Neutral Citation: [2013] IEHC 504

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2009 / 190 J.R.

Between:

R. A. [NIGERIA]

APPLICANT

-AND-

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND MARGARET LEVEY, SITTING AS THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT OF MS JUSTICE M. H. CLARK, delivered on the 12th day of November 2013.

1. The applicant seeks an order of certiorari quashing the decision of the respondent Tribunal dated the 27th January 2009, to affirm the negative recommendation of the Refugee Applications Commissioner that she should not be declared a refugee. By order of Mac Eochaidh J. dated the 21st December 2012, she was granted leave on a number of grounds, including that the decision is unsafe because of an unexplained ten month delay between the date of the hearing and the date of the decision, which is based on a rejection of credibility. The substantive application was heard on the 4th July 2013. The applicant was represented by Mr Paul O'Shea B.L. and Mr Niall O'Hanlon B.L. appeared for the respondents. At the close of the hearing the Court indicated *ex tempore* that the applicant would succeed on ground B (delay) and granted the reliefs sought. The Court now gives its reasons.

The Claim

2. The applicant was in the ninth month of her pregnancy when she applied for asylum at the Office of the Refugee Applications Commissioner (ORAC). She is a woman in her mid-30s who claims to have suffered persecution at the hands of her late husband's family. After he died in a car accident her in-laws expected her to follow their custom and marry his brother. When she refused, her in-laws threatened to kill her and her unborn baby as a sacrifice to their shrine. After three months of forced sexual intercourse and beatings at the hands of her brother-in-law, she left the family compound taking title deeds to land owned by her late husband and went into hiding. She then sold the land for the cost of being brought to Ireland, leaving her seven year old daughter behind in the care of her parents. She claimed to fear being killed by her in-laws if she returned. She said she could not relocate within Nigeria as they would use ju-ju and the Oracle to find her wherever she went. She had no identity documents of any kind and no documents to support her claim. Her son was born in Ireland three weeks after she made her claim for asylum. The apparent lack of coherence in her claim may in part be explained by the fact that she only spoke Yoruba, she claimed only a primary school education and her questionnaire was filled out in English by another asylum seeker.

The Decision

3. The Tribunal Member considered the definition of a refugee and noted that only one elements of the definition was present in the claim, being that the applicant was outside of her country of origin. It was not accepted that there was a genuine fear in the mind of the applicant and it was noted that she had never sought state protection. The Tribunal Member made the following credibility findings:-

> • It was not credible that the applicant remained in the same house with her persecutors for three months on the basis that she had no-where to go, when her own parents lived in the same region;
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> • COI suggests that a widow could be considered part of her husband's property to be inherited by his family after his death. The evidence that the applicant sold her husband's property required examination. Her evidence about whether the land was hers to sell was "vague"; it is highly unlikely that the land was hers to sell; if she was entitled to sell the property then all her brother-in-law was getting was a wife who was entitled to sell her husband's land, which is not what the COI suggests. Why would the brother force her to marry him if there was no economic gain? "*Thus this undermines her whole claim and goes to the core of it*."
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> • The medical report states that she is seriously traumatised and experienced flashbacks and feelings of sadness. While this may well be the case, it was not accepted that her symptoms were as a result of what she alleges happened to her as the Tribunal Member did not accept the claim as credible.
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> • She said at the Tribunal hearing that she had cuts which she endured as a result of a burial ritual, "*which was never mentioned before*".
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> • If the claim was credible she could have moved elsewhere in Nigeria. If she did sell the land she would have had ample resources to relocate.
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> • The applicant's evidence that she didn't know anywhere and no-where was safe as her in-laws and the Oracle could trace her anywhere was rejected.
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> • COI showed that persons who encounter difficulties from non-state agents are able to relocate internally.
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> • As she has sold her husband's land there would be no obvious reason for a forced marriage.
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> • It would not be unduly harsh to expect her to relocate. She had worked as a trader before. Whatever large city she chose would provide her with protection and access to public services, employment and other social rights. It was not

necessary to identify a specific relocation place in Nigeria.

4. The issue of a Convention nexus was not discussed. The Tribunal Member noted that in assessing credibility, account should be taken of the reasonableness of the facts alleged, the overall consistency and coherence of the story and any corroborative evidence adduced.

Delay

5. The applicant applied for asylum on 24th August 2006. As she is Nigerian her claim was prioritised and her Section 11 interview was held within three months of her arrival and the birth of her son. The Commissioner's Section 13 report issued on the same day as her interview in November 2006. She appealed forthwith to the Tribunal but in April 2007, while she was awaiting the hearing of her appeal, her baby was diagnosed with a life threatening condition and she was forced to seek an adjournment of her appeal hearing. The appeal hearing took place on 19th March 2008. Between then and the making of the Tribunal decision on 27th January 2009 there was a ten month delay. This seems to the Court to be extraordinary in the particular circumstances of the accelerated hearing provision applicable to her case. Leave was granted by Mac Eochaidh J. to argue that delay *per se* causes invalidity where the decision rests on credibility findings. However, the applicant focused in her submissions on the frailties of the findings arising from the delay in her specific case. She contends that the delay was unexplained and unreasonable and constitutes a breach of her right to good administration under EU law. The respondents contend that the six-month timeframe set by EU law applies only at first instance, not on appeal, and that in any event the applicant has not shown that the delay had any prejudicial effects.

