

THE HIGH COURT**JUDICIAL REVIEW****2007 1288 JR****BETWEEN****A. A.****APPLICANT****AND****THE REFUGEE APPEALS TRIBUNAL****RESPONDENT****JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 8th day of October, 2009.**

1. This is an application for leave to apply for judicial review of the decision of the Refugee Appeals Tribunal (RAT), dated the 11th September, 2007, to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner (ORAC) that the applicant should not be granted a declaration of refugee status. The hearing took place at the King's Inns, Court No. 1, on the 14th May, 2009. Mr. Paul O'Shea B.L. appeared for the applicant and Mr. Patrick O'Reilly B.L. appeared for the respondent. As the challenge is based on an asserted defective assessment of credibility, the detail of the applicant's evidence is relevant.

The Asylum Application

2. The applicant applied for asylum in the State on the 20th March, 2006, at the office of the Refugee Applications Commissioner, claiming to fear persecution by reason of his religion. It is recorded on his ASY-1 form that he was born in 1966 in Oyo State, Nigeria; that he last lived in Maiduguri in Borno State; that he was a Christian pastor and a member of the Yoruba tribe; that he was married and had six children (four daughters and two sons) and that his wife and children remained in Nigeria; that "someone" helped him to travel to Ireland but no money was paid; and that he left Nigeria on the 19th March, 2006, and flew to Ireland via Amsterdam. It was further recorded that at his preliminary s. 8 interview he said Muslims in his area attacked and burned his church. He had no passport and submitted two documents – a church poster and a church ID card.

The questionnaire

3. The applicant completed a questionnaire on the 24th March, 2006. He said that from 2000 until he left Nigeria he had lived in Maiduguri at two different addresses. He was trained as a teacher and held a professional diploma in public administration. He worked as a teacher from 1987 to 1996 and then became a pastor first in Ibadan in Oyo State and eventually ending up as the pastor of the "Marvellous Light Church" in Maiduguri. He was a member of the Christian Association of Nigeria and the Pentecostal Fellowship of Nigeria.

4. His previous wife died in 1987 and the mother of his five younger children is named as the woman he married in February, 2002. He named his six children as a daughter born in 1987, two sons born in 1990 and 1992, and three more daughters born in 1995, 1998 and September, 2001. All of the children were said to be in Nigeria and his parents were living at a compound in Ogun State.

5. The applicant said he left Nigeria because of threats, intimidation and hostility at the hands of Muslims who wished to prevent Christians from having their services on Sundays. He described in detail the increasing tensions between Muslims and Christians which resulted in his church being attacked and set alight on the 18th February, 2006. He also detailed his very narrow escape and the loss of "thousands of souls". One of his deacons realised the threat from the approaching Muslims and ordered the applicant's wife to get into his car and took her and the children away to safety. The applicant said the authorities were already aware of the crisis and they tried to control the situation "as usual" but it was too late for the victims.

6. The day after the attack on his church the deacon told the applicant that the Muslims were still seeking him out and that some members of the families of the Christians who had died the previous day were looking for him. The deacon advised the applicant to go to Lagos with his friend for safety. At first the applicant believed that his family had become victims but was assured that nothing had happened to them and that they had just been driven away to safety. He then agreed to go with the deacon's friend to Lagos. He was admitted to hospital the following day as a result of the stress and shock and because of his pre existing anaemia. He was discharged on the 15th March. The same friend then took him to a hotel where he met a white man called "Mr. Ian" who had been told about the applicant's plight and the danger he faced from the Muslims and the families of the church member who were victims. Mr Ian promised to take the applicant to a safe place and made the travel arrangements. The applicant had no passport and no visa to enter any country and says he never applied for an Irish visa. He said the documents that he used to enter Ireland were provided by Mr. Ian who showed everything to the authorities by himself. They travelled by air with a stopover in Amsterdam. When they got to Dublin Mr. Ian brought the applicant to ORAC and told him to go in and explain his plight.

