

**THE HIGH COURT
JUDICIAL REVIEW**

[2011 No. 390 J.R.]

BETWEEN

A. (SUING BY HER MOTHER AND NEXT FRIEND F.A) (NIGERIA/SIERRA LEONE)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Eagar delivered on the 4th day of June, 2015

1. This is a telescoped application for an order of *certiorari* quashing the decision of the first named Respondent to affirm the recommendation of the Refugee Applications Commissioner and an order remitting the appeal of the Applicant for determination *de novo* by a separate member of the Refugee Appeals Tribunal.
2. The notice of motion sought an order of *certiorari* by way of an application for judicial review quashing the decision of the first named Respondent to affirm the recommendation of the Refugee Applications Commissioner and an order remitting the appeal of the Applicant for a determination *de novo* by a separate member of the Refugee Appeals Tribunal and a number of ancillary reliefs relating to an injunction and an extension of time.
3. The grounds upon which reliefs were sought were as follows:
 - 1) The Tribunal failed to perform its function of assessment of the facts in accordance with the Refugee Act 1996 (as amended) (hereinafter referred to as "the Act of 1996") or the UNHCR Handbook and/or S.I. 518 of 2006, Council Directive 2004/83/EC and Council Directive 2005/85/EC.
 - 2) That the decision of the Tribunal was wholly lacking in cogency and the claim of the Applicant was prejudiced.
 - 3) That the Tribunal failed to make any clear findings on significant elements of the evidence and including the evidence of past persecution.
 - 4) That the Tribunal erred in law in failing to reasonably consider the country of origin information reports and the submissions contained in the notice of appeal.
 - 5) The Tribunal erred in law in making a finding in respect of internal relocation without making any assessment or without any regard to the UNHCR guidelines on internal relocation.
 - 6) The Tribunal erred in law in taking into account matters irrelevant to its determination and/or fails to take into account relevant considerations.
 - 7) The Tribunal erred in law in failing to lawfully speculate on the likelihood of exposure of the Applicant to persecutory risk on refoulement to Nigeria
 - 8) The Tribunal failed to discharge its duties in arriving at a decision in respect to the principle of non refoulement.
 - 9) Having determined that it would also decide upon the appeal of the Applicant as if she is a national of Sierra Leone, the Tribunal identified a litany of risks to which a person of the Applicant's age and gender would be exposed but thereafter failed to consider or otherwise speculate as to whether the Applicant is in fact exposed to persecution in Sierra Leone.
 - 10) Having bound itself to making a decision with regard to the best interests of the child no such regard is apparent.
4. The notice of motion was grounded on the affidavit of F.A, the mother of the Applicant. The Applicant's mother said she was born in Sierra Leone in 1985 and lived in Nigeria since the age of 2. Her twin sisters and her were forced by their aunt into sex slavery at the age of 10. When her sister fled from a man to whom she was sold she was rendered mute and deaf by their aunt and thereafter killed. She sought help on occasion from the police but was then raped by the police. She stated she was eventually sold and trafficked to Ireland and she applied for asylum in Dublin but her application was refused as it was determined she could avail of State protection in her country of origin.
5. The Applicant was born in Ireland on the 17th February 2009. Her father is a national of Nigeria. An application was submitted on behalf of her daughter on the 23rd October 2009. The ASY1 form was completed by the Applicant's mother on the 23rd October 2009 and an application for refugee status questionnaire was completed on the 3rd November 2009.
6. The Applicant's mother was interviewed on behalf of the Applicant under section 11 of the Act of 1996 on the 6th November 2009 and a report pursuant to s. 13 (1) of the Refugee Act 1996 (as amended) dated the 11th November 2009 indicated that the Refugee

Applications Commissioner was satisfied that the Applicant's mother did not establish a well-founded fear of persecution as required by section 2 of the Act of 1996. An appeal was lodged against that decision and the first named Respondent heard an appeal on the 28th April 2009 and on the 27th May 2009 affirmed the recommendation of the Refugee Applications Commissioner.

7. In relation to the minor Applicant, A, the Applicant's mother attended the section 11 interview on behalf of her daughter and in the report of the Refugee Applications Commissioner the issue of state protection was considered by the Refugee Applications Commissioner but it recommended that the Applicant had not established a well-founded fear of persecution. The appeal of the minor Applicant was heard on the 16th March 2011 by way of an oral hearing and the decision of the first named Respondent was made on the 6th April 2011 and affirmed the recommendation of the Refugee Applications Commissioner.

8. No application was made by the minor Applicant to have her appeal heard by a separate member of the Refugee Appeals Tribunal.

9. These proceedings were commenced on the 13th May 2011. The statement of opposition of the Respondents did not raise any issues as to the necessary extension of time and in those circumstances the Court formally grants an extension of time in respect of this application.

Decision of the first named Respondent

10. The first named Respondent outlined the Applicant's claim. The Applicant was born on the 17th February 2009 in Ireland. She is the daughter of Nigerian parents and thus of Nigerian nationality. The Applicant is a Christian and owing to her age she has to date no education. Her mother is F.A. who answered in the Applicant's questionnaire that she had feared persecution of her daughter because she is at risk from people who are after her own (F.A's) life. In relation to the fear of being reported to the authorities she claims she reported her case to the Department of Justice in Dublin. In the circumstances of this case it is impossible to separate the claim of the minor Applicant from that of her mother.

