Neutral Citation [2015] IEHC 412

THE HIGH COURT

JUDICIAL REVIEW

[2010/636JR]

BETWEEN

O. J. U. (AN INFANT SUING BY HER MOTHER) AND NEXT FRIEND M. U.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE REFUGEE APPLICATIONS COMMISSIONER

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 6th day of July, 2015

1. This is a telescoped application in respect of a decision of the Refugee Applications Commissioner declining to recommend asylum for the infant applicant.

2. The applicant was born in the State on 25th July, 2008, and applied for asylum in February 2010. The applicant's mother, at an earlier stage, sought asylum based on a fear that village elders would force her to subject her daughter (not the applicant) to female genital mutilation in Nigeria. The applicant's mother said that she came from a village in Edo State comprising less than twenty-five houses. By decision dated the 21st March, 2006, a s. 13 report declined to recommend refugee status on the basis of lack of credibility, availability of state protection and the possibility of internal relocation. With respect to internal relocation the s. 13 report describes as implausible the prospect that persons from the applicant's mother's village would be able to find the applicant's mother in a country of 137 million people.

3. In a s. 13 report dated 26th April, 2010, the Commissioner's authorised official recommended that the applicant not be given a declaration of refugee status on the basis that state protection would be available to the applicant and that internal relocation would be a viable option for her. Application for leave to seek judicial review was commenced by motion on 18th May, 2010.

4. The s. 13 report quotes from Article 2 of the European Communities (Eligibility for Protection) Regulations 2006 which addresses the existence of state protection. The decision maker concludes that such protection is available in the following terms:-

> *"The applicant's mother did not provide evidence to show that state protection would not have been forthcoming if the applicant returned to Nigeria. When asked if she could report her fears to the authorities in Nigeria for assistance, she stated "I don't know if the authorities would be any good…when you call them they say the network is breaking and give excuses not to come. The authorities in Nigeria do not work." (S.11 Interview Pg.5). She did not provide any evidence to show that the police would not have provided assistance to the applicant if necessary. It was also put to the applicant's mother as to whether she could approach organisations in Nigeria for support as they have a number of outreach facilities, (Appendix 1) and she stated "They only write these things but in reality they are not good. They only these things for themselves". There are viable and valid options open to the applicant through her guardian (mother) to access assistance and protection should she return to Nigeria, and applicant's mother has offered no reasonable explanation to infer otherwise."*

5. A separate finding was made in relation to the existence of internal relocation. It is in the following terms:-

> *"When it was put to the applicant's mother as to whether relocation would be an option – for example to Lagos, she stated '..People in Nigeria to and fro all the time. They could locate me'. (S11 interview, Pg.4 and 5).*
>
> *It was again put to the applicants mother about relocation to Lagos given that the population of Lagos is over 11 million coupled with the fact that she (the applicant's mother) left her country approximately 5 years ago, why would these families search for you now in a country of 150 million people and she responded "It is not that they would be looking for me, but people move around all the time. No matter what State I go to, there is a chance. I d not want to live in fear. (sic) There is always a chance." (S11 interview Pg.5). The applicant's mother has not offered sufficient reason or evidence that internal relocation is not a viable option for the applicant and her family or that the applicant would be targeted if she returned to a different area in Nigeria."*

6. The first ground of challenge (in the pleadings at paragraph (E)(b)) is as follows:-

> *"The RAC erred in law and in fact and in breach of fair procedures in failing to have due regard for its obligations pursuant to the European Communities (Eligibility for Protection) Regulations 2006 and or Council Directive 2004/83/EC 29th April, 2004.*

7. In written submissions this is said to embrace an argument that article 5 of the Protection Regulations was breached in that:-

> *"There was no assessment of all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied. In particular, where the applicant asserts that state protection would not be available to her in Nigeria but fails to produce any evidence supporting this there is an obligation cast upon the decision maker to access relevant country information and comply with the paragraph (a) [of Article 5 of the Protection Regulations] but this was not done"*

8. Counsel for the respondent refers to the decision of Clark J in CI & AF v. The Refugee Appeals Tribunal [2013] I.E.H.C. 488 where she said at para. 21:-

