Neutral Citation [2013] IEHC 278

THE HIGH COURT

JUDICIAL REVIEW

[2009 736 J.R.]

BETWEEN

O. O. C. (AN INFANT ACTING BY HIS FATHER AND NEXT FRIEND T. O. C.)

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND EAMONN CAHILL SITTING AS THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 9th day of May, 2013

1. This is an application seeking to challenge by way of judicial review the decision of the second named respondent dated 10th May, 2009, affirming an earlier recommendation of the Refugee Applications Commissioner of 6th January, 2009, that the applicant should not be granted refugee status pursuant to s. 16(2)(a) of the Refugee Act 1996 (as amended). The application was brought by notice of motion dated 3rd July, 2009, but no issue is taken in relation to the time within which this application was brought. The application was grounded upon the statement of grounds dated 3rd July, 2009, and the affidavit of the next friend sworn on 6th July, 2009. By consent of both parties the case proceeded on the basis of a telescoped hearing. The court was invited to consider whether the applicant had established substantial grounds upon which to be granted leave to apply for judicial review in respect of the Tribunal decision, and if so, proceed to hear and determine the matter by way of full hearing on the same date. A draft statement of opposition was served and furnished to the court together with legal submissions from both sides covering all of the relevant issues.

Background

2. The applicant is a minor born on 20th September, 2008, in Ireland. His parents are Nigerian who are failed asylum seekers and now seek subsidiary protection. Their failed asylum applications are not the subject of these proceedings. The applicant child has never been to Nigeria.

3. The basis of the applicant child's claim is, in effect, the same as that of his mother and father. An application for refugee status was made on his behalf by his mother on 9th February, 2008. The Refugee Applications Commissioner rejected his application on 6th January, 2009, following which the matter was appealed to the Refugee Appeals Tribunal. Evidence was given by his mother to the Tribunal on 27th April, 2009, following which a decision issued on 10th May, 2009.

4. The basis for the application is set out in the questionnaire completed on his behalf by his mother on 15th December, 2008, and in the information furnished by her in the course of a s. 11 interview on 5th January, 2009.

5. These matters are also set out in the grounding affidavit of the child's father and next friend as follows:-

> "4. In Nigeria I worked as a town planner and during the course of my employment I was forced to act in a manner contrary to the interests of several property owners. These property owners now seek revenge against me as a consequence of my activities and they also seek revenge against members of my family. I fear that the applicant might be persecuted on account of these facts should he be returned to Nigeria and that the police would offer no effective assistance on the face of this foreseeable persecution."

6. This claim was set out in full in a summary of the applicant's mother's evidence in the decision of the Tribunal as follows:-

> "His problems arise from the fact that his father worked as a town planner in Nigeria. As part of his professional activities his father, T. C., was required to issue an order providing for the demolition of certain buildings. His father was personally threatened by a group of landlords who purported to own the buildings. Both parents sought asylum in Ireland and they claim that they had been terrorised by the landlords who owned and occupied the premises.
>
> The witness said that the family are Pentecostal Christians. She fears that her son, the applicant, will suffer because of the problems experienced by his parents. The buildings were demolished in December, 2008. Since coming to this country, the applicant's mother's mother in law has herself been threatened by the landlords. So concerned is she for her safety that Mrs. C. Snr has relocated elsewhere. Mrs. C. Snr was told that the landlords – "aggressive landlords" – threatened anybody associated with T.C..
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> The witness said that she and her husband lived in Lagos. Her husband worked in Odun State where his mother now resides. She said that the reason why she fears the landlords is because all of their property was demolished. They now have no home for themselves, no social welfare and no means of earning a living. These men have threatened to kill the witness and her husband if they get the chance.
>
> On the issue of internal relocation or continued residence in Lagos where there is a population of 14m, the witness said that the landlords would find herself and her husband and they would do anything to get her. When the witness was asked why they would want to kill her, she did not respond…
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> In response to cross examination…the witness said that her husband was a senior town planner. He had ordered the demolition of a particular building which had been erected without planning permission. Her mother in law had consulted a lawyer in Nigeria, … and her husband had received correspondence suggesting that he remain in Ireland as he would face too many problems were he to return to Nigeria."

