

THE HIGH COURT
JUDICIAL REVIEW

2007 1107 JR

BETWEEN

**J. T. (A MINOR, SUING THROUGH HIS MOTHER
AND NEXT FRIEND M. T.)**

APPLICANT**AND**

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

RESPONDENTS**JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 31st day of March, 2009.**

1. This is an application for leave to apply for judicial review of the decision of the Refugee Appeals Tribunal (RAT) to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner (ORAC) that the applicant should not be granted a declaration of refugee status. Mr. Hugo Hynes S.C. and with Mr. James Healy B.L. appeared for the applicant and Ms. Siobhan Stack B.L. appeared for the respondents. The hearing took place at the King's Inns, Court No. 1, on the 25th March, 2009.

Background

2. The applicant, who is now almost four, was born in the State on the 13th June, 2005. He brings this action through his mother. His claim for asylum was commenced on 30th September, 2006. His mother had previously made an individual application for asylum; that application had not yet been determined when the application was made on her son's behalf. In her claim she asserted that she was from Benin where she lived and worked in a brothel with a woman "Mama". This woman had raised her since she was either abandoned or orphaned and put her to work at as a prostitute at a very early age. The risk she was fleeing was asserted to be from that brothel owner. Her asserted fear for her son was that if he were to be returned with her to Benin, Mama would not tolerate a child interfering with her capacity to work and that Mama might therefore harm her son. No other fear of persecution was asserted. The child applicant's claim was therefore dependent on his mother's fear of persecution from Mama being established. Her application for a declaration of refugee status failed.

3. In both claims, Country of Origin information (COI) referred to by the ORAC indicated that prostitution is a crime in Benin and abuse of children is met with stiff sentences on conviction. The child applicant's mother did not establish to the satisfaction of the ORAC that she had a well founded fear of persecution and the easy possibility of relocation was found to be an option. These findings affected the child's claim and a negative recommendation was also made by ORAC in respect of his application, which was appealed. A Form 1 Notice of Appeal was submitted on behalf of the child applicant and an oral appeal hearing took place at which the child applicant was legally represented by his current solicitors and counsel. No attendance note of the oral hearing is before the Court. The Tribunal Member upheld the negative recommendation of the ORAC on the basis that the applicant's mother did not have a well founded fear of persecution and therefore the child applicant's claim failed. That decision is now the subject of challenge.

The Issue in the Case

4. Although many grounds were advanced challenging the RAT decision in the supporting Statement of Grounds there was one issue argued in the challenge and that is that the Tribunal Member refused to permit cross examination of the Presenting Officer - who represents the Refugee Applications Commissioner - at the appeal hearing in the child's case. In her grounding affidavit, the applicant's mother states "*I say and I am so advised and it is a matter of concern to me that the Respondent would not allow my legal representative to put any questions to the Presenting Officer, at my oral hearing in relation to my claim stating to him that this was an unusual request.*" Mr. Hynes S.C., for the applicant, argued that in so refusing, the Tribunal Member acted in breach of fair procedures in that only one side of the case was tested and that the s.13 report was therefore unchallenged. He relied on Regulation 9(1) of the Refugee Act 1996 (Appeals) Regulations 2003 (S.I. No. 424 of 2003), which permits cross examination of the Commissioner at appeal hearings. This provides:

"9.-(1) In conducting an oral hearing the Tribunal shall –

(a) ensure that the applicant, his or her legal representative, if any, the Commissioner and the High Commissioner, if present, are informed of the order of proceedings which the Tribunal proposes to adopt; [...]

(e) allow for the examination and cross-examination of the applicant, any witnesses and the Commissioner [...].

5. It was argued that the purpose of the regulatory provisions is to ensure a balanced procedure based on the principle that both sides of the case should be heard and tested and that the refusal to allow the applicant an opportunity to test the evidence of the Presenting Officer constituted a breach of fair procedures. Counsel for the applicant relied on the decisions of Smyth J. in *Florentina Bozsa v. The Refugee Appeals Tribunal* [2002] I.E.H.C. 136 and *Nicolaev v. The Refugee Appeals Tribunal* (Unreported, High Court, Smyth J., 8th July, 2002).

