

THE HIGH COURT
JUDICIAL REVIEW

2009 842 JR

BETWEEN**M. A.****APPLICANT****AND**

**THE MINISTER FOR JUSTICE AND LAW REFORM,
ATTORNEY GENERAL AND IRELAND**

RESPONDENTS**Judgment of Mr. Justice Ryan, delivered on the 12th November, 2010****Background**

1. According to his account the applicant was born in western Nigeria and is a Christian. In 2002 he moved with his parents to south western Nigeria where he continued his education, attending school until May, 2006. In all he had 12 years of education. At school he met another student and from 2004 entered a two year homosexual relationship with him. On the 25th August, 2006 his boyfriend's brother discovered them naked in his boyfriend's room. The brother threatened to report them and he and his friends seriously beat and punished them. Later that day when the applicant phoned his boyfriend, the brother answered and said they had "gotten rid" of his boyfriend and threatened that the applicant would be next. He feared that his parents would disown him or kill him if they knew he was gay because homosexuality is against their ethnic and religious beliefs - they are both Christians and members of a secret cult. His boyfriend's parents would kill him for sacrifice as homosexuality is also against their cult and their traditional beliefs. If he went to the police they would arrest, torture, abuse and imprison him because homosexuality is illegal in Nigeria. The applicant said he could be subjected to the death penalty and could not relocate within Nigeria because the cult would trace him using spiritual powers and the police would also trace him. He went to Lagos where he contacted an agent who set about arranging a visa and a plane ticket to Ireland. The applicant already had a passport issued in 2005. He returned home after arranging his travel and remained there without difficulty until the 10th September, 2006, when he packed some clothes, stole money from his father's cupboard, took a bus to Lagos and from there flew overnight to Dublin transiting for 40 minutes in Paris. His agent told him to destroy everything including his visa upon arrival. He had no difficulty at immigration and a taxi driver in Dublin directed him to the Commissioner's office.

2. At interview the applicant was asked how, if he moved elsewhere in Nigeria, people would know he was gay; he said "*There is no way I will live there without showing my sexual orientation.*" It was put to him that according to COI,

homosexuality is tolerated in larger cities if not made public; he again replied was no way people would not find out about his homosexuality. The Commissioner made a negative recommendation in his case in December, 2006 highlighting a number of credibility issues relating to:

- His inability to state his boyfriend's address;
- His failure to make any attempt to contact his boyfriend after being told by his brother that they had "gotten rid" of him;
- His inability to say what business his father was in;
- His claim that the spiritual powers of the cult would help to locate him elsewhere in Nigeria;
- His inability to describe the visa he had destroyed after arriving in Ireland; and
- Reference was made to ss. 11 B (b) and (e) of the Refugee Act 1996.

3. The Commissioner referred to a 2004 British-Danish FFM report which indicated that, although homosexuality is illegal, few cases have been tried in the courts and there is usually little attention in the press and among the public about such cases. The report stated that "*Homosexuals living in the larger cities of Nigeria may not have reason to fear persecution, as long as they do not present themselves as homosexuals in public.*" Reference was also made to a 2006 U.K. Home Office report which stated that although homosexual acts were illegal, "*gays and lesbians in Nigeria were mainly suffering because of discrimination and stigmatisation, not because of legal persecution*" and that "*the situation for gays and lesbians in Nigeria was not considered an important issue among local human rights NGOs*". It was also found that his fears were of a localised nature and that internal relocation would be a viable option in the light of the small number of arrests made.

4. In early 2007 the applicant appealed to the Refugee Appeals Tribunal. Detailed written submissions furnished in March, 2007 argued *inter alia* that the applicant would be suppressed in his self-expression as a human being in Nigeria. It was argued that he has a right not to be persecuted for legitimate human behaviour and that he could not reasonably be expected to relocate within Nigeria. The hearing in March, 2007 resulted in a negative decision but it was vitiated as a result of judicial review proceedings.

