Neutral Citation: [2014] IEHC 600

THE HIGH COURT

JUDICAL REVIEW

[2011 No. 404 J.R.]

BETWEEN

D.A. (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND, R.A.) (NIGERIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, EMMA TOALE SITTING AS THE REFUGEE APPEALS TRIBUNAL, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Eagar dated the 9th day of December, 2014

Background

1. The applicant is a Nigerian national born in the State on 14th May, 2010. His mother and next friend, R.A., has made an application for asylum on his behalf in which she states that the claim of her son is intrinsically linked to her own and further claims that he will be subjected to facial scarification if returned to Nigeria and persecution by reason of membership of a particular social group. The applicant's mother's application for refugee status was turned down by the Refugee Applications Commissioner and subsequently, by the second named respondent.

2. I note that the applicant's mother has not sought judicial review of the decision of the second named respondent in relation to that decision. In effect, the applicant's mother has stated that the claim of her son is intrinsically linked to her own, but further claims that he will be subjected to facial scarification if returned to Nigeria. As the mother's claim for refugee status has been refused, this Court must accept that the grounds linking her son with those claims must also be rejected.

3. The applicant's mother stated that when she came to Ireland she left her two other children with her mother and she states that she fears they are not safe and, therefore, she could not return there with the applicant.

4. She further states her fear that the applicant will be forced to undergo tribal markings by her husband's family, as it is the custom for a child born outside the family compound to be marked as a form of identity. She also noted that the two other children were born within the compound and did not undergo this procedure. However she unusually contended that her husband intervened to stop the procedure. Both the applicant's parents have such markings on their bodies. She also indicated that she was estranged from her husband, having no knowledge of his whereabouts and having had no contact with him since the birth of the applicant. She states that he is unaware of the birth of the applicant, but states that he was aware of her pregnancy and the sex of the child. She further states that internal relocation within Nigeria is not a viable option for her as "anywhere you go you could be seen and that there is nowhere safe in Nigeria". She submits that the police would not intervene as the issue would be deemed a family matter.

5. The grounds upon which relief is sought are stated in general terms in the Statement required to Ground the Application for Judicial Review as follows:-

> (a) The Refugee Appeals Tribunal erred in law and in fact and in breach of fair procedures in failing to have regard to its obligations pursuant to the European Communities (Eligibility for Protection) Regulations 2006 which gives effect to the EU Council Directive 2004/83/EC
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> (b) The Refugee Appeals Tribunal failed to have due and proper regard to the provisions of Council Directive 2005/85/EC as of 1st December, 2005.

6. The applicant's mother swore an affidavit to ground the application for judicial review on the 16th May 2011. The exhibits to the affidavit of the applicant's mother were in a somewhat disorganised state and it is more helpful to have the documents particularly in relation to the application to the Refugee Applications Commissioner in correct date order.

7. The application for refugee status questionnaire was completed on behalf of the applicant by his mother on the 10th December 2010 and she attended the s.11 interview on behalf of her son on the 2nd February 2011. The decision of the Refugee Applications Commissioner was dated the 21st February 2011 and the Refugee Applications Commissioner concluded that the applicant had not established a well founded fear of persecution as required by s.2 of the Refugees Act 1996 (as amended).

8. With regard to the question of state protection the Refugee Applications Commissioner decided that the applicant had failed to demonstrate that the State would not seek to protect him and in terms of the issue of internal relocation it is stated that the applicant's mother could travel with the applicant to another part of the country and remain safe from community members.

