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THE HIGH COURT
JUDICIAL REVIEW

2008 645 JR

IN THE MATTER OF THE REFUGEE ACT 1966 (AS AMENDED),
IN THE MATTER OF THE IMMIGRATION ACT 1999 (AS AMENDED),
IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 AS AMENDED,
AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003, SECTION 3(1)

BETWEEN

U. I.

APPLICANT

AND
THE REFUGEE APPEALS TRIBUNAL,
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,
THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

AND
HUMAN RIGHTS COMMISSION

NOTICE PARTY

Judgment of Mr. Justice John Edwards delivered on the 29th day of October, 2008.

Introduction
1. This is an application for leave to apply by way of judicial review for an order of certiorari quashing the decision of the first named respondent made on the 10th day of May, 2008 to affirm the recommendation of the Refugee Applications Commissioner, and various ancillary reliefs. Among those ancillary reliefs, the applicant also seeks a declaration pursuant to s. 5(1) of the European Convention of Human Acts, 2003, that the rule of the law governing the scope of judicial review relating to an asylum decision as set out in *O'Keeffe v. An Bord Pleanála* is incompatible with the European Convention on Human Rights and Fundamental Freedoms in that the test so afforded fails to constitute an effective remedy for the purposes of Article 13 of the said Convention. As I am satisfied that in the circumstances of this particular case it is appropriate in any event to apply the higher standard of anxious scrutiny in considering whether or not to grant the applicant's claim for leave to apply for judicial review, the claim for this particular declaration is redundant.

Background facts
2. The applicant's claim is grounded upon an affidavit sworn by him on 5th June, 2008 and also upon a subsequent affidavit sworn by his solicitor, Sean Mulvihill on the 20th October, 2008. The applicant deposes that he was born on 10th October, 1963 and is a national of Nigeria. He says that he fled Nigeria in fear of persecution on the grounds of his religious beliefs and he remains fearful for his life and safety if he is returned to Nigeria. He is a Christian from the Igbo tribe. His father held the title of King of the Isingwu Mbaise. His father died in February 2002 and he, as his eldest son, was entitled to and was expected to succeed him. In order to be installed as King he had to be prepared to participate in a traditional ritual requiring the killing of two persons as described by the so called "Oracle" (Chief Priest of the Tribe). The intended sacrificial victims were to be an old woman and a boy or girl aged between two and five. The applicant was expected to kill them by beheading them. The applicant says that he refused to accept Kingship as he would not participate in such a ritual. After the applicant refused the offer of succession, he was told by the Chief Priest that he if he persisted with his refusal he would pay with his life. He was given a period of time – twelve market days (four market days equals forty-eight days) – to produce the heads. The applicant says that he stood his ground and did not perform the required ritual within the specified time. He was then given a further five weeks to do so but again did not comply. He was told by the Chief Priest that either he or his wife would die as a consequence of his stubbornness, as a new King could not be elected until the designated successor had either been installed or had died. The applicant claims that at midnight on the 30th June, 2002, two of his children became suddenly ill. The two children began foaming at the mouth and their bodies began to swell. Within ten minutes both were dead. The applicant believes that the Chief Priest used "Voodoo" to kill his children and this was done in order to pressurise him into carrying out the required rituals and assuming Kingship. The applicant said that he buried his children in the bedroom of his home to avoid their bodies being removed to a place known as "the evil forest" and dumped there. There was a risk that that could happen because the children were twins and twin births are considered to be shameful among the Igbo people. The children were likely in the circumstances to be regarded as having suffered "bad deaths". Within the Igbo culture if a person dies a "bad death" the body is secretly thrown away with no burial at all. For these reasons the applicant did not report his children's death and accordingly there is no official record of them. Moreover, there was obviously no investigation into their deaths and no autopsies were carried out. Some days later the applicant and his wife went to his sister-in-laws home in Uyo Akwaibon State. His sister-in-law and her husband were among the few family members who were prepared to support him as others in the family wanted him to perform the required ritual. The applicant contends that there was not enough room in his sister-in-laws house for the entire family and accordingly he stayed with somebody else in the same village. He contends that on the 19th August, 2002, the elders of this tribe discovered that his wife was with her sister and they dragged her from her sister-in-laws house and beat her. They cut her leg with a knife. She was four months pregnant at the time and was taken to hospital where she miscarried.

