

THE HIGH COURT

[2005 No. 737 J.R.]

**IN THE MATTER OF ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000, THE REFUGEE ACT, 1996 AS AMENDED
AND IN THE MATTER OF JUDICIAL REVIEW**

BETWEEN

K.K.

APPLICANT

AND

PATRICK HURLEY ACTING AS THE REFUGEE APPEALS TRIBUNAL

RESPONDENT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

FIRST NOTICE PARTY

AND

IRELAND AND THE ATTORNEY GENERAL

SECOND NOTICE PARTY

Judgment of Mr. Justice McGovern delivered the 22nd day of May 2007

1. The applicant is a national of the Ivory Coast who was born on the 24th September, 1954. He was married and had five children in that marriage. His wife died in 1997. There is some confusion as to whether he is married to his current partner. In his affidavit granting the application he says that he resides with his "second wife", N.R.E. in L. and that they have one child (a son) his date of birth is the 1st March, 2003. In the questionnaire completed in connection with his application for refugee status on the 9th January, 2003 he says that his "present marital status" is unmarried but refers to a marriage by ethnic rite and goes on to describe his spouse or partner as N.R.E. He also says "I have five children by my female common law partner who died in 1997". It has to be said that his marital status is somewhat unclear from the information which he has provided.

2. The applicant applied for asylum in this jurisdiction on the 23rd December, 2002. He was interviewed on the 4th March, 2003 and was subsequently found by a Refugee Applications Commissioner not to be a refugee. He appealed against this decision and the Refugee Appeals Tribunal held an oral hearing on the 15th February, 2005. The Tribunal found that the applicant was not a refugee and at the conclusion of the Tribunal Report the Member stated:

"I find the applicant's account unsatisfactory in terms of credibility and substance".

The applicant has challenged the decision to refuse him refugee status. On the 20th day of November, 2006 the applicant was granted leave to apply for judicial review for the reliefs set forth in a draft amended statement approved by the court on the following grounds:-

"1. The respondent's decision contains several errors on the face of the record in particular:

(i) The applicant's attempt to visit his father at the town of I., his failure to go to that town because of reports he had received from people fleeing from I. to the effect that rebels were in control in that town, burnt down his father's house and were looking for him.

(ii) The applicant's inability to return to his home town of B. because rebels were there going from house to house killing non-Muslims.

(iii) The issue in relation to two guns held by his father in his house and how that was interpreted by the Tribunal Member.

(iv) The issue in relation to his separation from his children and his partner.

(2) In the premises the decision of the respondent's (sic) was based on a flawed view or on a misunderstanding of the evidence".

3. In granting the applicant leave to apply for judicial review Dunne J. stated:

"I am conscious of the fact that a court in looking at matters of credibility should be careful not to interfere with a decision on credibility given that the court has not had the opportunity that the Tribunal Member has had a viewing in assessing the applicant directly...".

4. It seems to me that is especially the case where the applicant has been granted an oral hearing which is what occurred in this case. The legislature has put in place a particular regime for challenging decisions made in the asylum process. It is the Refugee Appeals Tribunal and not the courts which act as the forum for an appeal from a decision of the Refugee Applications Commissioner. The Illegal Immigrants (Trafficking) Act, 2000 permits an applicant to question the validity of certain matters, including a decision to refuse refugee status but specifies that this must be done by way of an application for judicial review. That means that where an issue has been decided against an applicant on the facts - whether arising on a credibility issue or otherwise - the applicant will have to show that there was some issue involving want of fairness or a breach of natural or constitutional justice, or that the manner in which the respondent assessed the evidence was outside the powers granted to him, in other words *ultra vires*. It is not the function of the courts, in an application for judicial review, to substitute its view on the facts for those of the Commissioner or the Tribunal.

5. I have considered the evidence in this case and the submissions made by counsel for the applicant and the respondents.

6.

Ground 1. (i)

The applicant in his submission states:

"The s. 13 report at page 2 states that the applicant decided to visit his father as he was worried for his safety".

7. He says that this is factually incorrect because the interview shows that when he heard the rebels had taken control of I. he wanted to go there to visit his father because he is very old. It seems to me that this amounts to the same thing. What other reasons would he have for wanting to visit his father on the basis that he was very old and that rebels had taken over control of the area where he lived other than out of concern for his safety? Certainly I see nothing inconsistent in the interpretation given by the Commissioner to the evidence. This is a submission which is directed towards the s. 13 report of the Commissioner. No allegation is made that the decision of the Tribunal (the first respondent) contains an error of fact on this issue.

8. The applicant complains that at paragraph 4(2) of the s. 13 report the Commissioner is factually incorrect in stating that the town of I. where the applicant claims his father was taken by the rebels does not appear to have ever been in the control of the rebels and was indeed used by the refugees in the north for safety. The Commissioner says that the town lies south of D. which is a town that was only taken and held for four days by the rebels. An exhibit attached to the s. 13 report states of D.:

"Provincial capital briefly seized by rebels before government army regained control. D. is located about 250 miles (400 km) from A. and 75 miles (120 km) from Y."

9. I find no evidence that the first named respondent made any error of fact on this issue. But in any case the complaint on this matter contained in the submissions relates to the s. 13 report of the Commissioner and there is no specific allegation made against the first named respondent on this matter.

10. The applicant's complaints in relation to paragraph 4(3) of the s. 13 report as contained in the submissions also relate to findings of the Commissioner and not the first named respondent.