The s. 11 interview

7. The applicant provided significantly different information at his interview. He said that he originally moved from Ibadan to Maiduguri because of problems with his father who, as a Muslim, disapproved of the applicant being a pastor. The applicant had himself changed religion when he was in secondary school. When asked why he did not mention the threats from his father in his questionnaire he said "*The question is not in the questionnaire because he cannot come to that place when I moved.*"

8. The applicant confirmed the address of his church in Maiduguri in Borno State as 22, Bulumkutu. When asked why different addresses for the church were given on a poster and ID card that he had submitted to ORAC, he said the poster had the correct address but there was a mistake in the printing of the ID card. The applicant was asked a variety of questions about the town of Maiduguri. He was unable to provide the names of some landmarks including the river and explained that *"I don't go out, I live in the church."* He was asked about the protest and about the length of time it took for his journey to Lagos. He said he went to hospital before they reached Lagos and he submitted receipts for the bill he had paid.

9. The applicant reiterated that he feared the families of the victims who *"don't want to see me again until I am dead"* and the Muslims. When asked if he could move elsewhere he stated that he had left Ibadan because of his father's threats and when asked if he could move to Lagos answered that *"All the money we have for my retirement, in the church and in the school, it's gone."* He said the victims' families could find him even if he went to Lagos.

The s. 13 report

10. On the 16th April, 2006, a negative recommendation issued from ORAC. The ORAC officer noted that the applicant had submitted a church poster, a church ID card and seven receipts from a hospital, and said the authenticity of the documents could not be verified. She found that the claim was not sufficiently serious as to amount to persecution but consideration was given nonetheless to the circumstances and factors pertaining to the claim. Reference was made to an IRIN report which recorded that at least 17 people including a Catholic priest had been killed and 30 churches burned in Maiduguri on the 18th February, 2006, in a protest about a cartoon of the Prophet Mohammed published in a Danish newspaper which turned into riots. Reference was also made to a BBC report which recorded that there had been a protest over the cartoon in Maiduguri and protesters carried machetes, sticks and iron rods through the streets. In addition reference was made to a ReliefWeb report which stated that police and military personnel were on the streets to ensure there would be no repeat of the unrest. Those three reports were appended to the s. 13 report.

11. The authorised ORAC officer found that there were serious credibility concerns in relation to the applicant's claim that he was living in Maiduguri for six years but was unable to name the river or the roundabouts which were characteristic landmarks which have come to almost designate neighbourhoods. He failed to say there was a market on the road where his church was located. The discrepancies in the address of the church on the poster and the ID card were noted. He had not sought state protection and had not been able to offer a reasonable explanation as to how those who were allegedly after him would be able to find him in a heavily populated area such as Lagos. It was concluded that he had not met the standard of proof.

The Appeal documents

12. A detailed Form 1 Notice of Appeal was lodged by the Refugee Legal Service (RLS) on behalf of the applicant, which expanded on his early difficulties with his father. It was submitted that he was born a Muslim and converted to Christianity in secondary school; his father did not agree with his conversion to Christianity and threatened to kill him as a result. The applicant's father was extremely unhappy with his son's decision to become a Pastor. Because of his difficulties with his father he had to leave Ibadan. The incident of the 18th February, 2006, in Maiduguri was also set out. It was submitted that his life is in danger both from Muslims and the families of the Christian victims who were killed in the incident and that it was for that reason that the applicant fled Nigeria. It was not submitted that he had any fear of persecution at the hands of his father. Each of the negative credibility findings were identified and explained and it was submitted that the determinations of the Authorised Officer were not in accordance with credibility principles endorsed by the High Court in *Memeshi v. Refugee Appeals Tribunal* [2003] I.E.H.C. 65 (Peart J.) and *Camara v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Kelly J., 26th June 2000) and *da Silveira v. Refugee Appeals Tribunal and Others* [2004] I.E.H.C. 436 (Peart J.) were not applied. Fifteen grounds of appeal were appended to the Form 1, challenging the findings made and legal principles applied by ORAC. Three COI reports (by the U.S. Department of State, Amnesty International and Human Rights Watch) were forwarded to the Tribunal on the 21st August, 2007, together with three previous RAT decisions.