3. The applicant informed the Tribunal that he told the police on two occasions about the duress that he was under but that they were not interested in offering protection as the matter was regarded as a traditional matter to be sorted out between the applicant and his tribal elders. The applicant deposes that his home in Isingwu Mbaise was burnt down. With the help of a priest who arranged for an agent to assist them, the applicant and his wife fled Nigeria. His wife's sister agreed to take care of their other three children. The applicant arrived in Ireland on 7th October, 2002 and immediately applied for refugee status. His application was duly considered and he was notified by a letter dated the 18th September, 2003 that the Refugee Applications Commissioner was recommending that he should not be declared to be a refugee. He was provided with a copy of the s. 13 report. He appealed against the decision of the Refugee Applications Commissioner to the Refugee Appeals Tribunal. The Tribunal has on four different occasions affirmed the decision of the Refugee Applications Commissioner. In respect of each of the first three occasions the decision of the Refugee Appeals Tribunal was successfully judicially reviewed. The most recent decision of the Refugee Appeals Tribunal, following a hearing on the 8th May, 2008, was given on the 10th May, 2008. The applicant is now seeking to challenge that decision by way of judicial review.

4. The decision document is divided into seven sections entitled:-

(1) Grounds of appeal,

(2) Background information,

(3) The applicant's evidence,

(4) Submissions,

(5) Law,

(6) Analysis of the applicant's claim,

(7) Conclusion.

5. The critical portion is that contained in Parts (6) and (7) and I think that it is appropriate to recite those parts in full:-

Analysis of the Applicant's Claim
The applicant maintains that his life was in danger because he refused to submit to the ritual requirements involved in the installation of the King in his village. Is this assertion objectively supported?

The Nigeria Country Director of the Heinrich Boll Foundation, an NGO conducting projects in the field of civic education worldwide wrote:-

> "…overall, the role and functioning of traditional and chieftaincy institutions throughout Nigeria differs widely, depending to good extent on the culture and traditions of the respective locality, region and ethnic group."

A Norwegian fact finding report on Nigeria (August, 2006) states that it is "extremely rare" for someone to refuse a chieftaincy title and that traditional thrones are "subject to great competition in the local communities". According to this report, if the first person in line for a throne refuses it, someone else will want the position.

Another report quoted in an I.R.B. response indicated that people compete for chieftaincy positions. A person can refuse an offer of chieftaincy and such refusal remains without consequences. However, this statement is subject to qualification.

There is a distinction between traditional rulers (kings/chiefs) and representatives of African traditional religion (priests). There is a considerable variety of local practice. In certain communities, linkage between chieftaincy and traditional religion is rather strong. The report suggests that in such a setting, it is imaginable that a person "called" to become a priest of a deity may, at the same time, be called to become a traditional ruler. However the author of this statement admits that he could not point to any particular example.

In another of origin report presented at the ACCORD/UNHCR Seminar in Vienna by Heinz Jockers, it is stated that there is usually no forced recruitment into secret societies. Pressure may, however be exerted on certain individuals to join because of the advantages of being part of the secret society. It is unlikely there is a rule of automatic succession in a position (the son replacing the father) but more likely that those families who traditionally have had the authority to invite new members can choose the most suitable candidate. If this person should for some reason – because of his or her Christian belief – not want to join and if there is no other candidate from this particular family, he or she might be ostracised or might also lose property or an inheritance but would not have to fear for his or her life.

According to the same author, human sacrifices for ritual purposes happen extremely rarely, if at all. However Heinz Jockers has also written that poison is sometimes used to punish somebody whose actions violate a taboo of the society. A report on Human Rights Issues in Nigeria issued by the joint British – Danish Fact Finding Mission (2004) makes the following comments: Victims of secret cult activities would be able to seek protection within Nigeria and they may also be able to get assistance from the police. It quotes Mohammed Sani Usman, Chief Administrator Officer, National Human Rights Commission, Abuja, as follows:-

> "It cannot be ruled out that a person who is victimised or threatened by members of a secret cult would at all times be able to find safety. If through requesting assistance from the Nigerian police force, the victim is seen as posing a threat to the cult's existence, then the victim may be at risk from the cult. However, the police are generally very dedicated, acting firmly against threats against secret cults throughout Nigeria."

