

THE HIGH COURT

JUDICIAL REVIEW

2007 1457 JR

BETWEEN

E. F. I.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL,

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

AND IRELAND

RESPONDENTS

JUDGMENT of Ms. Justice Clark delivered on the 25th day of February 2009

1. The applicant seeks leave to apply for judicial review of the decision of the Refugee Appeals Tribunal (RAT), dated the 22nd October, 2007, affirming an earlier recommendation of the Office of the Refugee Applications Commissioner (ORAC) that she should not be granted a declaration of refugee status.

Factual Background

2. The applicant comes from Benin City in Edo State in Nigeria and sought asylum in the State on 13th July, 2004. She states that she comes from a Christian family and was born in 1989. As her mother had died she and her sister were being brought up by their father and uncle. She has a limited education as a shortage of money led to her withdrawal from school. She then started working in a hairdressing salon where, at age 15, she met a distant relative of her late mother who offered to take her to Zamfara in the north eastern part of Nigeria where she would provide for her and ensure an education. This part of Nigeria operates under the Sharia law system.

3. It appears that the relative who the applicant addressed only as "Madam" operated a brothel. The applicant was put to work as a prostitute for a period in excess of a year. She was not provided with any education and was not permitted to retain her earnings while she worked in the brothel and on the streets. She was arrested on the street and tried before a Sharia court where she had no legal representation and did not understand the language of the trial which she says was conducted in "Muslim". She was held in jail and learned that she was to be stoned to death for breaching the Sharia criminal code in relation to fornication or adultery. Her jailer arranged to liberate her and to provide her with her conviction papers in exchange for sex. When liberated she returned to Madam and was brought back to the south to Benin City. She was not permitted to contact her father as Madam feared that he would find out what had happened to his daughter and be angry with her. Madam therefore arranged for the applicant to travel on false papers to Ireland where she applied for asylum.

Procedural Background

4. The applicant applied for asylum upon arrival in the State on 8th September 2007, claiming to fear persecution on the basis of membership of a particular social group being young girls forced into prostitution. She stated that she fears the sentence of the Sharia court if she were to be returned to Nigeria. She filled out her ORAC questionnaire in English and spoke English at her s. 11 interview with ORAC on 2nd June, 2005. She produced a Nigerian passport in a different name. The passport had an Irish visa and was produced with her questionnaire and at the ORAC interview.

5. She also submitted a copy of her "certificate of conviction" from the Sharia court together with a school certificate sent to her by her uncle together with the envelope in which it was sent, to prove her identity. The applicant failed before ORAC which made several negative credibility findings in a lengthy and detailed s.13 report. The applicant was found not credible in her account of events in Zamfara. It was pointed out that country of origin information (COI) which was appended to the s. 13 report recorded that Sharia law applied only to Muslims and that State governments have not attempted to coerce non-Muslims to be tried by Sharia courts.

6. The authenticity of the document of conviction was doubted, as was the assertion that she did not know Madam's name or how she was related to her late mother. The fact that she could not pronounce the name of the town in Zamfara State where she spent over a year was adversely commented on. Similarly her fear of the verdict of the Sharia court, her escape and the fact that Madam would pay for her to come to Ireland were all found not credible.

7. The applicant appealed from the ORAC recommendation to the Refugee Appeals Tribunal (RAT). An oral appeal hearing took place at which the applicant told her story with some small variations. For instance she said that she was detained for one month before her trial as opposed to the three months she described to the ORAC officer at her s. 11 interview. She stated that she had been beaten by Madam when she was forced to work as a prostitute. She was questioned about how she was able to find her way back to Madam's house if she did not know the name of the town in Zamfara State and how she got there. She was also questioned about her return to Madam, her contact with her uncle and her travel arrangements. Reasons for the doubts expressed as to the authenticity of the "conviction document" were put to the applicant: it was written in English and had the wrong date for the particular penal code. She was asked why, if she

feared Madam, she did not either report the matter to the police or seek the assistance of a woman's organisation. She replied that she did not trust the police and had no faith in any women's organisations. She said she did not want to return to her family as life was hard there and that here she had food, water and money. As might be expected as the applicant is a Christian, the issue as to whether Sharia law is applied to non-Muslims was raised.

