

THE HIGH COURT

JUDICIAL REVIEW

[No. 2009/273/J.R.]

IN THE MATTER OF THE REFUGEE ACT, 1996 (AS AMENDED), IN THE MATTER OF THE IMMIGRATION ACT, 1999, IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000 (AS AMENDED) AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT, 2003 SECTION 3(1)

BETWEEN

R. T.K.

C. C. K. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND R. T. K.) APPLICANTS

AND

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

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 14th day of March 2013

1. This is an application for leave to seek judicial review, dealt with in a 'telescoped' manner, in which the applicants are seeking, *inter alia*, an order of *certiorari* quashing the decision of the Refugee Appeals Tribunal (the "Tribunal") of 7th January 2009 affirming the recommendation of the Refugee Appeals Commissioner refusing refugee status.

2. The applicants also seek an order directing the matter to be remitted to the Tribunal and for a de novo hearing before another Tribunal member. Further, the applicants seek a declaration that the second named applicant has an entitlement to submit (and to have considered and determined) an individual asylum application on her own behalf.

Background:

3. The applicants are a mother and daughter from the Ivory Coast. The first named applicant (hereafter the "applicant" or the "mother") claims to be illiterate and was born on 1st February 1979, while her daughter was born on 31st May 2002. The applicant arrived in the State on 23rd May 2005 following the payment of five hundred dollars to an agent who assisted with her travel. Her young daughter was subsequently smuggled into Ireland on 21st May 2006 following the arrangement of her travel from the Ivory Coast by a family friend.

4. The applicant makes various claims in support of her application for refugee status. The applicant claims that she was raped by four rebel soldiers during the course of a robbery while she was working in a garage in Abidjan in March 2004. She claims she suffered an ectopic pregnancy arising from the rape, that she required a termination as a result and that she spent some months in hospital recovering. She claims that her brother was a trainee army officer with the government security forces and that he was approached by the rebels to join with them in their cause. When her brother refused to get involved with the rebels, the applicant claims that her family was directly targeted. First, her brother went missing for three weeks before it emerged that he had in fact been killed. The applicant claims that a journalist then came to their house and gave a DVD recording of the killing to her father. The applicant says that the journalist was murdered and, on hearing this news, her father sought to arrange for the entire family to flee. In the course of attempting to organise this escape, the applicant claims her father was also killed and his body dumped at the side of the road.

5. The applicant stated that she fled from her home and became separated from her mother and daughter. She claims she fled initially by bus to Ghana where she remained working for two months before engaging with an agent who assisted her travel to Ireland in May 2005. On her arrival she made her application for asylum claiming a fear that she would be killed in the Ivory Coast.

6. The Office of Refugee Applications Commissioner (ORAC) made a negative recommendation on the applicant's claim for refugee status in their report. Her claim was recommended for rejection primarily as there were concerns about perceived inconsistencies and discrepancies in her story which went towards a finding of a lack of credibility. ORAC stated: "*The applicant said the reason she left the Ivory Coast was because her brother was killed. She claims rebels killed him because the family refused to join the rebellion. However, some major discrepancies, contradictions and credibility issues again emerge when the account is studied.*" Following the negative recommendation in respect of the applicant's claim for refugee status, she appealed to the Tribunal and it is that decision which is impugned in these proceedings.

7. The Tribunal affirmed the recommendation of ORAC and refused the applicant's claim for refugee status primarily on the basis of the lack of credibility of her story. The Tribunal was also of the view that even if it was to accept the credibility of the applicant's claim, the general situation in the Ivory Coast had changed markedly since her departure and would serve to undermine the well-foundedness of any fear the applicant may have of returning.

Judicial Review proceedings:

8. Some sixteen grounds are raised in the statement of grounds and while various matters are raised in the applicant's written submissions, at hearing counsel for the applicant focused on three grounds of challenge to the decision of the Tribunal and I propose

to address each in turn.

(i) Reg. 5(2) European Communities (Eligibility for Protection) Regulations 2006:

9. Counsel for the applicants contended that the Tribunal Member did not adequately consider or have regard to the provisions of Reg. 5(2) of the European Communities (Eligibility for Protection) Regulations 2006 (the "2006 Regulations") which provides:

"5. (2) The fact that a protection applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, shall be regarded as a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated, but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection."