Another authority, Clement Nwanko has written in the same report that a person escaping persecution or being killed by a secret cult only rarely will be at a risk in another location within Nigeria. Nwanko is apparently unaware of any examples of cult members killing non-cult members and he is of the opinion that this will only take place in extreme cases.

The applicant made reference to "evil forest" where the remains of certain people were deposited. The Danish – UK report makes a reference to the fact that in 2004 the Nigerian police force arrested 30 witch doctors on suspicion of carrying out human sacrifices after finding 50 mutilated bodies and 20 skulls in an area known as "evil forest" by local people. This location is near Okaja Village in Anambra State in south eastern Nigeria.

Ms. Lee in her submissions, referred to what she perceived as the difference between ritual murder and human sacrifice. The Canadian response on this point (July, 2005) states as follows:-

> "ritual Murder' refers to the killing of human beings for ritual purposes (one of which might be characterised as human sacrifice)".

Another source quoted in the document explained that human sacrifice involved the participation of the community in a formalised manner, while ritual murders are individual acts, often performed following consultation or with the participation of a witch doctor and are designed to call the favour of the gods on to an individual.

A UNHCR document (July, 2005) states that people have been sentenced to death, and executed where convicted of participation in ritual murders. Three people were sentenced to death in Delta State in 2005. Seven people, including a chief, were sentenced to death by hanging, for the ritual killing of a boy in 2003 in Owerri, Imo State. On the other hand, the same document points out that while several well-known and important people have been executed, people feel that the police are subject to the taking of bribes when complaints of this nature are taken to them.

The applicant maintained throughout his appeal that his children had been killed by Voodoo. There is no objective proof that Voodoo exists. It is quite possible that his children died from natural causes. By not taking them to hospital for pathology, it would not be possible to ascertain the cause of death.

The country of origin reports do indicate that the police are prepared to intervene. In the UK Operational Guidance Note on Nigeria, it is concluded that membership of the secret cult is not illegal but any illegal act those involved might commit, such a threatening behaviour or murder are criminal offences and will be treated as such by the Nigerian authorities. I have read the various documents published in Nigeria in support of the applicant's contention, inter alia, that he was expelled from his local community. There is no objective proof to satisfy the Tribunal that these documents were inserted for the purposes intended. Additionally, there is a letter written on behalf of the local community complaining that the police have not acted by detaining the applicant. This letter indicates that the police have been tolerant in their attitude to him and this is not consistent with the evidence that he gave in his appeal.

I have also read the Spirazi reports and it is apparent that the applicant's wife has suffered quite considerably. IHowever, her case is not necessarily his case.

Conclusion
For the reasons I have given this applicant is not a refugee. The appeal is dismissed and the recommendation of the Commissioner is affirmed."

6. The applicant seeks to judicially review this decision on a number of grounds. These can be summarised as follows:-

> (a) A failure to consider all the evidence, including all of the country of origin information and a medical report and other documents submitted by the applicant;
>
> (b) A failure to assess the evidence in the light of all the country of origin information before the Tribunal, and in making selective use of country of origin information it did not rely upon;
>
> (c) A failure to make any assessment on the subjective fear of the applicant in relation to the demise of his children;
>
> (d) A failure to make any credibility or other finding in relation to the substantive aspects of the applicant's account;
>
> (e) A failure to speculate upon the likelihood of persecution in the event of the applicant being refouled to Nigeria; and
>
> (f) Making an adverse credibility finding against the applicant without at the same time giving any indication that any explanations given by him had been taken into consideration by the Tribunal.

7. It must be stated at the outset that this court is completely satisfied that no case whatever has been made out on grounds (c), (d) or (f). It is quite clear from the decision of the first named respondent that the applicant was given the benefit of the doubt with respect to any question of subjective fear and there was no adverse credibility finding made against him. However, an applicant must do more than establish that he has a subjective fear. His subjective fear must also be objectively justifiable. It was this hurdle that he failed to clear. The Tribunal considered that the applicant's subjective fear was not well-founded when considered objectively and in the light of country of origin information.