The Two Letters
7. Two letters were submitted to the Tribunal in support of the application. One was said to have been received by the applicant child's grandmother from the aggrieved landlords whose property had been demolished. It was a threatening letter. It demanded that Mrs. C. Snr produce her son within 48 hours or they would kidnap and/or eliminate her entire family. It ended with a statement that she had been warned.

8. A second letter purporting to be from a firm of solicitors "Chief Toye Coker & Company" dated 13th January, 2009, and addressed to the applicant child's father in Cork, was also submitted. It was stated to be in respect of "the issue of aggressive landlord of Warewa community, Verger area, Ogun State". The letter stated that they were acting on behalf of Mr. T. C.'s mother who had brought the threatening letter to the solicitors to obtain legal advice. It noted that the content of that letter referred to the father's action in respect of a demolition exercise carried out by him at the Warewa community under the instructions of "the ruling government of PDP in Ogun State". It stated:-

> "The landlords of that community are aggrieved and wants our client to hand you over to them. At the same time they are seriously threatening to endanger your family if they cannot get you.
>
> We therefore advise you to prolong your stay in your present location, as security of your life in Nigeria cannot be guaranteed under the prevailing circumstances.
>
> However, relevant law enforcement agents have been informed of this development and necessary security measures have been put in place to protect your family.
>
> Kindly get us informed of any possible development at your end in this regard so as to ensure swift assistance."

9. Both of these letters were relied upon on behalf of the applicant child as evidence of the fear of persecution to which he and his parents would be subjected if they returned to Nigeria.

The Tribunal Decision
10. The Tribunal carried out an analysis of the applicant's claims set out at para. 6 of the decision. It first sets out the contents of the two letters referred to above. It then refers to the evidence and materials submitted to the Tribunal and states:-

> "Two letters have been sent from Nigeria and these are exhibited on file. There is no objective evidence to suggest that either of these two letters is objectively reliable. Country of origin reports indicate that forging documents in Nigeria is very easy to do, such is the level of corruption. The letter from Chief Toye Coker & Company cannot therefore be relied upon as genuine. The letter from the landlords was handwritten. There is no objective evidence to support the contention that these people even exist or that a letter purportedly written by them can be objectively validated."

11. The decision then goes on to deal with three other matters. Firstly, the Tribunal noted that country of origin reports suggested that Nigerian police, although quite justifiably and often accused of corruption, could be relied upon when satisfied that serious harm would result were they not to intervene. This information was said to be supported in numerous and highly reliable objectively based country of origin sources. Secondly, the Tribunal addressed the mother's fear that her son would face death if taken to Nigeria. It stated that when asked why the landlords would wish to kill her, she did not respond to the question which, it was said, raised a credibility issue for her. She maintained that the police were not available to give protection but it was concluded that this view was not shared by a number of UK Border and Immigration Agency Operational Guidance Notes on Nigeria and two COIS Nigeria Country Reports for 2007. Thirdly, the Tribunal considered a fear expressed by the applicant child's mother for her daughter, his sister, should the applicant be returned to Nigeria. This matter is entirely unrelated to the applicant child's claim.

12. The decision concludes in the following way:-

> "For the reasons I have given, this applicant is not a refugee."

The appeal was dismissed and the recommendation of the Commissioner was affirmed. The court observes that there is no discussion in the analysis of the claim as to whether there is any basis for concluding that the facts outlined on the applicant's behalf are capable of establishing that he is a refugee or potentially subject to persecution within the definitions of the Refugee Act and the Regulations.

The Challenge
13. The child applicant seeks an order of *certiorari* quashing the decision of the Tribunal on some fifteen grounds. These were reduced when the matter came before the court to the grounds which are set out at paras. E(iii), (iv) and (v).

Grounds E(iii) and (v)
14. Counsel submitted that the Tribunal relied on undisclosed country of origin information to determine that the letters submitted by the applicant were forged. The information was submitted that these letters were an important part of the applicant's case. It was not furnished to the applicant nor was any opportunity afforded the applicant to deal with the allegation that the letters were potential forgeries. In addition, it was contended that no further investigation was carried out by the Tribunal in this regard in respect of each of the letters. It was submitted that the determination was fundamentally flawed and was contrary to the principle of *audi alteram partem*.