6. There is no doubt that the provision of an early decision is part of good administration. Article 23 of Council Directive 2005/85/EC ('the Procedures Directive'), which establishes minimum standards on procedures for granting and withdrawing refugee status, provides that Member States shall process applications for asylum in an examination procedure in accordance with the basic principles and guarantees set down by the Directive, and must ensure that such a procedure is concluded *'as soon as possible'*, without prejudice to an adequate and complete examination. The Directive suggests six months as a normal time frame. As transposed into Irish law, the requirement for an early decision seems to apply only to the processing of an asylum application by the Commissioner at first instance and does not apply on appeal. Section 13 of the *Refugee Act 1996*, as amended by the *ECs (Asylum Procedures) Regulations 2011* (S.I. No. 51 of 2011), provides:-

> *"(12) If a recommendation under subsection (1) cannot be made within 6 months of the date of the application for a declaration under section 8, the Commissioner shall, upon request from the applicant, provide the applicant with information on the estimated time within which a recommendation may be made.*
>
> *(13) The provision under subsection (12) by the Commissioner of an estimated time within which a recommendation may be made shall not of itself oblige the Commissioner to make a recommendation within that time."*

7. Neither the Procedures Directive nor the Refugee Act 1996 suggests that a decision delivered outside of the initial six month timeframe gives rise to an automatic rejection of decision. A reviewing court considering a delay of more than six months must therefore apply normal principles of fairness and justice.

8. In this case the Tribunal decision on its face states that the evidence (as opposed to the analysis) was typed up at the hearing. No other explanation for the delay was provided. It is true that the applicant did not write seeking delivery of the decision or a rehearing of the appeal because of a delay of more than six months. However, in the particular stressful circumstances in which the applicant found herself, with her child's life dependent on chemotherapy, it is not surprising that she did not complain or press the Tribunal for a decision. The Court therefore attaches no weight to this factor.

9. What is at play here is that a protection applicant is entitled to assume that her hearing will be conducted efficiently and fairly. She is entitled to an impartial hearing from a decision maker who has considered all the papers filed in advance of the hearing, who listens, who takes notes and who then determines within a reasonable time frame whether the applicant should succeed in her appeal or whether the Commissioner's negative recommendation should be affirmed. In addition, she is entitled to expect that clear reasons will accompany the decision.

10. In the present case, as is clear from the summary of the Tribunal decision at paragraph 3 above, the Tribunal's affirmation of the Commissioner's negative recommendation did not depend on an assessment of demeanour but was, nevertheless, based on the rejection of the applicant's credibility. The core finding was that no woman would remain in the home of her oppressor when her parents lived in the same region. It would be unreal to suggest that the rejection of credibility was immune from impressions formed in the Tribunal Member's mind on the manner in which the applicant presented her evidence. There is no evidence before the Court that the Tribunal Member took any notes at the hearing other than the note of evidence which was typed after the hearing and which is recited in the challenged decision. With the lapse of ten months from the hearing date, during which time it must be assumed other applicants – perhaps from Nigeria and with similar backgrounds and narratives – were heard), there must be some doubt as to the accuracy of the Tribunal Member's recall of credibility. A decision which may be clear and which has the appearance of being based on evidence and information put before the Tribunal may nevertheless be of doubtful validity where an excessive delay in providing those reasons has occurred. In the circumstances a ten-month delay in arriving at the decision must raise issues of general fairness as the passing of time undoubtedly affects memory and fades impressions. The matter which requires determination by this Court is whether the breach of good administration is sufficient to infect the process to such an extent that the decision should not be permitted to stand. In other words, does delay of this nature *per se* cause prejudice?

11. The authorities opened to the Court suggest that some degree of prejudice, inaccuracy or flaw must be shown or implied before a Court will set aside a decision for a delay of even 10 months (see, for example *A.W.S. v. Refugee Appeals Tribunal* [2007] IEHC 276 and *H.R. (Belarus) v. Refugee Appeals Tribunal* [2010] IEHC 510).

12. However, what is of concern here goes beyond actual prejudice but is elemental to the law of judicial review and goes to the heart of judicial discretion. On the particular facts of this case, where no additional documents were awaited by the Tribunal Member which could have contributed to the delay, where the applicant was subject to accelerated procedures, where although her baby was extremely ill with leukaemia, the appeal was heard and where no explanation has been provided for the delay in a case largely rejected on credibility grounds, the Court has concerns that the process may be infected by unfairness and the decision must therefore be quashed.

13. For the avoidance of doubt, the Court emphasises that this is a decision based on its own particular facts. Not all delays of more than six months have to be set aside. Reasons are frequently provided which are determinative of the issue. Decisions may be misfiled and not notified to an applicant. Dictation can be lost in a typing pool. The important consideration is not the date of delivery but the date on which the reasoned decision is actually made. There was no evidence here to suggest that the decision was actually made

any earlier than on the date it was signed.

Conclusion

14. For the foregoing reasons the Court quashed the Tribunal decision and remitted the appeal for fresh consideration by a different Tribunal Member. As the substance of the appeal will now have to be considered afresh, the Court will refrain from making any further observations on the remaining grounds on which leave was granted.