8. The ground of complaint to which most time was devoted at the hearing concerned the suggestion that the first named respondent failed to consider all of the evidence and in particular all of the country of origin information and that, moreover, he made selective use of the country of origin information. The court notes that the letter of the 29th May, 2008 from the Office of the Refugee Appeals Tribunal to the applicant notifying him of the Tribunal's decision indicates that that decision was reached having considered:

> "The following matters…
>
> • Your notice of appeal under s. 16(3) of the above Act and the grounds thereof submitted with the notice, including all supporting documentation of records;
>
> • The report and recommendation of the Refugee Applications Commissioner under s. 13 of the above Act;
>
> • All documents, representations in writing and other information submitted to the Refugee Applications Commissioner in connection with your case which had been previously furnished to you or your legal representatives;
>
> • The documents submitted with your appeal;
>
> • The evidence adduced at your appeal hearing and the representations made concerning your application at that hearing."

9. In circumstances where it has been expressly asserted that the decision was based upon a consideration by the Tribunal of all of the relevant material, the court must ask itself is there any reason to believe that that was not so. It certainly does not automatically follow that just because certain country of origin information, or for that matter any other piece of evidence, is not specifically mentioned in the decision that it was not considered. In this regard I find myself in complete agreement with the following statement from the judgment of Ms. Justice Dunne in the case of *A.W.S. v. The Refugee Appeals Tribunal, The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General,* (Unreported, High Court, Dunne J., 12th June, 2007):-

> "There may be cases in which it could be inferred from the omission of a reference to a significant fact or a document in the course of a Tribunal decision that the same had not been properly considered or evaluated. However, there must be some evidence to support such a contention."

10. Moreover, Hardiman J. giving the judgment of the Supreme Court in *G.K & Others v. The Minister for Justice, Equality and Law Reform and Others* [2002] 2 I.R. 418, made a statement to like effect, at pp. 426/427 of the report. He said:

> "A person claiming that a decision making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case."

11. What is the applicant's evidence to support his contention that the Tribunal failed to consider all of the country of origin information before him? Predictably he has no direct evidence. However, he asks the court to infer that the Tribunal did not take all of the country of origin information into account from the nature of the material he particularly relies upon. That material focuses

particularly upon reports relating to, and describing the prevalence of, traditional rituals involving sacrifices, including human sacrifices, in Nigeria. It is clear from this material that the mainstream religions of Christianity and Islam mingle in Nigeria with traditional faiths, many of which involve fetish magic, known as juju. These traditional faiths sometimes require their adherents to participate in elaborate rituals at landmark events in the life of the individual, or in the society within which he or she lives. In the case of the Igbo specifically they have elaborate funeral rituals which are sometimes very bloody involving the sacrificing of birds, animals and, in some instances, humans. The general thrust of the country of origin information is that while human sacrifices may occur they are rare nowadays. In support of his case the applicant quoted from *Khazadi v. The Minister for Justice, Equality and Law Reform,* (Unreported, High Court, Gilligan J., 19th April, 2007) and also from *Imoh v. The Refugee Appeals Tribunal*, (Unreported, High Court, Clarke J., 24th June, 2005). However the passages quoted from these cases related in one instance (*Khazadi*) to the use of medical evidence, and in the other instance (*Imoh*) to the use of country of origin information, in assessing the credibility of applicant. As pointed out earlier in this judgment, the applicant in this case was not the subject of an adverse credibility finding. Accordingly, the quotations relied from *Khazadi* and *Imoh* are not in point. Before referring to the respondents reply to the suggestion that the Tribunal failed to take into account of this particular country of origin information it is important to state that the second and complimentary facet to this part of the applicant's case is that, faced with conflicting country of origin information, the Tribunal member arbitrarily preferred certain country of origin information over other country of origin information and failed to give reasons for doing so. In that regard the applicant relies upon my decision in the case of *Simo v. The Refugee Appeals Tribunal*, (Unreported, High Court, Edwards J., 5th July, 2007). Having regard to all of the country of origin information in this case I am absolutely satisfied that the Tribunal did have regard to all of the evidence before him and that he did not arbitrarily prefer one piece of country of origin information over another piece of country of origin information. In *M.E. v. The Refugee Appeals Tribunal and Others*, (High Court, Ex-tempore, Birmingham J., 27th June, 2008), my colleague Mr. Justice Birmingham pointed out "in a situation where, as here, there is a significant volume of country of origin information, it is possible by selective quotations to find support for almost any proposition". For this reason it is important to consider the country of origin information as a whole and to have regard to the general or principle thrust of it. I find that in this particular case the thrust of the country of origin information was correctly identified by the Tribunal member. Moreover, it is completely understandable why he did not quote specifically from the material in which the applicant places so much store. That material related specifically to traditional funeral rituals as practised by various tribes in Nigeria included the Igbo. It did not relate to rituals to be performed on the installation or enthronement of a new King. The respondents, in their reply, strongly emphasized this point and I agree with them. Indeed, the country of origin information was largely silent on the question of such rituals. However, the available country of origin information did make it clear that a person could refuse a Kingship or Chieftaincy title without consequences and that if the person first in line for the position did not want it, somebody else would take it on.