11.

1. (ii)

The applicant had the benefit of legal advice when submitting a notice of appeal against the s. 13 recommendation. In part (iii) of the form he stated that it was on grounds of "political opinion" that he had a well founded fear of being persecuted. He did not state that it was on the grounds of race or religion or nationality or membership of a particular social group which were the other categories provided for in that section. Yet the applicant complains that the first respondent states at page 2 of his decision "according to the Grounds of Appeal furnished, the Applicant fears persecution in his country of origin for reasons of his political opinion including imputed political opinion". Undoubtedly the applicant referred to the fact that rebels were killing those who were non-Muslims and he had stated that he is a Catholic. The applicant submits that there is no record in any of the documentation submitted in this matter that indicates the applicant fears persecution for his political opinion, but it is quite clear when one looks at part three of the appeal form that this is not so. The statement by the first named respondent that the applicant's troubles, as presented, relate in large measure to the civil war and civil disturbances seems to be borne out by the evidence.

12.

1. (iii)

At page 6 of his decision the first named respondent states:

"The applicant's account centres on the storey that his father was seen by the authorities as having supplied arms to the rebels."

The applicant complains that this is somewhat different to what he said in his interview. I think this is correct. In his interview he stated:

"One of the lieutenants stood up and asked me if I knew that my father was buying weapons from the rebels..."

He goes on to say that he tried to explain that his father had the guns to protect him from people who would come to his farm to steal things. I accept that there was an error of fact made by the first named respondent in stating that the applicant's father was seen by the authorities as having supplied arms to the rebels. But I am not satisfied that this error of fact which, when viewed in the overall context of the evidence and findings, is such as to make the decision of the first respondent reviewable. The matter will have to be assessed in the light of all of the findings which are complained of. If this is merely one of a significant number of errors of fact it may, at the end of the day, make the decision reviewable but on its own it does not seem to be such a fundamental error of fact that would bring the Tribunal outside its jurisdiction. See *A.B.M. v. Minister for Justice, Equality and Law Reform* (Unreported, Judgment of O'Donovan J. 23rd July, 2001).

13.

1. (iv)

At page 6 of his report the first named respondent states:

"The applicant states that B. was in turmoil when he left. The applicant in essence states that having heard that his wife was in Y. he decided to go there. It is striking in the applicant's account that he did encounter his wife at any point from the time he left B. until he left the country. He did not meet her when he was in most danger and when – presumably – his children were or would have been in most danger. The applicant's account of his detention and release from detention involved his children or at least one of them – his daughter. It is, therefore in the view of the Tribunal inconsistent with a well founded fear of persecution that the applicant left his children behind him. In effect the applicant was abandoning them to their fate. He states his intention was to return to collect them. The applicant did not do so. This fact on its own tends to substantively detract from a well founded fear".

14. The applicant claims that this is speculation on behalf of the first named respondent and that he was never questioned for clarification. It seems to me that it is interpretation of the evidence rather than speculation. If there were little or no facts available to the Tribunal it might amount to speculation but a substantial amount of information was furnished by the applicant which enabled the first named respondent to reach certain conclusions. Provided there were facts or evidence which would entitle the first

respondent to reach the conclusion he did, then his decision would appear to be immune from challenge unless there were some breaches of natural or constitutional justice or lack of *vires*. It is true, as he says, that his wife was dead at that particular time but it also seems clear from his interview that the applicant had a partner at that time. He refers to her at page 5 of his interview record. At page 8 of his interview he refers to the same person as his "wife" while he says "the same person who helped my wife to travel to Ireland helped me to do so". I do not consider that any reference by the Tribunal to the applicant's "wife" amounts to an error of fact which will go to the validity of the Tribunal decision. It seems to me that it was open to the first respondent to reach the view which he did on the evidence. The applicant also drew the courts attention to the fact that his children at the time were aged 18 to 28. In his affidavit grounding the application for leave to apply for judicial review the applicant states that his children "...presently reside in the Ivory Coast in a rented house in T. which I pay for". This would tend to suggest that the family are living in the Ivory Coast in circumstances where he is able to get money to them and pay for their rented accommodation which seems somewhat at odds with his situation where they are in danger. In other information in support of his claim which was contained in the Questionnaire completed by him, the applicant stated:

"My problem is my children, who are back there and who were orphaned by their mother. I am their sole carer in their studies at present. There is no one to look after them. I am asking you for help if possible to get them here".

15. The view of the first respondent was that the applicant had stated that his intention was to return and collect his children but he did not do so and that that fact on its own tends to substantively detract from a well founded fear. It seems to me that it was open to the Tribunal to make such a finding on the evidence.

16. I am satisfied that the respondents considered the application of the applicant in a fair and reasonable manner and that there were inconsistencies in the evidence given by the applicant to the Commissioner and the first named respondent which justified the first named respondent in finding there was a credibility issue. To give but one example the applicant stated in the questionnaire that he had never been arrested, detained, interrogated or in prison in his own country or any other country. Yet in his interview he states that he was detained and interrogated for about three hours. (See page 6 Interview record sheet).

17. I am satisfied that when one looks at this matter in its entirety the first named respondent was entitled to come to the conclusion which he did and that he was not acting *ultra vires* or in breach of the applicant's rights to natural or constitutional justice.

18. Accordingly I refuse the relief sought.