> *"The law on state protection is clear: in the absence of a complete breakdown of the state apparatus, a presumption exists that a state can and does protect its own citizens from acts of persecution perpetrated by non-state actors. Cogent evidence is required to displace this presumption. As Birmingham J. held several years ago in G.O.B. v. The*

Minister [2008] IEHC 229, the issue of the availability of state protection in Nigeria is not a new one and protection decision-makers are not coming to the issue as novices; "A great number of other cases will have raised issues about seeking assistance from the Nigerian Police. Those officials who deal with these issues must be considered to have required a broad familiarity with the general perception of the Nigerian Police Force." The Commissioner and the Tribunal must be presumed to be aware of the law enforcement position in Nigeria. While it is not perfect, it exists with the assistance of a functioning police force and a functioning judicial system. No state can provide perfect protection nor does refugee law require such perfect protection. In this case, while the risk of forced FGM and child trafficking may exist as a remote possibility as opposed to a probable risk, the risk that the Nigerian State would be unable to protect the child is also remote. The Court prefers the respondents' arguments on the reality of the availability of protection as demonstrated by COI reports."

9. In my view the decision with respect to state protection is somewhat sparse. On a simple reading, it suggests that a decision maker is merely required to ask a protection applicant "why don't you go to the police?". A decision on state protection as an alternative to an established and objectively justified fear should either refer to some source which confirms the existence of a functioning police force or other form of protection from the source of the harm or to the presumption that functioning states protect their people. However, it is difficult to see how the decision maker fell into legal error with the conclusion that "there are viable and valid options open to the applicant through her guardian (mother) to access assistance and protection should she return to Nigeria…". It is recalled that the statement is made following the reference to article 2 of the Eligibility for Protection Regulations which provides that protection against persecution or serious harm shall be regarded as being generally provided where reasonable steps are taken by a state…to prevent the persecution or the suffering of serious harm.

10. It is insufficient for an applicant in judicial review to say that the requirements of article 5 (a) of the 2006 Regulations are breached because there was no assessment of relevant facts as they relate to the country of origin at the time of taking a decision. Significantly detailed complaints as to what facts were not considered as well as submissions as to the effect of the alleged failure would be required to ground such application. If the applicant had produced material to suggest that no state protection is available for children who might be subject to F.G.M. then the absence of an identifiable source for the claim by the decision maker that such protection is available might assist with an argument that an error as to jurisdiction had occurred. The decision on state protection may lack detail but it does not lack jurisdiction. If this conclusion is wrong, I am satisfied that the error is not sufficiently grave to warrant intervention at this stage of the asylum process.

11. Before considering the next allegation of the illegality in the decision reference should be made to the conclusion by the authorised officials as follows:-

"The applicant's mother claims that the applicant fears persecution on the grounds of her gender – social grounds relating to threat of FGM in Nigeria. However, the applicant's guardian (mother) has failed to demonstrate that the applicant is at risk of adverse treatment on the grounds of her race, religion, nationality, membership of the a particular social group or political opinion based on the validity of internal relocation and assistance readily available throughout Nigeria."

12. I read this conclusion as confirmation that the decision maker did not reject the notion that the applicant had a well founded fear of persecution connected with forced F.G.M. in Nigeria. This decision rejecting refugee status is based not on the absence of subjective or objective elements of the fear of persecution but rather on the availability of state protection and/or internal relocation as a response.

13. Thus, the next allegation which is that article 5 (1) (c) of the 2006 regulations requiring the personal circumstances of the applicant to be considered must be rejected. If there was a failure to consider the personal circumstances of the applicant it had no impact on the decision taken on behalf of the Commissioner. It should be recalled that Regulation 5(1)(c) provides:-

" *The following matters should be taken into account by a protection decision-maker….*

(c) the individual position and personal circumstances of the protection applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm…"

14. This rule requires an applicant's personal circumstances to be considered when assessing whether the applicant's stated fears equate to fear of persecution or serious harm. The decision expressly states that her fears are persecutory in nature. The decision maker says:-

"The applicant's claim may be considered to constitute a severe violation of human rights and therefore may be considered as being of a persecutory nature and as such could satisfy the persecution element of the refugee definition."