5. A new appeal in January, 2008 yielded another negative decision, in March, 2008. The Tribunal Member noted a series of credibility issues:

- It was not credible that he would have returned home after arranging his travel and remained there until 10th

September after his homosexuality was uncovered and it was difficult to believe his parents or his boyfriend's parents would not have approached him during that time;

- It was difficult to believe he would not have known his boyfriend's address given the frequency of his attendance there;
- It was difficult to believe he could not name the cult of his boyfriend's parents given his close relationship with his boyfriend for two years and given that he knew the cult was against homosexuals;
- It was difficult to believe he was unaware of the national debate that was taking place in Nigeria in 2006 in relation to same-sex marriages and the freedom of association of homosexuals following the introduction of a restrictive bill in parliament, the strong mobilisation of different sectors of civil society and the "public hysteria" the bill created.

Subsidiary Protection

6. In May, 2008 the applicant applied for subsidiary protection claiming that, if returned, he would be at risk of torture or inhumane treatment or punishment. Many of the written submissions made to the Tribunal in March, 2007 were repeated and it was argued that there were numerous errors in the Tribunal's decision particularly relating to the assessment of credibility. Reliance was placed on the COI reports furnished to the asylum authorities and a further six reports were appended.

7. In January, 2009 the Minister decided that the applicant was not eligible for subsidiary protection. The following matters cited in a 2008 British-Danish FFM mission report were noted:

- The death penalty for homosexuality applies only in the 12 northern States where Sharia law operates. 20 people were charged between 2003 and 2007 and 10-12 were sentenced to death by stoning but those sentences had been overturned by federal courts. Sentences of amputation had also been imposed but none implemented since 2001.
- The Nigerian Criminal Code prohibits acts of sodomy between two men, with a maximum sentence of 14 years' imprisonment;
- Gay men are often arrested and jailed until they can bribe their jailors to release them;
- Lagos - the most cosmopolitan city - has enacted anti-gay legislation;
- There was a rising trend of conservatism and intolerance in Lagos State even in relation to women's clothing;
- A civil liberties NGO spokesman said homosexual acts or behaviour are tolerated as long as they are carried out discreetly and in private but homosexuals would be arrested for offending public decency for showing affection in public. He also said that violent attacks on homosexuals were not a common occurrence;
- The public has little confidence in the police who are perceived to be ineffective and corrupt but the public believes that the police would provide protection for homosexuals threatened with violence.
- There are a number of support groups for homosexuals in Nigeria. The groups keep a low profile but members still fall victim to societal intolerance and hostility and some had been the target of personal attacks because they opened their doors to suspected gay people. At least two members of one group had died from complications related to discrimination they had suffered and members of another group had been shunned for defending the rights of gay people.

8. The examining officer concluded *"The above extract from the report indicates that if Nigerian homosexuals are discreet, they are unlikely to run foul of the law."* It was noted that the Commissioner had considered a 2005 British-Danish FFM report which cited instances of humiliation of gay people in northern Nigeria, but it was concluded that the report did not indicate that such incidents were widespread and that as the 2008 report did not refer to any further such incidents, it was reasonable to assume that the incidents had not been repeated. Finally, it was concluded that the applicant had not demonstrated that he would be without protection in Nigeria or that he was at risk of serious harm if returned there. The credibility issues highlighted by the Commissioner and the Tribunal were noted and it was found that on that basis, he did not warrant the benefit of the doubt.

Leave to Remain

9. In February, 2009 the Minister also rejected an application for leave to remain on humanitarian grounds and non-refoulement. The examination of file had regard to the various matters set out in s. 3(6) of the Immigration Act 1999 and found that there was nothing in the humanitarian considerations on file to suggest that he should not be returned to Nigeria. With respect to refoulement, reference was made to the 2008 British-Danish FFM report and the same conclusions were drawn as in the subsidiary protection decision. Consideration was given to the return of failed asylum seekers and internal relocation. It was concluded that Nigeria is a vast, populous country which would facilitate the internal relocation of a young, single, educated man such as the applicant. Consideration was also given to s. 4 of the Criminal Justice (UN Convention Against Torture) Act 2000 and Article 8 of the ECHR. The file examination concluded with a recommendation that a deportation order be signed.

10. The applicant instituted judicial review proceedings of the deportation order dated 4th February, 2009. At the leave hearing in June, 2008 he sought to rely on a UNHCR *Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity* of 2008 which had not previously been furnished to the Minister. The Court indicated that it could not consider the *Guidance Note* but suggested that it could be furnished in support of a revocation application under s. 3(11) of the Immigration Act 1999. The proceedings were accordingly withdrawn and the Minister undertook not to deport the applicant until the revocation application had been determined.