15. It was also submitted that in failing to provide the applicant with copies of the country of origin information upon which reliance was placed in respect of the forgery issue, the Tribunal failed to comply with its obligations in accordance with s. 16(8) of the Refugee Act 1996 (as amended). Section 16(8) provides that:-

> "The Appeal Board shall furnish the applicant concerned and his or her solicitor (if known) with copies of any reports, observations, or representations in writing or any other document, furnished to the Appeal Board by the Commissioner copies of which have not been previously furnished to the applicant pursuant to section 11(6) and an indication in writing of the nature and source of any other information relating to the appeal which has come to the notice of the Appeal Board in the course of an appeal under this section."

16. The Tribunal, having considered the handwritten threatening letter relied upon, concluded that "there is no objective evidence to

support the contention that these people (referred to in the letter) or that a letter purportedly written by them can be objectively validated". That is an unobjectionable logical conclusion reached by the Tribunal.

17. A more difficult issue is presented by the conclusions reached in respect of the letter said to have come from the solicitors in Nigeria. The relevant conclusion is stated as follows:-

> "Country of origin reports indicate that forging documents in Nigeria is very easy to do, such is the level of corruption. The letter from Chief Toye Coker & Company cannot therefore be relied upon as genuine (emphasis supplied)"

18. An examination of the contents of the letter indicates that its terms could not have advanced the applicant child's case. It simply encloses a copy of the threatening letter, outlines its contents, makes reference to the father's work for the ruling government party and his part in the demolition of premises, the fact that the landlords of the premises were aggrieved or said to be seriously threatening and endangering his family "if they could not get you" (meaning the applicant child's father). He was then advised to stay in his present location "as security of your life in Nigeria cannot be guaranteed under the prevailing circumstances". It goes on to say that relevant law enforcement agents had been informed of the development and necessary security measures had been put in place to protect his family. It does not say which law enforcement agencies have been informed or by whom and what security measures had been taken to protect his family or by whom, or whether indeed the solicitors were involved in that aspect of the case at all. Indeed, the paucity of detail in relation to all of these matters in the course of this application is striking. Therefore, had the Tribunal confined itself to a finding that the letter was not verifiable or that it did not put much weight on its contents, such a conclusion would have been understandable and reasonable in the circumstances of the case.

19. The court is concerned that the Tribunal went further. It referred to country of origin information to the effect that the forging of documents in Nigeria "is very easy to do such is the level of corruption", and immediately thereafter stated that "the letter from Chief Toye Coker & Company cannot therefore be relied upon as genuine". This directly linked the country of origin information in relation to forgery to the letter submitted on behalf of the applicant child. It is one of the reasons given by the Tribunal for its determination that the applicant child was not a refugee.

20. A clear implication of that finding was that because it was very easy to forge documents in Nigeria by reason of corruption in that country, the letter produced purporting to emanate from the solicitors was a forgery and that the application was based on a forged document.

21. In *A.T.T. v. the Minister for Justice, Equality and Law Reform* [2009] IEHC 1, Birmingham J. considered a challenge to a Tribunal decision adverse to the applicant and based on the grounds that the Tribunal breached s. 16(8) of the Act by failing to state the nature and/or source of information that came to its attention in the course of the appeal concerning the alleged forgery of arrest warrants and summonses considered at the Tribunal's hearing. The Tribunal had stated:-

> "The matter of arrest warrants and summonses were addressed at the hearing and it is well recognised that these and other documents can be forged or easily obtained in D.R. Congo. Blank documents are also available."

Birmingham J. stated in relation to the issue concerning forged documents:-

> "9. So far as the question of forged documents is concerned, there is no specific finding that the documents produced were in fact forged. It does not seem to me that the Tribunal Member was doing any more than indicating, that he was not operating on the assumption that the documents produced were necessarily authentic and that as such they corroborated the applicant's account. It appears that the question of the documents was specifically addressed at the hearing and in particular the applicant's attention was drawn to the fact that country of origin information indicated that such documents were not furnished to the subject. By so doing it was clearly being suggested to the applicant that if his account was correct, that he would not be in possession of documents of that character, and insofar as he was in possession of documents which he ought not to have had, that there had to be doubts about their authenticity. I can find no problem with the approach taken to this issue whatever."