11. The first named Respondent then recited the details of the Applicant's mother's history. The Applicant's mother attended for a section 11 interview on the 6th November 2009. She confirmed that her nationality is that of a person from Sierra Leone, however, her father's nationality is Nigerian. The Applicant's mother was taken to Nigeria when she was two years of age. She stated that if she went to Nigeria her aunt would kill her and if they killed her the same would happen to the Applicant in this case. She claims that perhaps her daughter will end up in the same position she did, namely being involved in prostitution. The Applicant's mother stated this in the section 11 interview. The Applicant's mother stated that she fears for her daughter in Nigeria and that the person she fears is her aunt. She claims she and her twin sister were working for her aunt from the time they were 10 years of age. Her aunt lives in Ondo. Her aunt does not know she has a daughter.

12. The Applicant's mother was asked why her aunt would be able to find her if she moved to another part of Nigeria, for example Abuja. She claimed that people from Abuja could see her and tell her aunt that she was in Abuja. It was put to the Applicant that Nigeria is a large country with a large population (approximately 149 million). It was put to the Applicant that the UK Home Office states that internal relocation is almost always an option. The Applicant's mother then stated that people who used to sleep with her would come from Abuja, Kaduna, Ondo and other places and perhaps they would know her because they had slept with her and they could give her aunt the information that they had seen her there with her baby.

13. The Applicant's mother claimed that her twin sister was killed by her aunt. The Applicant's mother was asked why her daughter would not be able to get protection from the authorities. She claimed that they could not help anyone and they did not help her at the time her twin sister died.

14. It was put to the Applicant's mother that there a number of woman's organisations like WACRL and BAOBAB, who help women and children with problems with Nigeria. The Applicant's mother said this was not an option.

15. The most important thing the Applicant's mother stated is her grave fear that there is nowhere they can stay. She said *"They all know me. I have slept with people from all over the country. They can go and tell my aunt where I am and even if the police come they can bribe them"*. The Applicant's mother claimed that even when she reported it the police came and slept with her.

16. The Applicant's mother was asked why her daughter would not be safe in Sierra Leone. The Applicant's mother said she was born in Sierra Leone but she does not know any of her relatives there. She did not have any problems in Sierra Leone because she left when she was two years of age. The Applicant's mother stated that she does not know what is going on in Sierra Leone now but she does know that her four brothers died in Sierra Leone. She does not have a problem in Sierra Leone but she does not know what the situation is.

17. The first named Respondent had dealt with the mother's claim and the decision of the first named Respondent was attached to the papers. The decision of the first named Respondent in respect of the Applicant's mother's case was found on the basis that she did not have a well-founded fear of persecution in Nigeria on the basis that she did not show that there was no State protection available to her in respect of the harm she feared, namely being forced into trafficking and prostitution.

18. The Applicant's mother claimed that she could not go back to Nigeria because she is not really from Nigeria and she didn't know the groups that the presenting officer referred to that were in a position to provide assistance to women in her position.

19. Submissions on behalf of the Applicant were that

(a) The Commissioner did not ask the right questions.

(b) That the Applicants will have been overcome over a long period of time and was a vulnerable woman and a victim of trafficking.

(c) It was submitted that the question for the Refugee Appeals Tribunals was whether and to what extent the State could offer protection in respect of what might happen on her return.

(d) It was submitted that the operational guidance had to be read in context and in conjunction with other country of origin information provided by the UK Home Office. BAOBAB had stated itself it could not support all women and that it was grossly under funded.

(e) It was submitted that while Nigeria had good intentions, support could not be guaranteed and in relation to Sierra Leone it was submitted that the position there was worse than in Nigeria. Reference was made to a Daily Fact Finding

mission and report in 2004 which referred *inter alia* to the fact that NAPTIP a government organisation set up to help people in the position the Applicant found herself in, has not been followed up by sufficient government funds. It can be difficult for NAPTIP to provide protection for all victims of trafficking.

20. Country of origin information was presented on behalf of the Applicant which referred to widespread official corruption, societal discrimination and violence against women, female genital mutilation, child abuse and trafficking in persons. The report also stated that women faced widespread legal and societal discrimination particularly in matters of marriage, divorce, property and inheritance. Women did not have equal access to education, economic opportunities, health facilities or social freedoms. The law however prohibits trafficking in persons but there were reports that persons were trafficked to, from and within the country. There is a shelter for trafficking victims run by the International Organisation for Migration and this has been operational since 2006. It provided a safe haven, medical care and counselling integration. There were gaps in the services that they were able to provide due to limited funding and the lack of shelter facilities outside of Freetown in Sierra Leone.