The appeal hearing

13. An oral hearing took place on the 22nd August, 2006, at which the applicant was represented by counsel. No attendance note of the hearing is before the court and the applicant's grounding affidavit provides no details of the hearing. From the RAT decision it appears that the applicant gave additional new evidence at the hearing relating to his problems with his father which dated from his conversion when his father would not pay for his training to be a teacher. His father threatened him every month that if he did not return to his original religion he would be killed. He said he first married in 1986 in a traditional ceremony and at the christening of their first child, his father wanted to kill the applicant, his wife and his child. The RAT decision recounts the applicant's evidence that his wife was subsequently killed, in 1987, "presumably by his father or those individuals who supported his father." The applicant went to the police in 1987 when his wife was killed but they said it was a family matter. The applicant's mother-in-law took the couple's child into her care.

14. The applicant's problems with his father continued while he was living about an hour's drive from his father's house. His father's interference worsened after he became a Pastor in 1996 and in November of that year his father came to the applicant's church with a group and burned it down. In 2000 the applicant moved to Maiduguri. His father ceased to be a problem at that time but he encountered difficulties with other Muslims who came to the church every Sunday to prevent the services and disrupt the congregation. The applicant reiterated his previous account of the events of 18th February, 2006, his escape to Lagos, his stay in hospital and his travel to Ireland. The Tribunal Member records that the applicant claimed to have left Nigeria because of all the problems encountered in Maiduguri between 2000 and 2006.

15. The applicant was questioned by the Presenting Officer who suggested that the rioting over the cartoon of Mohammed was not directed at the applicant and that the government acted to protect the people and had arrested 150 people. The applicant responded that when the police arrived the place was totally vandalised. They had not investigated when his first wife was killed. This appeared to elicit suggestions from the Presenting Officer that it appears strange the police would not interfere if the applicant's wife had been murdered. The Presenting Officer suggested that the applicant was not worried about the welfare of his current wife and six children. The applicant replied that his current wife and children were taken away in a car by another church member during the riots and he did not see them again but he spoke to his wife on arrival in Ireland. Submissions were made by the applicant's legal advisor relating to the Notice of Appeal and COI, specifically the US State Department Country Report for 2005 relating to deficiencies identified in police practices and relating those findings to the failure of the police to investigate the murder of the applicant's first wife. The existence of the conflict was recognised by both parties but the submissions by the Presenting Officer were to the effect

that the attacks were generalised and did not amount to persecution of the applicant. The Tribunal Member asked the applicant if he was an only child; he replied that his father has seven wives and twenty children.

The RAT decision

16. The appeal did not succeed and a negative decision endorsing the ORAC recommendation issued from the RAT on the 11th September, 2007; that decision is challenged in these proceedings. After setting out the applicant's claim and various legal provisions and principles the Tribunal Member made a number of comments or findings which are contained in separate paragraphs which can be summarised as follows:-

- a. It is difficult to believe that the father of 20 children and seven wives would pursue his son to the point that he would threaten to kill him;
- b. It is difficult to accept that the applicant, during the course of what he alleges to have been harassment and abuse by his father, who then threatened to kill him, could remain unharmed in Nigeria for so long;
- c. The account of the death of his first wife is not credible;
 - d. It would seem extraordinary if not indeed unusual that the applicant would run away from his second wife and six children;
- e. It seems an extraordinary suggestion that the first contact he made with his second wife after the rioting was when he rang her from Ireland;
- f. Credibility is stretched when it is suggested that the applicant could pass through the immigration authorities at Dublin Airport with such ease with a Mr. Ian using a false passport held by Mr. Ian the name and date of birth on which the applicant did not know. As a matter of fact and practice this cannot happen;
- g. It was not clear how the applicant passed through immigration at Amsterdam and why he did not apply for asylum there.