8. A negative decision issued from the RAT in respect of the applicant; that decision is the subject of the present leave application. The analysis of the applicant's claim in the RAT decision runs to four and a half pages. The authenticity of the documents submitted and credibility issues relating to the application of Sharia law to non-Muslims were outlined. In addition, an issue was raised with respect to conflicting information which centred round the contents of a U.K. Home Office Operational Guidance Note (OGN), a Human Rights Watch report and two documents furnished and relied upon by the applicant. The OGN was to the effect that internal relocation was almost always an option to escape any ill treatment from non-state agents. The case was not treated as one where trafficking was relevant as the applicant gave evidence that Madam sent her to Ireland as she (Madam) feared the applicant informing her father of Madam's actions and feared his anger.

Challenge to the RAT Decision

9. The applicant relies on two main grounds in support of her application: (1) that the Tribunal Member engaged in selective reliance on COI reports; and (2) that the Tribunal Member failed to consider four previous RAT decisions.

(1) Selective reliance on COI reports

10. Ms. Brazil B.L., counsel for the applicant, asserts that the RAT decision was unlawfully determined in the manner in which it assessed COI. In particular she argues that the Tribunal Member failed to have regard to the contents of the document from an organisation named "Christian Solidarity Worldwide" which, in contradiction to the U.K. Home Office OGN relied on by the Tribunal Member, reported that:-

"in Niger state in October 2007 five Christian women were reportedly sentenced to two year prison terms for alleged prostitution while in Bauchi all girls above the age of sixteen were given 90 days to marry or face arrest for prostitution".

11. By way of explanation both of the states mentioned in that extract are in the northern part of Nigeria which has operated under Sharia law since about 2000. The information in the Christian Solidarity Worldwide report also appears to contradict that contained in a U.S. Department of State Report and a Human Rights Watch report, both of which say that non-Muslims in the northern states are not subject to Sharia law. It was submitted that the contents of the Christian Solidarity report do not stand alone as the contents are confirmed by a report from the Immigration and Refugee Board of Canada (IRB) which it was asserted is a reputable source of objective information.

12. It was argued that when such COI is conflicted there is an onus on the RAT to indicate why the evidence of one source is preferred over another. The applicant relies on the decision of Clarke J. in *Zhuchkova v. The Minister for Justice and the Refugee Appeals Tribunal* [2004] I.E.H.C. 414 and the decision of Edwards J. in *Simo v. The Minister for Justice, Equality and Law Reform and The Refugee Appeals Tribunal* [2007] I.E.H.C. 305. *Simo* is a substantive hearing decision where it was established that where a conflict occurs in COI and where a Tribunal Member prefers one source over another, rational explanations must be provided.

(2) Failure to consider four previous decisions of the RAT

13. It was argued that four previous RAT decisions obtained and relied upon by the applicant at the RAT hearing bore a striking similarity to the facts of this case in that they involved a lack of state protection for child victims of sexual exploitation. The applicant claims that were she to be returned to Nigeria, she would have no one to protect her and as she is not educated, she would be forced to turn to prostitution. In the four recited cases, one of which was agreed not to be relevant to this case, the evidence was that the Nigerian State was unable to provide effective protection and that although there were several credibility issues in each case, the child applicants were all given the benefit of the doubt and granted refugee status because it was considered unreasonable to expect them in their individual circumstances to relocate internally. In all those cases the applicants were considered to be part of a social group who were unable to rely either on family or state protection against sexual exploitation.

14. Counsel for the applicant referred to the Supreme Court decision in *Atanasov v. The Refugee Appeals Tribunal* [2006] I.E.S.C. 53 which determined the principle of an applicant's entitlement to access previous RAT decisions for use in support of her or her own appeal. Geoghegan J., in delivering the judgment of the Supreme Court, said as follows:-

"It is not that a member of a tribunal is actually bound by previous decisions but that consistency of decisions based on the same objective facts may, in appropriate circumstances, be a significant element in ensuring a decision is objectively fair rather than arbitrary."

15. While not a separate submission, the applicant argued that while the Tribunal Member indicated her view that the applicant had a problem in establishing that Sharia law applied to non Muslims and that she doubted the validity of the alleged "document of conviction" because it was in English and referred to the wrong date of the criminal code or that Madam was the source of the applicant's alleged persecution she nevertheless made no decision on credibility. Instead, she went on to consider whether internal relocation was a viable option to possible persecution and ignored the previous RAT decisions relied upon by the applicant, which referred to the absence of effective state protection for children generally.