6. This being an application to which section 5(2) of the Illegal Immigrants (Trafficking) Act 2000 applies, the applicants must show substantial grounds for the contention that the decision ought to be quashed. It has been well established that this means that grounds must be shown that are reasonable, arguable and weighty, as opposed to trivial or tenuous.

The Court's Assessment

7. There was no dispute that there is provision for cross-examination of the Commissioner's representative who is described as the Presenting Officer. It is difficult however to envisage how in practice this occurs as the Presenting Officer has not prepared the s.13 Report and merely acts as the Commissioner's representative; he or she is not a witness. However as the right appears in the procedural rules applicable to the hearing of appeals and contained in Refugee Act 1996 (Appeals) Regulations 2003 (S.I. No. 424 of 2003) there must be circumstances where it is appropriate to question the Presenting Officer on perhaps the source of information relied on. It is the Tribunal Member however who controls the conduct of the appeal procedure and must be deemed to be aware of the issues which will arise from the documents of the statutory investigation conducted by ORAC, the s. 13 report and the appellant's grounds of appeal. The Tribunal Member who can himself pose questions or refer issues to ORAL for clarification or determination retains a discretion to allow the calling and examination of witnesses and in this regard may enquire as to the purpose of cross examination to determine its relevance according to the circumstances of the case.

8. As the issues before the Tribunal Member in this case were contained in the Notice of Appeal and related to mainly to COI and to medical reports and social support services provided to the child applicant which were fully exchanged and disclosed in advance of the hearing, it is difficult to envisage how cross examination of the Presenting Officer would arise.

9. It is not entirely clear what did in fact happen at this hearing as the affidavit sworn by the applicant's mother states "*I say and I am so advised and it is a matter of concern to me that the Respondent would not allow my legal representative to put any questions to the Presenting Officer, at my oral hearing in relation to my claim stating to him that this was an unusual request.*" The applicant's solicitor, who was present at the hearing, makes no averment whatsoever in her affidavit as to any request, attempt or otherwise to cross examine the Presenting Officer which was then refused.

10. On the basis of the mother's affidavit it cannot be said that any application to cross examine was actually refused. The Tribunal Member merely said this was an unusual request. That was a comment, query or decision that was well within the competence of counsel for the applicant to handle if in the interests of his client he believed that cross examination was appropriate. Counsel was unable to state what in fact occurred after his request and was unable to establish any prejudice attributable to the failure to cross examine the Presenting Officer.

11. The procedure before the Tribunal Member is not adversarial in the sense that each side is tested by cross examination as in a criminal case. Natural and constitutional justice ensures that no party is taken by surprise and that each party is permitted to present its case. The applicant is fully aware that he has to establish that the s.13 findings and recommendation are incorrect and that by the written appeal submissions and oral evidence at the hearing he must establish that he is in fact a refugee. The Tribunal Member is bound to consider all the documents and to form a credibility assessment of the applicant personally based on his oral evidence and any documents furnished. The Court is not satisfied that any prejudice has been established. The Presenting Officer is not the author of the s. 13 report and I cannot see what benefit to the applicant the cross-examination of the Presenting Officer would have achieved in this case. It is not correct to argue that unless the Presenting Officer is cross examined, the s. 13 report is untested. The entire appeal is based on impugning the correctness of the findings and the recommendation based on those findings where the Tribunal Member conducts an entirely separate and independent assessment of the relevant facts.

12. The applicant argues that there has been a breach of fair procedures but has been unable to establish any actual prejudice even if the Tribunal Member did refuse to conduct cross examination, which has not been established. Neither of the decisions referred to by counsel for the applicant are helpful to his case.

Conclusion

13. In the light of the foregoing, I am not satisfied that substantial grounds have been shown and accordingly, I refuse leave.