22. The provisions of s. 16(8) of the Act were also considered in *BIGA (applicant) v. Refugee Appeals Tribunal (Ben Garvey) and the Minister for Justice, Equality and Law Reform* (Unreported, High Court, 24th February, 2010, Clarke J.). In that case the applicant complained that the Tribunal had concluded that it was difficult to assess the genuineness of a series of documents submitted by the applicant. The Tribunal in that case noted that it was aware of comments from the British Embassy in Kinshasa that due to the prevalence of corruption and poor administrative records, considerable caution should be exercised before accepting the validity of certificates and identity cards. It was also noted that the Belgian General Commissioner for Refugees had also stated that documents furnished may contain information that is false. It was contended that the Tribunal was obliged to furnish the applicant with an indication of the nature and source of that information and this ought to have been furnished to her before the Tribunal decision was made, because she was entitled to know the case against her. Notice would have enabled her to make observations or submissions and to submit country of origin information that could have contradicted that advice or explained any discrepancies in the documents submitted. It was argued that the documents furnished were capable of speaking to certain of the adverse credibility findings and were corroborative of her specific assertions and ought not to have been disregarded.

23. The respondents in that case contended that there was no obligation on the Tribunal Member to cite country of origin information in support of the view expressed that it was difficult to establish the authenticity of documents from the DRC. Such a difficulty arises in all asylum cases and decision makers were not obliged to accept the validity of each and every document submitted unless its authenticity were disproved. It was also submitted that the documents were of little probative value in establishing whether the applicant was a refugee or not.

24. Clark J. noted that seven adverse credibility findings were made against the applicant in that case in respect of her credibility, the seventh of which concerned the conclusion that it was difficult to assess the genuineness of the documents furnished by the applicant. This finding referred to the Tribunal's awareness of the comments from the British Embassy and the Belgian General Commissioner referred to above. It was accepted that the Tribunal Member made no reference at the oral hearing to the information from the British Embassy or the Belgian Commissioner and that the first reference to it appeared in the Tribunal's decision.

25. The applicant in the *BIGA* case argued that she was severely prejudiced by the failure on the part of the Tribunal to notify her in writing that he was aware of the warnings that had issued in respect of accepting the validity of official documents purporting to be from the DRC. It was said to be a breach of statutory obligation which should lead to the quashing of the Tribunal Member's decision. Clark J. did not accept the contention that the fact of non-disclosure had the consequence that the applicant was rendered unaware of the case being made against her. It was held that the cautionary advice related to "official documents" and was not part of a case

against her. Further, it was noted that most of the documents furnished did not fall into the category of official documents and were newspaper articles, letters and a membership card. The court also noted that the documents furnished which contained internal inconsistencies were simply not accorded much weight. In the course of her judgment Clark J. stated:-

> "The court is not at all convinced that these arguments are correct and finds that there has been a considerable overstatement of the role played in the appeal decision by that warning. The wording in s. 16(8) obliges the tribunal member to notify the applicant of "the nature and source of any other information relating to the appeal which has come to the notice of the Tribunal in the course of an appeal". The so called warning information was not specific to the applicant's appeal nor is there anything to suggest that the various statements made by the officials in the British and Belgian Embassies in Kinshasa came to the tribunal member's notice during the course of the applicant's particular appeal. The information was of a purely general nature which was not directed to the applicant's documents and as was pointed out by the respondents, could apply to any documents from any country of origin."

Further, it was also noted that the caution in relation to official certificates and identity cards was not relied on to impugn any specific events described by the applicant. Clark J. was satisfied that the documents and information in that case which were not disclosed to or referred to at the oral hearing "did not affect the ultimate decision in the applicant's case. The advices from the two diplomatic office holders did not lead to the broader negative credibility findings which were unrelated to the documentation that she furnished".