10. In this regard, counsel submitted to the court that the incident of rape claimed by the applicant, and which was not factually controverted by the Tribunal, constituted 'serious harm' for the purposes of the 2006 Regulations. 'Serious harm' is defined ins. 2(1) of the 2006 Regulations as: *"serious harm' consists of-(a) death penalty or execution, (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."* It was argued that it was incumbent on the Tribunal Member to regard the rape incident as a serious indication of the applicant's well-founded fear of persecution and that the Tribunal failed to do so. The respondents argued that the Tribunal Member did refer to the rape incident and expressly concluded in her decision that: *"There is no suggestion that the Applicant was personally targeted for a convention ground during this unfortunate attack. The Applicant resumed working in the oil depot after the attack and it would appear that the Applicant was the victim of an indiscriminate criminal attack and as such this attack does not bring the Applicants claim within Section 2 of the Refugee Act, 1996 (as amended)."*

11. It is apparent that this ground of challenge was pleaded only in the most general of terms in the applicant's statement of grounds. Further, it is noted that the argument advanced at hearing did not appear at any point in the applicant's written submissions. It is also clear to the court that this claim, as presented by counsel for the applicants at hearing, is not the claim which was advanced by the applicant at first instance or at interview.

12. The primary claim made by the applicant at first instance and to the Tribunal is that she fears persecution on the basis of membership of a particular social group and imputed political opinion, due to her family's failure to support the rebel militia in the Ivory Coast which led to the deaths of her father and brother.

13. I note in passing that not only did the Tribunal Member refer to the 2006 Regulations in her decision (para. 5.4 'Assessment of facts and circumstances') but she also specifically addressed the applicant's claim of rape and discounted it in the terms quoted above and also by stating, *"While this is a terrible incident, it appears to have been a random opportunistic attack."* It is evident that the Tribunal Member was of the view that this *"random opportunistic attack"* was not likely to be repeated.

14. I find that there is no basis for the applicant's complaints relative to Regulation 5(2) of the 2006 Regulations. My view is that Tribunal Member properly assessed the connection between the rape incident and the alleged fear of persecution and came to a rational and well reasoned finding that the appalling rape was not connected in any way with the claim for refugee status. The applicants' complaints are therefore insubstantial and cannot support a grant of leave to seek judicial review.

(ii) Application by the minor:

15. The second matter argued was that the Tribunal Member, in including the applicant's daughter in the decision made on 7th January 2009, acted without jurisdiction. Counsel for the applicants sought a declaration that the second named applicant should be permitted to submit an asylum application in her own right. The applicants referred to the fact that the Tribunal decision is expressly stated to refer to both the mother and daughter and highlighted that the second named applicant did not arrive in the State until after the determination of her mother's application by ORAC. In respect of this claim, counsel for the applicants seek to rely on the dicta of McCarthy J. in *Oloo Omeo v. Refugee Appeals Tribunal* (Unreported, High Court, McCarthy J., 31st March 2009) at a hearing for leave to seek judicial review, who stated:

"It seems to me that it is clear from the statute that the Tribunal has jurisdiction only if it is hearing appeals from the Commissioner, and (if that is the case, one must ask whether or not there was a decision of the Commissioner in relation to those three children. Manifestly there was not. They were not in the jurisdiction when the Commissioner adjudicated upon the matter and the Tribunal accordingly had no jurisdiction to deal with their purported appeals."

16. The respondent does not dispute that the second named applicant arrived in the State after the determination of her mother's application by ORAC. However, the respondent points to the fact that the applicant was in receipt of legal advice at the relevant time and that she completed an ASY1 Form on her daughter's behalf. The respondent also highlights that the applicant confirmed that the second named applicant was to be part of her application and that she did not want the second named applicant to be *"interviewed or considered separately"* from her application and that she understood *"the decision which will be made in relation to my asylum application"* would also apply to her child. The respondent also submits that the precise argument relied on by the applicant in this regard has in fact been rejected at a substantive hearing by Clark J. in the case of *P.I.P.O., O.O. & HO. (Minors) v. Minister for Justice and Law Reform* [2010] IEHC 368.