The Revocation Application

11. In June, 2009 the applicant's solicitors made submissions under s.3(11) to the Minister to revoke the deportation order. Particular issue was taken with the conclusion that he was unlikely to fall foul of the law in Nigeria if he was discreet regarding his sexual orientation. It was argued that the applicant would be condemned to a form of perpetual persecution if he could only avoid harm by concealing his sexuality. The solicitors appended the 2008 UNHCR *Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity* which had been discussed in Court on the judicial review application. Specific reference was made to paragraphs 8, 9, 25, 26 and 32. The solicitors also made other arguments and furnished supporting submissions.

The Impugned Decision

12. In July, 2009 the Minister notified the applicant of his refusal to revoke the deportation order. The decision was based on an examination of file that details the consideration of the case. The asylum and immigration history was set out and the representations and testimonials summarised. Reference was made to a 2009 UK Home Office COI report which reiterated that same-sex relations between men are illegal and punishable with up to 14 years imprisonment, any attempt with up to seven years and acts of "gross indecency" between males with up to three years. The 12 Sharia States were named and it was noted that, while the offence of engaging in homosexual intercourse is punishable by stoning, no such sentences were imposed during 2008. There were widespread taboos about homosexuality and very few people were openly homosexual. The offence of sodomy is not defined and a person cannot be prosecuted without a confession so the offence is difficult to prove and there have been no convictions under common law. It was noted that a bill was introduced in parliament in 2009 which proposed to ban same-gender marriage and which would permit the police to raid public or private gatherings of any suspected LGBT group. It had not yet been passed into law.

13. Reference was also made to a 2007 UK Home Office COI report which reiterated that no one had been sentenced to death for sodomy with an adult in the Sharia States and that, in practice, most cases had been about sexual abuse of children. Reports had not been found of the federal government's enforcement of the section of the Criminal Code which criminalises homosexuality. An LGBT NGO was quoted as saying that the penal code was more strict on paper than it was in practice and that in Lagos *"gays and lesbians can live freely as long as they do not impinge upon the rights of others"*. The examining officer referred to a passage from the report dealing with internal relocation for persons fleeing non-state persecution and considered that to be open to the applicant. The memorandum referred to support organisations for the LGBT community which, although they did not openly profess their existence given the prevailing atmosphere in Nigeria, still existed. The applicant would be able to contact them for advice or support. The writer concluded that protection would be available to and accessible by the applicant in Nigeria. Consideration was also given to Article 8 of the ECHR. Ultimately, it was found that there was nothing in the representations which would warrant the revocation of the deportation order. The Minister affirmed the deportation order.

14. An application for injunctive relief was refused and the applicant was deported. The applicant sought an order of *certiorari* quashing the refusal of the Minister dated the 28th July, 2009 to revoke the deportation order. By order of Mr. Justice Cooke dated the 17th December, 2009 leave was granted on the following ground:

"In deciding that protection would be available to the Applicant in Nigeria against mistreatment on account of his sexual orientation provided he was discreet, did not impinge on the rights of others and, if necessary, relocated internally to escape ill treatment from non-state actors, the Minister erred in law by failing to consider whether such requirements to conceal his sexual orientation resulting from the criminalisation of homosexual relations and resulting in discriminatory treatment constituted, according to current standards of human rights, a form of persecution for the purposes of international protection."

Analysis

15. At the leave hearing in this Court in June, 2008 when the applicant sought to challenge the deportation order, the Court indicated that it could not consider the 2008 UNHCR guidance note because it had not previously been furnished to the Minister and so had not been taken into account by him when he made the decision to proceed with the deportation order. The applicant withdrew the proceedings and the Minister undertook not to deport him until the revocation application had been considered. The applicant accordingly applied to the Minister under section 3 (11) of the Immigration Act, 1999 to revoke the deportation order, relying on the guidance note. The applicant did not limit himself to this ground but it was obvious that it was the major plank of his application. There would have been no doubt about this in the Minister's mind because of what happened at the abortive leave application.

16. Therefore, even before the Minister received the application to revoke the deportation order, he was aware that the UNHCR guidance note was a major point in the case. And the specific question was whether it was reasonable to require the applicant to live discreetly so as not to attract attention because of his homosexuality. In the examination of the case pursuant to section 3 (6), in respect of non-refoulement and for subsidiary protection, the conclusion was that the applicant could live in safety if he was discreet and that he had the capacity to relocate within Nigeria. The guidance note said that such a requirement was incompatible with the individual's human rights.