9. This decision was appealed to the second named respondent.

10. The second named respondent outlined the laws which cited the relevant statutory obligations on her including the definition of a refugee, the burden of proof as provided by s.11 (A) of the Refugee Act 1996 (as amended) which provides that where an applicant appeals against the recommendation of the Commissioner under the s.13 it shall be for him or her to show that he or she is not a refugee. The second named respondent also dealt with the s.11 (B) of the Refugee Act 1996 in outlining the provisions of that section with regard to assessing the credibility of the applicant. He further quoted in relation to the assessments of facts and circumstances Regulation 5(1) and (2) of the European Communities (Eligibility for Protection) Regulations 2006 and quotes those sections. She further quotes regulation 2 of the European Communities (Eligibility for Protection) Regulations 2006 and regulation 9 of the European

Communities (Eligibility for Protection) Regulations 2006. She further quotes regulation 10 of the European Communities (Eligibility for Protection) Regulations 2006.

The analysis by the second named respondent
11. The second named respondent set out briefly the facts of the mother's claim for refugee status but notes that the applicant's mother's claim was determined by the Tribunal where she was found not to be a refugee within the meaning of s.2 of the Refugee Act 1996.

12. The second named respondent noted the facts as set out in this judgment and referred to the evidence given by the applicant's mother at the hearing. She noted that the applicant's mother was asked at the hearing that if she knew of the tradition of her husband's family why would his family be told of the applicant's existence since he was born in Ireland. She stated she could not hide a child from them and she would have to tell them about one of their own. She also said that she did not tell them but that maybe her husband did. This response was considered highly curious by the second named respondent who also indicated that she considered it internally inconsistent. She would agree that they should be told about his birth and then state that he is in need of protection from them.

13. The second named respondent also indicated that it was clear from her evidence that her two older children had been living with her mother since the applicant came to Ireland and there was no evidence that any attempts were made on the part of her husband's family to try and get the children now and mark them even though she states her husband had come to Ireland even before she did and therefore would not be in a position to intervene. The second named respondent indicated that there had to be a question mark as to whether the family had a desire to mark these children who were living in Nigeria. She noted there had been no attempt to mark the two children who were living with her mother even in her husband's absence and she concluded that the applicant's mother's fear for the applicant in this regard was not well founded.

14. A reasonable amount of Country of Origin Information was submitted on behalf of the applicant. However at the hearing by this Court little reference was made to the materials and is certainly unhelpful that Country of Origin Information documentation have not been identified as being relevant to the application. Country of Origin Information submitted on behalf of the applicant highlighted the tradition of facial marking but stated that the practice was gradually declining and increasingly restricted to people in rural areas. There the mere fact that such scarring is performed however does not amount to a conclusion that this applicant would be subjected to it and therefore the finding of a fear for the applicant being not well founded still stood.

15. The second named respondent indicated that a finding had been made in the mother's claim that internal relocation was an option for her and was not unduly harsh. She stated that given this and given also the fact that it was considered that since the applicant's two siblings had been living with the applicant's grandmother uninterrupted and unharmed from the paternal family then the applicant along with his mother could successfully relocate there. Further the applicant's mother stated that she had two brothers living in Lagos and while it is noted from her evidence that Lagos is two hours from the paternal home it is nonetheless considered that she along with the applicant could relocate and find support with them in Lagos and this especially so since the other two children are living closer to the paternal family without problems. The applicant's mother also claimed that the applicant's paternal grandmother is very old and it is just her and his grandfather living in the family compound. It is also noted that it was not considered that they would be in a position to seek out the applicant throughout Nigeria especially since there was no evidence that they were even aware of his existence. She held that the applicant had failed to discharge the burden of proof in establishing a claim for refugee status and that the appeal was dismissed and the decision should be read in conjunction with that of the applicant's mother.

16. Counsel on behalf of the applicant cited the Procedures Directive:-

"Member States shall ensure that decisions by the determining authority are taken after an appropriate examination and Member States shall ensure that applications are examined and decisions are taken individually, objectively and impartially."

17. He further submitted that the above standards were not adhered to in the following way:-

> (1) Country of Origin information submitted that was supportive of the applicant's claim, while mentioned in the decision, did not give a reason for rejecting this information or considering it of sufficient weight to prove the applicant's claim.
>
> (2) The applicant's best interests as a child were not identified in the decision and was, therefore, not properly considered in accordance with Article 24(2) of the Charter of Fundamental Rights of the European Union.
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> (3) The claim was not investigated "individually".