If there was, as alleged, a failure to consider the personal circumstances of the applicant such failure was without negative legal effect because the decision maker accepted that mischief feared was indeed persecutory in nature. The heart of this decision is that protection from persecution/serious harm is available by way of state protection or internal relocation. This decision does not reject the existence of the subjective fear of harm. It also accepts that the harm feared does amount to persecution.

15. In any event the applicant's personal circumstances were actively considered. The decision refers to her as a 20 month old girl born in Ireland of Nigerian nationality. The decision expressly refers to the "linked files" of her mother and her sisters where full details of the mother's narrative concerning fear of F.G.M. are set out. If some element of the applicant's personal circumstances was not considered, it has not been described in the pleadings, in written submissions or in oral submissions. I find that no breach of article 5 (1) (c) of the 2006 regulations has occurred.

16. The applicant maintains that the failure to consider the contents of a compact disk submitted to the Commissioner demonstrates the absence of an assessment of the applicants personal circumstances as required by article 5 (1) (c). Even if it were the case that the disk had not been considered the failure to consider the disk did not have any impact on the decision taken as to whether the stated fears amount to persecution. I emphasise that the decision-maker accepted this part of the claim made. I cannot find errors as to jurisdiction in these complaints much less grave errors.

17. It is said in relation to the plea at ground "F" of the statement grounding application (which alleged breach of the procedures directive or the qualifications directive without specifying how such breach occurred) that, article 8(2)(a) of the procedures directive provides that all "applications are examined and decisions are taken individually, objectively and impartially". The applicant complains

that the claim was not assessed objectively although no explanation is given in any way for this allegation. It is said that an objective analysis necessitated consultation of country information regarding the availability or otherwise of state protection and that the application of laws and effectiveness of state protection should have been considered by reference to up to date and impartial country of origin information.

18. A claim such as this could not succeed without much greater detail either in the pleading, the written submissions or in oral submissions. No explanation has been offered to the court as to how it is alleged that the applicant's claim was not assessed objectively. Neither was any explanation offered as to what country of origin information ought to have been considered which, had it been consulted, might have resulted in a different outcome. This claim as to illegality is not made out.

The internal relocation decision:
19. Ground "E(g)" of the statement grounding application provides:-

> *"The country of origin information relied upon by the Second Named Respondent was insufficient to comply with the requirement of Council Directive 2005/85/EC of the 1st December 2005 in that it was not up to date and was not from more than one source and had limited relevance. Had proper up to date information been consulted it would have been seen that the question of internal relocation was not properly addressed. In addition UNHCR Guidelines in relation to internal relocation have not been applied."*

20. The complaint is amplified in the written submissions as follows:-

> *"The assessment of the issue of internal relocation did not accord with the minimum standards applicable. There is no analysis. No consideration of the prevailing conditions in any of the intended place of relocation was considered or the personal circumstances of the Applicant. There is no disclosed basis upon which a finding in this regard was arrived at. An analysis of the internal relocation alternative requires a forward-looking test. This error is fundamental."*

21. This complaint is not made out by reference to material put before the court to establish the veracity of the complaint and it must therefore fail. In essence the plea of illegality as to the manner in which the treatment of internal relocation was handled is that it is not sufficiently detailed. It is alleged that the personal circumstances were not considered. It is said that the reasonableness of requiring or asking the persons concerned to relocate was not considered and that the burden of proof in relation to internal relocation has been erroneously placed on the applicant.

22. In my view none of these allegations is borne out. Whilst it is true that the analysis as to internal relocation is not rich in detail it seems to me that the complaint must be supported by reference to the personal circumstances which ought to have been considered together with an argument that had the identified personal circumstances been considered a different internal relocation decision might have been reached. The same can be said as to the charge that the reasonableness of asking persons to relocate was not considered. An applicant in a case such as this must show how it would be unreasonable to expect the applicant to internally relocate. As to the suggestion that the text quoted above indicates that the burden of proof was placed upon the applicant, this seems to me to misinterpret what has happened. The decision- maker has recorded statements by the applicant as to why relocation was not an option and when these statements were found wanting it was concluded that internal relocation was a solution to the stated fear. In my view no error as to jurisdiction has occurred. In so far as this conclusion may be wrong, I alternatively find that no error as to jurisdiction sufficiently grave to warrant intervention at this stage of the asylum process has been established.

23. I reject the application for judicial review of the decision of the Refugee Applications Commissioner.