17. Clark J. in that case rejected the applicant's claims that the provisions of s. 11(1) and 11(2) of the Refugee Act 1996 placed an obligation on the Refugee Applications Commissioner to investigate a minor's claim and that these requirements could not be waived by the minor's mother. Clark J. further rejected the plea that the Tribunal had no jurisdiction to include a minor in an appeal where no investigation had been carried out by ORAC. Clark J. said:

"There is no obligation to conduct a separate s. 11 interview or to prepare a separate s. 13 report and recommendation in relation to a dependent infant on whose behalf no independent fear of persecution is asserted. It makes no difference if such a dependent child is born before or after the Commissioner's recommendation on the parent's claim as in either case, the Commissioner's recommendation will also apply to the dependent. Similarly, if the dependent is joined to the parent's Tribunal appeal, the decision on appeal affects the dependent whether the outcome is positive or negative. The Court is satisfied that this interpretation accords with the principle of family unity and that to interpret the Refugee Act 1996 in any other way would be to go beyond any of the key conventions on which the legislation is based."

18. I agree with the decision of Clark J. above and hold that those findings are similarly applicable in this case. No good argument was advanced before the court at hearing as to why this decision should not be followed and I note that the applicant's case was made

solely by reference to a decision taken at the leave stage by McCarthy J. and without reference to the contrary decision of Clark J. (following a substantive application for review), quoted above. It appears that, even in the absence of the clear guidance provided by the decision of Clark J. no separate argument or independent fear of persecution was in fact raised or advanced on behalf of the minor in this case. I therefore find that the applicants cannot succeed in their application on this ground of challenge.

(iii) Credibility findings:

19. The third argument advanced by the applicants was that the Tribunal Member erred in law and breached fair procedures with regard to the adverse credibility findings made against the applicant. In this respect the applicants, in particular, took issue with three adverse credibility findings made by the Tribunal, namely regarding: (a) the applicant's hospitalisation; (b) the DVD evidence; and (c) a possible asylum claim in Ghana. Counsel for the applicant claimed that the Tribunal Member erred in failing to evaluate the credibility of the applicant in accordance with law and as elucidated by Clark J. in *S.R. [Pakistan] v. Refugee Appeals Tribunal* [2013] IEHC 26.

a. Applicant's hospitalisation:

The Tribunal Member stated: *"In the Applicants questionnaire she stated that she met her brother in her village after she left Abidjan hospital while during the interview the Applicant said she was in hospital when she last saw her brother. In the Applicants interview she states she was hospitalised in her village for three weeks in June, 2004 and in the questionnaire it was stated that she was hospitalised for two months in Abidjan. At ground four of the 'Further Grounds of Appeal' it is confirmed that the Applicant was hospital for two months in her home village. Considering that the Applicant is illiterate it is understandable that she may be unsure of the time frame of her hospital stays but it would not be unreasonable to expect her to be consistent in recounting where she was hospitalised, even considering her limited education ... No credible explanation has been offered for these inconsistencies, and these inconsistencies further undermine the Applicants credibility."* [sic]

It is evident from this passage that the Tribunal Member finds that inconsistencies in the applicant's story affect credibility in this case. In my view, the credibility finding in this regard is clear, specific and cogent. It is easily understandable from its text and it is rational.

b. DVD evidence:

The applicants sought to argue that the Tribunal Member misunderstood the relevance of the DVD disc submitted by the applicant and erred in making a finding in this regard. The decision states: *"The Applicant has submitted a DVD which she states depicts the killing of her brother. The Applicant was unable to say who made the DVD nor could she name the journalist who gave it to her father. The Applicant states that she recognises her brother on the DVD. Appendix iii contains a translated script of the contents of the DVD. The person involved in the ritual is not identified and there is no evidence in the DVD that he is the brother of the Applicant. Examination of the contents of the DVC reveals that the footage in the DVD was included in a televised political debate on Ivorian national television and some of the television discussion voices over the footage of the ritual. It would appear from studying the footage that the contents of the ritual killing on this disc was aired on television as part of a debate and as the contents of the DVD is already in the public domain the Applicants fears in relation to her possession of this DVD or knowledge of its contents is not well founded."* [sic]