18. He submitted that the claim should have been investigated individually and said no reliance should have been placed on the mother's rejected claim for asylum.

19. Counsel further stated that because the same decision maker was responsible for both decisions an impartial assessment required a different tribunal member.

20. Counsel also submitted that it was unclear from the decision what the reasons for the rejection of the applicant's claim in general were in relation to scarification. He cited *DDA v. Minister for Justice Equality and Law Reform* [2012] IEHC 308 and the judgement of the European Court of Justice in *MM v. Minister for Justice Equality and Law Reform*, Ireland and the Attorney General. This latter decision appears to relate to an application for subsidiary protection and is not particularly helpful in this case. I have also considered the decision of Mr Justice Cooke in *DDA (Nigeria) v. Minister for Justice Equality and Law Reform and the Refugee Appeals Tribunal* and in my view the issues arising in that case were totally different from the issues arising in this case.

21. Counsel on behalf of the respondent stated that it was her view that none of the issues were involved in the statement of grounds. In particular the following issues, that the second named respondent was not objective, was not impartial, that the best interests of the child were not considered, the issue of state protection had not been specifically raised in the statement grounding the application for leave.

22. It is clear that the Superior Court rules had been changed substantially in relation to judicial review applications by S.I. No. 691 of 2011, which came into force on 1st January, 2012 and radically amends Order 84.

23. This raises a number of matters:-

1. Should a court in looking at these changes to the rules made on 1st January, 2012, seek to interpret the applications made before that date in accordance with the new rules? My belief is that the application was made at a time when these rules were not enforced, nevertheless it also appears to me that prior to the change of the rules it was always clear that applications for judicial review required something more than generic grounds.

2. No attempt was made to amend the statement of grounds after the passing of the rules. However, it is equally clear that the respondent did not enter into correspondence with the applicant's legal representatives in relation to the new rules. I am satisfied that, although I am not happy with the generic grounds which appear in the Statement Grounding the Application for Leave, I am prepared to adjudicate on this matter on the merits of this case put forward by counsel for the applicant.

24. Counsel on behalf of the respondent then indicated that the best interests of the child was a matter which must be based on something in particular, and it is clear that the mother of the applicant had stated that her child's application was intrinsically linked with her own, which had been rejected and not challenged by way of judicial review. No application had been made by the applicant's mother to have a different tribunal member hear her child's application. I accept the submission made by Counsel on behalf of the respondent in relation to the issue of the "best interests of the child."

25. In relation to the decision of the second named respondent counsel for the respondent stated that none of the Country of Origin Information supported the contention that children were forcibly marked against the will of their parents.

Decision of the Court
26. I am satisfied that the tribunal member has made a number of findings, each of them sufficient to support the decision that the applicant was not a refugee. The role of the court is not to supplement its own decision for that of the second named respondent.

27. In the case of *Meadows v. Minister for Justice Equality and Law Reform* [2010] IEHC the Supreme Court reviewed the principles to be applied by a court in reviewing the decision of a professional decision maker. Denham J. (as she then was) held:-

"(i) In judicial review, the decision making process is reviewed.

(ii) It is not an appeal on the merits.

(iii) The onus of proof rests upon the applicant at all times.

(iv) In considering the test for unreasonableness the basic issue to determine is whether the decision is fundamentally at variance with reason and common sense.

(v) The nature of the decision and the decision maker being reviewed is relevant to the application of the test."

28. I am satisfied that the second named respondent considered the applicant's claim in accordance with the law and her conclusions are rational and reasonable in relation to the issue of the scarification of the applicant.

29. I am also satisfied that her decision in relation to internal relocation is reasonable and in accordance with law.

30. In all these circumstances, the court is not satisfied that the applicant has established any substantial grounds upon which leave to apply for judicial review might be granted in this case and the application, therefore, is dismissed.