17. The Tribunal Member accepted that there were riots, that people were killed and that the State intervened in Maiduguri and arrested 150 rioters. In addition he found that the applicant could have relocated in Nigeria. He then examined this possibility by referring to para. 91 of the UNHCR Handbook and the UNHCR Position Paper on the Internal Flight Alternative of 1999 and concluded that the tests referred to in *R v. The Secretary of State for Home Department, Ex Parte Robinson*, [1997] EWCA Civ 2089 (11th July, 1997) were very helpful in considering whether applicants have an internal flight alternative. He then recited those tests and concluded that "*It is clear from the applicant's presentation of his case through his able Legal Advisor that his evidence was less than convincing and less than credible*" and confirmed the recommendation of the Refugee Applications Commissioner.

Extension of Time

18. These proceedings were commenced two days outside of the fourteen day period allowed by s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000. The applicant has provided a satisfactory explanation for this very short delay and I am satisfied on that basis that there is good and sufficient reason to extend the time.

SUBMISSIONS

19. Mr. O'Shea B.L., counsel for the applicant, argued that the RAT decision is in error and should be quashed by reason of the following:-

- a. Flawed treatment of credibility;
 - b. Failure to deal with the Notice of Appeal in relation to all aspects of the applicant's claim.

(a) Treatment of credibility

20. Counsel for the applicant argued that the credibility findings made by the Tribunal Member were based largely on gut feeling, surmise, speculation and conjecture and were therefore invalid in the main. He argued that the Tribunal Member made no actual findings but merely expressed opinions and that it is not clear what elements of the applicant's story were believed and which were disbelieved. Each finding was examined and criticised for its want of objective assessment and the lack of explanation as to how the Tribunal Member reached his conclusion. In particular he challenged the finding that the applicant's account of the death of his first wife was not credible and submitted that there was no rational basis for the Tribunal Member's statement that it was extraordinary that the applicant would not have contacted his wife earlier. Counsel submitted that husbands run away from their wives every day, sometimes for arguably trivial reasons, and there could have been any number of reasons for the lack of contact. He argued that trauma affects different people differently and that some people are brave while some are cowards. He also submitted that whether or not the applicant contacted his wife bears no nexus to the persecution feared.

21. Counsel for the respondent accepted that the manner in which the Tribunal Member expressed his credibility findings was not forensic but he argued that it is not the duty of the decision-maker to make forensic findings. Reliance was placed on *Okeke v. The Refugee Appeals Tribunal* [2006] I.E.H.C. 46 where it was argued that by using the words "it is difficult to believe", the Tribunal Member engaged in conjecture. Peart J. stated that he found "nothing objectionable" in the manner in which the Tribunal Member expressed her view.

22. The respondent argued that the Tribunal Member reached a careful decision on credibility at the end of the decision by stating that the manner in which the applicant presented his evidence was less than convincing. It was argued – relying on *Muanza v. The Refugee Appeals Tribunal* (Unreported, High Court, Birmingham J., 8th February, 2008) – that there is no duty on the Tribunal Member to set out precisely what he does and does not believe and what he is and is not taking into account.

(b) Treatment of the Notice of Appeal

23. The second challenge was that the Tribunal Member failed to address all of the issues raised in the Notice of Appeal. Counsel for the applicant pointed out that a particularly lengthy and detailed Notice of Appeal was lodged by the RLS on behalf of the applicant, appended to which was extensive COI and several previous RAT decisions. He noted that the RAT

decision is silent as regards the case law furnished and he argued that it was insufficient for the Tribunal Member to simply state that consideration had been given to the documents submitted without going on to address the contents of the documents. Reliance was placed on *I.K. v. The Refugee Appeals Tribunal* [2008] I.E.H.C. 173 where Birmingham J. held:-

"In the situation where ORAC had relied on county of origin information and that reliance was addressed in the notice of appeal and alternative country of origin information referred to, I am of the view that it was arguably appropriate and necessary that the Tribunal Member should refer to the existence of the two sources of information and indicate at a minimum whether he regarded them as consistent or in conflict and if in conflict why he was preferring one over the other."

