the decision of the tribunal member and further remitting the matter for *de novo* consideration by a different tribunal member.