In respect of this claim it is clear that the Tribunal Member has adequately assessed the evidence as produced by the applicant. A translated script of the audio content of the DVD was obtained and the Tribunal Member goes into some detail as to what the contents of the DVD purport to be. It is clear from the above passage that the Tribunal Member is of the view that there is no evidence contained in the DVD to prove that the person depicted is in fact the brother of the applicant. As such the applicant's claim that the DVD is evidence of past persecution of her family and that her father was in fact killed simply for possessing it, is held not to be well-founded by the Tribunal Member. I find this to be a clear, specific, cogent and rational finding made by the Tribunal Member.

c. Asylum claim in Ghana:

The applicants also make complaint with regard to the Tribunal Member's findings in relation to the failure of the applicant to seek asylum in Ghana. The decision of the Tribunal states: *"The Applicant lived in Ghana for two months prior to travelling to Ireland. She states that she did not encounter problems in Ghana. She states she worked in Ghana packing shopping and a man whom she packed goods for helped her leave Ghana. The Applicant left Ghana of her own volition after paying a man for her travel (page 23, interview). She did not seek asylum in Ghana. Ghana is a signatory of the UN Convention relating to the Status of Refugee and the 1967 Protocol. The government has established a procedure to process refugee claims and there is protection against refoulment in Ghana. While the Applicant may be of limited education, it is difficult to believe that she would not have sought assistance in Ghana rather than risk illegal international travel and her actions in this regard are not indicative of a person fleeing persecution. Section II B (b) is relevant to the Applicants claim."* [sic]

It is clear to me that the Tribunal Member was of the view that the failure of the applicant to seek asylum in the first country to which she fled counted against her credibility. It seems illogical that the applicant would flee to Ghana with such haste that she did not pause to establish what had happened to her father, abandoning her mother and daughter in the process and yet did not seek some form of protection there. It would appear that the Tribunal Member had adequate grounds to conclude that *"her actions in this regard are not indicative of a person fleeing persecution."* In my view the Tribunal Member made a clear, reasonable and rational finding in applying the provisions of section 11B (b) of the Refugee Act 1996 relative to the applicant's credibility in this instance.

20. In my assessment of the above credibility findings made by the Tribunal Member, I have been guided by the judgment of Cooke J. in *J.R. v. The Refugee Appeals Tribunal* [2009] IEHC 353; Clark J. in *S.R. [Pakistan] v. Refugee Appeals Tribunal* [2013] IEHC 26; and my ruling in *R.O. (An Infant) v. Minister for Justice and Equality* [2012] IEHC 573. In particular, I find instructive the dicta of Cooke J. in *I.R.* that *"... a decision on credibility must be read as a whole and the Court should be wary of attempts to deconstruct an overall conclusion"*, and Clark J. in *S.R.* that *"While a Court must approach judicial review of the decision of an administrative authority with*

care and avoid the temptation to replace its own view for that of the decision maker, the Court is obliged to determine whether or not the decision is sound in law and, in particular, whether the conclusions reached on credibility are legally sound. While it is the function of the Tribunal Member to evaluate credibility and come to a view on the validity of the claim made, he/she is not at large to arrive at such decision on the basis of instinct, pre-conceived ideas or gut feeling. " Further, I distilled certain principles from the case law on the duty to give reasons for credibility findings in my decision of *R.O. (An Infant)*, which I also find to be of useful application in my assessment of this case.

21. As advised by Cooke J. in *I.R.*, the court ought not normally deconstruct Tribunal credibility findings. In that light and by applying the approaches taken in the above cases, I am of the view that the Tribunal Member has given a rational and well reasoned decision. The conclusions *reached "are legally sound"* in line with the requirements of Clark J. in *S.R.* and the reasons given for the lack of credibility of the applicant are specific, cogent and substantial. No illegality or irrationality attaches to the decision of the Tribunal Member in this instance.

Conclusion:

22. I find no flaws in the manner in which the Tribunal Member has reached her conclusions in this case. The applicants have failed to convince me as to the merits of the three complaints advanced at hearing and thus substantial grounds have not been advanced to justify the grant of leave to seek judicial review. As I refuse leave to seek judicial review in this 'telescoped' hearing, I am not required to consider substantive judicial review remedies.