THE COURT'S ASSESSMENT

24. This being an application to which s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000, applies, the applicant must show substantial grounds for the contention that the RAT decision ought to be quashed. As is now well established, this means that grounds must be shown that are reasonable, arguable and weighty, as opposed to trivial or tenuous.

25. The Court approaches its assessment of the applicant's submissions in a holistic manner, bearing in mind all of the evidence that was before the Tribunal Member. A consideration of that evidence indicates the evolving nature of the applicant's account of events in Nigeria which expanded considerably between the ASY-1 to the oral appeal hearing. It is difficult to discern why exactly so much time was spent on the applicant's conversion from Islam to Christianity and his problems with his father when his original claim was that he had continuing problems with Muslims in his town who were constantly disrupting church services and who ultimately burned his church to the ground during the riots which took place on the 18th February, 2006. The families of those Christians in his congregation who had died in the riots also sought to kill him. Although he gave a detailed description of his reasons for leaving Nigeria in his questionnaire, the applicant did not mention any fear at the hands of his father, he did not describe how his first wife had died, and he made no mention of having been a Muslim himself. He did not mention any conversion to Christianity or problems with his family arising from that conversion until his interview. Even at that stage there was no suggestion that his first wife had been murdered in 1987. The information was that she had died and one had to assume that the other five children were born between his first wife's death and his subsequent marriage to those children's mother in 2002. It seems to the court that the murder of one's spouse is something which any rational person would be expected to mention when recounting live changing experiences even if that murder was not relevant to his reasons for leaving Nigeria.

26. Another totally new aspect to the applicant's evidence at the appeal hearing before the RAT was that his father had threatened to kill him on a constant basis before he moved to Maiduguri; that his father had threatened to kill his first wife and son; that his first wife was murdered; and that his church in Ibadan was burnt down by his father. Those elements of the applicant's claim came to light at the oral hearing and are before the court only because they are recounted in the Tribunal Member's decision. The applicant's grounding affidavit makes no attempt whatever to address these issues. Obviously, if these new issues were raised by the applicant, the Tribunal Member had to consider them as he clearly did.

(a) Treatment of credibility

27. No arguments were advanced to support the assertion made that the Tribunal Member engaged in speculation or conjecture by his indication that he found it difficult to believe the applicant's claims. This Court considers that there is nothing unusual when a decision maker whose function is to determine credibility expresses difficulty in accepting some of the evidence given. If that decision-maker had said "I do not accept the applicant's evidence" with no more elaboration, the applicant would have cause to complain. That is not the case here. The Tribunal Member spelled out the parts of the applicant's evidence with which he had credibility problems. He took them chronologically and thus provided the context for his later findings. The first two findings related to vicious and constant harassment by his father who then just let go. No criticism can be levelled at this finding which involves no error of law and cannot be described as an irrational finding. The next issue is the account of the death of his first wife. That account was not disclosed to the court but from the RAT decision it appears to have been connected with the father's campaign to return the applicant to the Muslim fold. Whatever the account, it was found not credible. None of these findings however relate to the persecution alleged which was asserted to come from the Muslims of Maiduguri and the relatives of the victims in his congregation there but they are of relevance to the Tribunal Member's finding relating to the applicant's departure from his second family. Seen in the context of the alleged burning of his Church coupled with the intentions of the families of the victims to kill him, it is understandable that the Tribunal Member would express surprise and find it extraordinary that somebody who is the father of six children would not go to great lengths to ascertain that his wife and children were safe before boarding a plane for Ireland. The Tribunal Member followed this up with his rejection of the applicant's evidence that the first time he made contact with his second wife was when he rang her from Ireland.