17. The Guidance Note recognises sexual orientation as "a fundamental part of human identity": para. 8. It advises at para. 12 that "[b]eing compelled to forsake or conceal one's sexual orientation and gender identity, where this is instigated or condoned by the State, **may amount to persecution**" (emphasis added). It further states:

"25. A person cannot be expected or required by the State to change or conceal his or her identity to avoid persecution. As affirmed by numerous jurisdiction, persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action."

26. [...] There is no duty to be "discreet" or to take certain steps to avoid persecution, such as living a life of isolation, or refraining from having intimate relationships. "

18. The Guidance Note refers to the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* of 2007, which were drafted by a distinguished group of human rights experts including the International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organisations. They are stated to *"reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity"*. The Principles recognise that sexual orientation and gender identity are "integral to every person's dignity and humanity". They suggest that the right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity.

19. These principles were endorsed by the U.K. Supreme Court, in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31. The Court held that the 'reasonable tolerability' test applied by the Court of Appeal had to be rejected. Homosexuals are entitled to freedom of association with others of the same sexual orientation and to freedom of self-expression in matters that affect their sexuality. It is a breach of fundamental rights to compel a homosexual person to pretend that their sexuality does not exist or that the behaviour by which it manifests itself can be suppressed. Persecution does not cease to be persecution for the purposes of the Convention because those persecuted can eliminate the harm by taking avoiding action. Having said that, the persecution must be State sponsored or condoned in order to engage Convention rights and simple discrimination or family or social disapproval is not sufficient.

20. The applicant complains that the Minister gave no consideration to these questions and to the principles and advice set out in the

Guidance Note. In the events that happened in this case, one question had to be specifically addressed in the Minister's consideration of the application to revoke, namely, how achieving safety by living discreetly could be reconciled with Convention provisions and human rights. The memorandum does not reveal any consideration of this matter, except that it does record receipt of the submissions and of the UNHCR document. In the circumstances of this case, particularly having regard to the court proceedings at the abortive leave stage, I think that this was a fatal omission and that the decision lacks validity as a result.

21. It is true that, as was pointed out by the respondent, the circumstances in which the Court will intervene at the revocation stage based on refolement arguments are in general very limited; this is clear from the decisions of the Court in *Kouaype v. The Minister* [2005] I.E.H.C. 380 and *Kozhukarov v. The Minister* [2005] I.E.H.C. 424. However, those limitations arise in circumstances where a revocation application is made after all relevant matters have been considered.

22. The issue on which leave was given in this case gives rise to considerations of judicial review that are essentially traditional. The principal question for the Minister to consider in the application to revoke the deportation order was whether it was reasonable or legitimate in light of the Convention to conclude that the applicant could avoid trouble from the authorities by living discreetly. A reading of the file examination document makes clear that this did not happen.

23. It would of course be wrong to say that this is the only question that arises in this case. In light of the abortive leave application this was the principal matter to be considered by the Minister. Because he failed to do so, the applicant succeeds in this application for judicial review and the result must be an order quashing the decision on the revocation application. On a reconsideration under section 3 (11), the Minister is entitled to consider other relevant matters. Some of the questions that arise in a case of alleged persecution by reason of sexual orientation are dealt with by the UK Supreme Court in *HI (Iran)* above-see Lord Rodger at para 82, for example. And, of course, questions of credibility arise.

24. Both the Commissioner and the Refugee Appeals Tribunal highlighted credibility issues in this case and those findings were noted in the subsidiary protection decision. There are obvious evidential difficulties in assessing claims of persecution by reason of sexual orientation. The decisions of the Commissioner and the Tribunal ought to have been before the Minister pursuant to s. 16(17) of the Refugee Act 1996 and it must therefore be assumed that the Minister was aware of the credibility issues raised by the Commissioner and the Tribunal. The officer who examined the subsidiary protection and the leave to remain applications noted the credibility issues in the former decision but not in the leave to remain report. It is for the Minister to decide what reliance to place on credibility findings made by the asylum authorities.

Conclusion

25. In the light of the foregoing, the Court will grant an order of *certiorari* quashing the Minister's decision of the 28th July, 2009.