The Respondents' Arguments

16. Ms. Siobhan Stack B.L., counsel for the respondents, reminded the Court of the importance of considering all the pertinent facts of this case rather than concentrating on small extracts of the documentation before the Court in an effort to find a flaw in the decision. She submitted that the facts of this case differ materially from the facts of the four, and now reduced to three, previous RAT cases opened to the Court and relied upon before the RAT as the applicant here has a father and uncle who is a deacon in his Church in Benin City. She reminded the Court that there was an

inconsistency in the evidence on this point as the applicant said that she had spoken to her uncle by phone and told him what had happened to her. She also said that she was unable to contact her father as he had no phone and yet had said that her father and uncle both live in the same house. There was also conflict over whether Madam wished to be repaid the cost of her travel arrangements. Counsel argued that the Tribunal Member had to view the previous RAT decisions in the light of the particular facts of this case to establish whether there were any similarities between the previous decisions and the current case. The distinguishing feature of the previous decisions is that none of the other applicants in those cases had a family to return to, unlike this case. A further distinguishing feature is that this is not a case of trafficking as those cases were.

17. The Court was reminded that the applicant's evidence was that the reason Madam had sent her to Ireland was because she was afraid the applicant would tell her father about how Madam had exploited her. She was not sent here to engage in prostitution. While the applicant herself did not want to return to Nigeria, it was unclear what she actually feared apart from her assertion that her father was old, her mother was not there and her uncle had his own family to look after. Her claimed fear of persecution was not at all clear and she does not assert that she will be hunted down by Madam. The applicant conducted part of her case on the basis that she feared the sentence of the Sharia court but the Tribunal Member found that COI indicated that the non-Sharia law states do not return persons to face Sharia law judgments.

18. Counsel for the respondents then addressed the issue of whether non-Muslims are forced to accept the operation of the Sharia law code in the twelve states where it operates. The Human Rights Watch report was quite clear on this and the only challenge to the findings made in that report is the single document from the Christian Solidarity Group which is the source of the comments in the Canadian IRB document. The latter document is in effect a review of the literature on the subject and the Christian Solidarity article relates to reports of isolated incidents which were not confirmed.

19. Counsel submitted that if it were true, as reported in the Christian Solidarity Worldwide report, that all girls above the age of sixteen should marry or be considered as prostitutes, she would have expected that this would have been picked up and reported upon by Human Rights Watch. She contended that all of the reputedly sourced documents go one way in advising that non-Muslims are not subject to Sharia law. Counsel was unable in the absence of any attendance note of the oral appeal hearing to say the differences between the COI reports were argued or canvassed at that hearing but she accepted that the Form 1 Notice of Appeal does raise the difference between the COI as a specific ground of appeal. She observed, however, that no further supporting documentation was furnished with the Notice of Appeal to enhance the case being made on the application of Sharia law to non-Muslims even though the onus was on the applicant at the leave stage to establish that she was a refugee.

20. Counsel for the respondents distinguished between the principles and the facts which applied in *Zhuchkova v. The Minister for Justice, Equality and Law Reform* [2004] I.E.H.C. 414 and the issue here, arguing that *Zhuchkova* was concerned with a flawed inference drawn from COI which in turn gave rise to an error of fact on which negative credibility findings were based. She argued that the decision in *Simo v. The Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 305 was not helpful as the difference in the findings in different COI reports was not outlined in that decision.

21. Counsel for the respondents preferred instead to rely on *M.E. v. The Refugee Appeals Tribunal* [2008] I.E.H.C. 192, a recent decision of Birmingham J. where he outlines the danger of taking a single line or sentence of a COI report and placing reliance on that extract in isolation from the rest of the document. Counsel submits that *M.E.* indicates that in general, the whole COI report should be read in the round to arrive at a fair and balanced assessment. Counsel further argues that as the law is that a decision-maker does not have to refer to every document submitted and that it was up to the applicant to establish what particular point had been overlooked, unless she can say that the failure to consider specifically this point has meant that she is now unaware of why she was refused, she has not made out substantial grounds.

22. Counsel submits in relation to the relocation argument that the applicant's asserted fear was associated with the alleged threat of Sharia law and that the applicant was quite free to relocate out of Zamfara State which in fact the applicant did. She noted that there is no conflict between any COI on this point. She pointed out that much of the COI which was relied upon by the RAT in making her assessment of both the risk of a Christian being sentenced to stoning under Sharia law and the applicant's fear of Madam was in fact included in the documents furnished by the applicant. The information about victims of trafficking was sourced by the RAT member and put to the applicant at the hearing.