28. All these findings were asserted to have been based on conjecture. An expression of opinion or the rejection of certain parts of a person's evidence does not amount to conjecture. It would only be conjecture if a Tribunal Member guessed or hazarded reasons or formed an opinion on the basis of no or very slim evidence. Here the Tribunal Member considered relevant matters when assessing credibility. Those matters were the applicant's account of his relationship with his father, the account of his first wife's apparent killing and the well documented events of the riots and church burnings in the applicant's asserted town. In the context of those relevant matters the Tribunal Member expressed the view that he found it extraordinary that the applicant would leave Nigeria without first ascertaining that his wife and children were safe. The court endorses the opinion expressed by Peart J. in *Okeke v. The Refugee Appeals Tribunal* [2006] I.E.H.C. 46, that there is nothing objectionable in the Tribunal Member expressing an opinion.

29. In reading the key findings in the RAT decision it is clear that the Tribunal Member took each of the key points in the applicant's narrative which he found not credible in chronological and ascending order using the language which developed from "difficult to believe" to "difficult to accept" to "not credible" then "extraordinary" and finally "credibility is stretched". In relation to the description of how the applicant passed with Mr. Ian through immigration at Dublin airport he bluntly stated that "as a matter of fact and practice this cannot happen".

30. The reason why the applicant's appeal was unsuccessful is clear from the RAT decision: the Tribunal Member did not find the applicant's account of the events that led him to leave Nigeria to be credible. He did not accept the applicant's account of his difficulties with his father, the death of his first wife, his departure from his second wife and children and the absence of any contact with them until he came to Ireland, and his account of his travel to and entry into this State.

No error has been established even at an arguable level which would meet the requirement of establishing a substantial ground for the purposes of obtaining leave on the challenge to this decision. The arguments related to the style of the decision and not to its substance.

31. It has to be considered that the Tribunal Member had before him the s. 13 report where doubts had been cast on the applicant's familiarity with landmarks in a town where he allegedly was a pastor for six years. There were other issues on which the Tribunal Member could have made findings and comments but did not do so, perhaps from good manners as suggested by counsel for the respondent, but that would be conjecture on my part. I am satisfied that the credibility findings made by the Tribunal Member were reasonable and rational and that there was sufficient evidence before him to provide a rational basis for the findings.

(b) Treatment of the Notice of Appeal

32. This is a case where there was no dispute that there had been violent riots in Maiduguri and that many churches had been burned down. The authorised officer at ORAC had appended three country reports to his recommendation. As there was no dispute on the issue there was nothing to be achieved by making reference to the country of origin information submitted by the applicant. Equally, there was no necessity to mention that the US Department of State report for 2005 identified several incidents of police brutality or corruption as they were irrelevant to the claim made by the applicant. The applicant did not claim to fear persecution from state bodies or agents. The alleged murder of his first wife was not the reason he claimed for leaving his country. The very well prepared Notice of Appeal raised many issues and sought to impugn the way in which the authorised ORAC officer reached his credibility findings. It also sought to explain some of the findings made by coming close to giving evidence on those matters. At the appeal hearing, the applicant went way beyond explaining inconsistencies identified at the ORAC stage and referred to in the Notice of Appeal written submissions when he raised matters not previously aired, being the threats by his father leading to the burning down of his church and the killing of his first wife. On those issues the Tribunal Member expressed his view that he found them difficult to accept. As the appeal then became a case where key aspects of the applicant's claim were disbelieved there was little to be achieved in providing a written analysis as to whether his asserted subjective fear was supported on an objective basis.

33. I am troubled however that the Tribunal Member failed to make any reference at all to the previous RAT decisions. It appears that three decisions were submitted by the RLS on behalf of the applicant, although it is not clear at what stage they were furnished or what submissions, if any, were made with respect to them. The Tribunal Member noted that he had considered the COI and the Notice of Appeal submitted by the applicant but made no comment on the RAT decisions furnished. I have considered each of the previous RAT decisions and I note that, unlike in this case, the personal credibility of the Nigerian applicants was fully accepted in each of those cases. Their relevance is therefore not established and I am satisfied the applicant suffered no prejudice as a result from the failure of the Tribunal Member to refer to them in his decision.

Conclusion

34. In the light of the foregoing, I am not satisfied that substantial grounds have been shown and accordingly, I must refuse leave.