21. In relation to the mother's claim the first named Respondent noted the law prohibiting all forms of trafficking in Nigeria and also noted that the government had established NAPTIP the National Agency for the Prohibition of Trafficking of Persons and other related matters. It was also noted that NAPTIP assisted victims of trafficking either through the provision of shelter or by connecting victims to non governmental or international organisations for shelter, counselling and reintegration assistance. Quality of care however remains compromised by inadequate funding. NAPTIP continues to operate seven shelters throughout the country in Lagos, Abuja, Kano, Sokoto, Enugu, Royal Uyo and Benin City. The Applicant had responded to the first named Respondent that she could not move to a number of areas within Nigeria because she did not have anyone there. The Tribunal Member points out that the Applicant has nobody here in this country, no family and no cultural connections.

22. The first named Respondent concluded that the Applicant did not satisfy the requisite criteria of the convention in that she does not show a failure of state protection. The first named Respondent said there were a great number of support mechanisms in place. The first named Respondent also noted that refugee law was formulated to serve as a backup to the protection one expects from the state of which an individual is a national. She quoted from the decision of *Attorney General v. Ward* [1993] 2 SCR 689, a decision in the Supreme Court of Canada where the Supreme Court of Canada addressed the issue of how, in a practical sense, a refugee claimant proves a state's inability to protect its nationals. The view taken was that "*clear and convincing*" confirmation of a state's inability to protect must be provided and absent some evidence, a nation should be presumed capable of protecting their citizens. She concluded her decision on the Applicant's mother as follows:

"Given the failure to show absence of state protection, I find that the Applicant in this case has not shown a reasonable likelihood of persecution therefore fails to meet the refugee criteria."

23. Counsel on behalf of the Applicant noted that the primary finding of the Tribunal was that state protection was available to the Applicant in Nigeria citing NAPTIP and BAOBOB. The secondary finding is that an option of relocating internally within Nigeria is available, noting the population.

24. Counsel for the Applicant criticised the decision of the first named Respondent to abide by the fundamental duty to hear the application of the child *de novo*.

25. The finding with regard to internal relocation was made without even a perfunctory regard to the personal attributes of the Applicant and her mother.

26. He quoted from Clarke J. in a case of *Idiakheua v. The Minister for Justice Equality and Law Reform and Another* [2005] IEHC 150 where he set out the test for state protection as follows:

"It would appear that the true test is as to whether the country concerned provides reasonable protection in practical terms. While the existence of a law outlawing the activity which amounts to persecution is a factor the true question is as to whether that law coupled with its enforcement affords reasonable protection in practical terms."

It was submitted by counsel for the Applicant that this standard had not been applied.

27. Counsel for the Respondents complained that a number of the grounds contained in the statement of grounds were pleaded in a vague and generic fashion and were not supported by the contents of the grounding affidavit. She also submitted that the case made by the Applicant's counsel in their written legal submissions dated the 28th February 2013 bore little or no resemblance to the grounds as pleaded and significantly there are no grounds impugning the finding that state protection was available to the Applicant in Nigeria. She submitted that in relation to the Applicant's complaint that the decision was prejudged she submitted that there was no evidence before the Court whatsoever that the Applicant's legal representatives either requested a different Tribunal Member or requested that the Tribunal Member decide the application without reference to the mother's case. She also submitted that no complaint in relation to state protection was pleaded in the statement of grounds. She also submitted that the Tribunal Member clearly considered the application *de novo* and carried out a full oral appeal re-examining of the issue of state protection in the context of the claim made then. She also submitted that the two applications, that of the mother and of the Applicant, were identical and no separate or independent ground for claiming asylum was put forward on behalf of the daughter.

28. In relation to internal relocation counsel for the Respondent submitted that this ground did not arise for consideration on the basis that the Tribunal Member did not reach an internal flight decision in the manner understood by the Convention. She quoted from James Hathaway in relation to the decision of Heald J in *Rajudeen v. The Minister for Environment and Immigration* [1985] 55 NR at 129:

"An individual cannot be considered a 'Convention refugee' only because he has suffered in his homeland from the outrageous behaviour of his fellow citizens. To my mind, in order to satisfy the definition the persecution complained of must have been committed or been condoned by the state itself and consist either of conduct directed by the state toward the individual or in it knowingly tolerating the behaviour of such private citizens or refusing or being unable to protect the individual from such behaviour."

29. Counsel for the Respondent submitted that the written legal submissions complained that the Tribunal Member erred as she did not examine the availability of state protection in practical terms. This was not challenged or pleaded in the statement of grounds and there is in fact no live challenge to the state protection finding.

Decision

30. Prior to dealing with this matter I would like to thank the parties for their additional information and submissions in relation to Country of Origin Information provided to the first named Respondent in relation to the determination by the first named Respondent in relation to the mother of the Applicant's appeal.

31. In relation to the issue of the pleadings I find that the complaints in relation to the written submissions of the Applicant are not sufficiently imprecise to warrant rejecting the Applicant's case. The Respondents replied to the written submissions with detailed written submissions and then made oral submissions on the points which were allegedly imprecisely pleaded.

32. I am satisfied however that in this case that the means by which the decision has been reached in this case was that the minor Applicant had been afforded fair procedures, the first named Respondent has acted reasonably and has not acted in excess of jurisdiction.

33. I am satisfied to refuse the application for judicial review in this matter and refuse an order of certiorari as requested in the notice of motion.