26. In *ASO v. the Refugee Appeals Tribunal* [2009] IEHC 607, the Tribunal considered the availability of state protection to the applicant upon return to Nigeria in the face of threats of attack and an allegation that her daughter had been murdered. It expressed surprise given the alleged murder that the applicant did not press her claim by renewing a complaint to more senior levels of the police force when it was not originally acted upon. The Tribunal relied upon country of origin information to the effect that the Nigerian police took appropriate action against cults such as the one feared by the applicant. The court noted that this country of origin information was referred to for the first time in the Tribunal decision. It featured nowhere else and was not a document available to the Refugee Applications Commissioner nor was it explicitly used at the hearing before the Tribunal. It appears to have been a document which was the result of the Tribunal Member's own researches. The court was satisfied that it was a document which was not put to the applicant at the appeal hearing or one upon which the applicant was afforded an opportunity to comment. It was a document in respect of which rebutting information might have been adduced. Consequently, there had been an infringement of the requirements of s. 16(8). The court stated that:-

> "In this instance the reliance placed upon the Home Office Guidance Note is more significant in that it is directed at a specific and important incident in the applicant's personal story namely, her kidnapping by the Oodua Peoples Congress. It is important to bear in mind that this issue is unique to the contested decision. The kidnap incident was not one of those points in the personal history identified by the Commissioner's report as a basis for doubting credibility. The court is therefore satisfied that this is an instance in which, prior to finalising the decision, the Tribunal Member was under an obligation, if not to reopen the hearing, at least to furnish the Home Office Guidance Note to the applicant's representatives and afford them an opportunity of commenting upon it or rebutting it by contrary information in the light of the reliance that the Tribunal Member proposed to place upon it."

In those circumstances the court was satisfied that the process by which the crucial finding as to the availability of state protection in that case was reached was sufficiently flawed to warrant the quashing of the decision.

27. The court is satisfied that the issue concerning the letter from the solicitor was dealt with in an unsatisfactory and unfair way. It is one thing for a Tribunal to indicate that on the basis of country of origin information it would not operate on the assumption that documents produced were necessarily authentic or that they supported an applicant's account. It is quite another to conclude that a document purporting on its face to emanate from a solicitor cannot be relied upon as genuine and base that conclusion upon country of origin information in respect of the facility with which documents can be forged in Nigeria and the level of corruption reported in that country. In this case the conclusion that the solicitor's letter could not be relied upon as genuine was amongst the reasons given by the Tribunal for its determination that the applicant child was not a refugee. This was clearly linked to the credibility of the applicant's father's account of why he feared persecution. It involved a conclusion that the application was based upon a forged document purporting to emanate from a solicitor's office. This is a most serious allegation. The court is satisfied that the Tribunal should have furnished the applicant with a copy of this information, indicated to the applicant in writing that there was a serious issue in relation to the authenticity of the letter and given the applicant an opportunity to address any allegation or suggestion that it was forged. At the very least, the country of origin information and the issue should have been raised directly with the applicant at the oral hearing. Therefore, the court is satisfied that the determination of the Tribunal was for that reason fundamentally flawed and contrary to the principle of *audi alteram partem*.

Ground (v)

28. The court is not satisfied that there is any basis upon which to grant leave to apply for judicial review arising out of this ground whereby the applicant complains that the country of origin information submitted to the Tribunal was not relied upon or referred to in the course of the Tribunal's decision. It is submitted that the Tribunal failed to weigh the country of origin information submitted by the applicant with the other information available. The court is satisfied that this ground is not sustainable and accepts the respondent's submission that the country of origin information referred to by the Tribunal was uncontroversial, general in nature and widely available. Elements of it were put to the applicant during the course of the Tribunal hearing and no issues were raised in respect of its reliability or provenance. It did not contradict other country of origin information supplied which was to the effect that the police in Nigeria are often corrupt which was accepted by the Tribunal.

Extension of Time

29. Notification of the Tribunal's decision was furnished to the applicant on 10th June, 2009. The next friend states on affidavit that it was received on 7th June, 2009. He endeavoured to obtain legal advice but only succeeded in doing so on 16th June, 2009. A full set of papers was sought from the previous solicitors in the case which were received on 30th June, 2009. Counsel was instructed on 1st July, 2009, and the notice of motion issued on 3rd July. The court is satisfied having regard to the fact that the applicant is a minor, and that the delay was relatively short and fully explained, that time should be extended in this case in the interests of justice.

Conclusion

30. The court is, therefore, satisfied that grounds (iii) and (v) of the draft statement of grounds afford substantial grounds upon which to grant leave to apply for judicial review of the Tribunal's decision and is further satisfied, having considered all of the evidence (including exhibits) and submissions, and the notice of opposition furnished by the respondents, that the decision was reached in breach of fair procedures and should be quashed. The matter should be remitted for hearing for a different tribunal member.