The Court's Assessment

23. The applicant seeks to have the decision of the Refugee Appeals Tribunal Member set aside on the basis of an unfair assessment of the risk to her as a person convicted of adultery or fornication and sentenced to death by stoning by a Sharia court. She bases her challenge on the difference between what is reported in a few lines in an article from the Christian Solidarity Movement, a partisan source, compared with a volume of objective authoritative reports, including reports from the U.K. Home Office and the U.S. Department of State and Human Rights Watch, which say clearly that non-Muslims are not forced to submit themselves to the Sharia penal code in Zamfara State. More important, the Zamfara State penal code itself indicates that non-Muslims will not be forced to submit themselves to its jurisdiction.

24. I have read the COI reports from both sides and do not believe that there is in fact any real dispute as the documents relied upon by the applicant do not refer to Zamfara. Further, when referring to the application of Sharia law in neighbouring states, the quotation in the Christian Solidarity Worldwide report relates to events which "reportedly" occurred. Such a quotation simply does not bear comparison with the documents relied upon by the Tribunal Member. The Christian Solidarity Worldwide report and the Canadian IRB report do not even address the issue that the Tribunal Member was faced with, which was whether the applicant had a well founded fear of being returned to face a Sharia court sentence if she remained in or was returned to Nigeria. For a number of reasons, not least of which is the fact that she is a Christian, it was found that her fear was not objectively well founded.

25. It is not a fair assessment of the Tribunal decision if an impression is given that the application or otherwise of Sharia law to non-Muslims was the sole basis of the determination to find that the applicant was not a refugee. There were doubts over the validity of the applicant's story of being tried and convicted by a Sharia court at all but the Tribunal Member went on to find that in any event, the applicant had left Zamfara and had returned to Benin City in the south of Nigeria, where secular common law applies. Country of origin information indicates that a person tried and convicted in a northern Sharia court who flees the sentence would not be forced by other states to return, nor do Sharia law states pursue persons so convicted.

26. While it would have been preferable for the Tribunal Member to say that she discounted or disregarded or attached little weight to the source of the documents raised by the applicant in her Notice of Appeal, I do not accept that the failure to do so in the circumstances of this case give rise to substantial grounds to impugn the decision even at the leave stage.

27. This brings me to the next ground for challenging the RAT decision: the Tribunal Member was asked to consider a number of previous RAT decisions which bore some similarity to the facts of this case. It was argued that those cases were selected to demonstrate a desirability for consistency in the decision making process on the availability of state protection and that the Tribunal Member should have had regard to those previous RAT decisions on the availability of adequate state protection before determining the applicant's appeal. It was submitted that her failure to do so amounted to a breach of fair procedures.

28. While there may be superficial similarities in the previous RAT decisions relied upon at the appeal and opened to this Court, it is clear that there are real differences between the prevailing domestic circumstances in those cases and those of the applicant in the present case. The similarities are her relative youth and her limited education and that she has been a victim of sexual exploitation by a brothel owner. The differences are that she has a father and uncle who she says would have disapproved of Madam's actions and would be angry with Madam for what she did in deceiving the applicant in depriving her of education and forcing her into prostitution. The applicant speaks English and was training to be a hairdresser. She has a family who would not willingly allow her to be exploited. She has a younger sister. She is not in the same category as the previous RAT decisions submitted where the young people involved were trafficked for purposes of sexual exploitation, had no family support and alleged inadequate state protection for young people in their position. The young lady in this case says she has a better life in Ireland than in Nigeria but unfortunately, this is not a ground for treating her as a refugee. She has not made out grounds for arguing that it was unfair not to consider the previous RAT decisions as those decisions did not address the same issues as faced the Tribunal Member in this case. In the circumstances, I refuse leave.

29. As has occurred in previous decisions, I have expressed disapproval of the formula of words used by tribunal members when seeking to deal with previous decisions of the RAT which are opened by applicants. This is not the first time during this legal term that a RAT decision has been considered where the identical or very similar sentence has been used to dispel the relevance of previous RAT decisions. The formula appears to ignore the import of the decision of the Supreme Court in *Atanasov v. The Refugee Appeals Tribunal* [2006] I.E.S.C. 53 and is disturbing. In *Lema v. the Minister for Justice* (Unreported, High Court, Clark J., 21st January, 2009), I said that:

"the quotation highlighted by the applicant from the decision has appeared verbatim in other decisions of the RAT and is suggestive of a blanket rejection of previous RAT decisions without further consideration or evaluation. This element of the decision, together with the rejection of the contents of the medical report without reference to reasons, is suggestive of a want of fair process."

30. While the facts of *Lema* on this issue can be distinguished in that there was no evidence that any assessment was made of the decisions in that case, the fact remains that there is the same use of the formulaic rejection of those decisions. In the circumstances, I will make no order for costs against the unsuccessful applicant.