12. The applicant also complains about a failure on the part of the Tribunal member to take account of a letter written in support of the applicant's claim for asylum by a Sister Patricia O'Regan, Director of the Diocesan Immigration Services at 34 Paul Street, Cork. In her letter to the Tribunal of 9th December, 2003, Sister O'Regan says:-

> "I have doubt that should Uzoma return to his village in Nigeria; his life would be in great danger. I have seen, during my time in Africa, the harshness of punishment handed out for many minor breaches of village/tribal law and practices. I would not want to see it again. Uzoma refused, because of his Christian beliefs, to follow the conditions demanded of him as eldest son when the time came for him to succeed his father as King. Kingship is a mark of his tribe. He outlines these conditions in his testimony. Again, because of my experiences in Africa, I had no doubt in accepting what he claims. His refusal would be seen as a denial of the very "life" of his tribe meriting the most extreme punishments. A return to his village, could, I believe, mean death for him. Tribal power is so extreme that he would always live in fear of being located and his movements would have to be restricted. That is tribal life in many parts of Africa. It is hard for us to absorb it but that is what happens. If Uzoma returns from my knowledge of Africa, he fears at the very least grave persecution."

13. It is certainly true that the Tribunal member does not specifically refer to Sister O'Regan's letter. It forms part of the general body of country of origin information in this case. However, it is anecdotal and it is against the general thrust of the country of origin information. Moreover, there are certain unsatisfactory aspects to it, though it is obviously written with the best of intentions. An obvious criticism that can be made concerning it is that although Sister Patricia O'Regan appears to have spent some time in Africa, she does not say if she was ever in Nigeria, or, if she was, what part of Nigeria she is familiar with. Nigeria is not a homogenous nation and it is clear from the country of origin information that tribal law and practice in one part of Nigeria may be radically different to tribal law and practice in another part of Nigeria. In that regard the quotation from the Nigerian Country Director of the Heinrich Boll Foundation cited by the Tribunal member makes that very point. It will be recalled that he said:

> "…overall, the role and functioning of traditional and chieftaincy institutions throughout Nigeria differs widely, depending to a good extent on the culture and traditions of the respective locality, region and ethnic group."

14. Moreover, Sister O'Regan's letter contains a number of assertions which appear to be factually inaccurate. She asserts specifically that kingship is a mark of the applicant's tribe. This is contrary to reliable country of origin information that has been put forward and in particular the information concerning chieftaincy issues among the Igbo provided by the Nigerian Country Director of the Heinrich Boll Foundation and referred to by the Tribunal member. I am satisfied that the Tribunal member in preferring the latter information was not behaving arbitrarily and that it was not necessary for him in the particular circumstances of this case, where there was a strong general or overall thrust in the country of origin information before him, to allude specifically to the letter from Sister O'Regan.

15. Finally, I attach little importance to the fact that the Tribunal member did not specifically refer to the medical report submitted by the applicant. This medical report established only that the applicant had been exposed to some psychological stressor or trauma. It provides no objective evidence as to the nature of the stressor or of the trauma in question. There is only the history given by the applicant which the Tribunal had in any event. It was not necessary to have regard to the consistency of his account as he was been given the benefit of the doubt on subjective credibility.

16. In all the circumstances of the case I am satisfied that the Tribunal member's decision was rational and lawful and I must refuse the applicant's application for leave to apply for judicial review.