Neutral Citation: [2015] IEHC 55

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1027 JR]

BETWEEN

M.O.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered the 3rd day of February, 2015

Background Facts

1. The applicant in these proceedings is a Nigerian national and is married with three children now aged approximately 13, 11 and 4 years. She formerly resided in Lagos. She alleges that in 2000, she was raped by her husband's brother who was residing with them at that time. She was assaulted and injured by the same individual in 2003 during the course of an attempted rape.

2. She says her brother in law went away to school between 2003 and 2009 but returned to live with them in the latter year. He began to issue threats to the applicant including that he would infect her with HIV and poison her with lead. Her husband and his family were not supportive of her in relation to these events. She suggested moving to a different part of the country to her husband but he was unwilling to move. She decided to go to her cousin in another city, Jos, but her cousin was accidentally killed by a stray bullet in the course of a riot and the applicant had to return home after five days. She had no other family, being an orphan who was raised by a guardian who was by this time deceased.

3. The applicant had trained as a dressmaker and had her own business in Lagos. She says that following all these events she became desperate to get away and suicidal. She began expecting another child. She related her situation to one of her customers and the lady offered to help her and introduced her to a Mr. Abby, who agreed to make travel arrangements for her to leave the country for a fee. She sold her dressmaking equipment and everything she had in order to pay Mr. Abby and flee Nigeria, at this point in the final stages of her pregnancy.

4. She left her husband and two children and travelled by air to London and Belfast and on to Dublin by car where she arrived on the 19th February, 2000. She was given a false passport by Mr. Abby. She said that she was not in contact with her husband or children since arriving in Ireland. The applicant never reported any of these events to the police in Nigeria. She gave birth to her baby shortly after arrival in the State.

5. The applicant applied for asylum on the day of her arrival. On the 22nd February, 2010, she was interviewed by an immigration officer pursuant to s. 8 of the Refugee Act 1996 and on the 9th March, 2010 she had a further interview with an officer of the Refugee Applications Commissioner pursuant to s. 11 of the Act. Her asylum application was fast tracked pursuant to a directive of the second named respondent regarding Nigerian applicants and whilst this was originally the subject matter of complaint in the applicant's statement of grounds, it is no longer being pursued.

6. The Commissioner's officer issued her report on the 12th March, 2010 recommending refusal of the application. The applicant appealed to the first named respondent (the "RAT") and her solicitors submitted a detailed notice of appeal on the 22nd April, 2010. An oral hearing of the appeal took place on the 17th June, 2010 and on the 29th June, 2010, the Tribunal member issued her report affirming the Commissioner's recommendation that the application be refused.

The Proceedings

7. The applicant instituted the within judicial review proceedings by notice of motion dated the 23rd July, 2010 and the matter came before the court by way of "telescoped" hearing so that the leave and substantive applications were heard together. The applicant seeks an order of *certiorari* quashing the decision of the RAT and various ancillary reliefs.

8. The remaining grounds advanced at the trial may be broadly summarised as follows. The applicant says that the adverse credibility findings were irrational on their face. In dealing with the issue of state protection, the Tribunal member had selective regard to the country of origin information and failed to give any reason for preferring one agency report over those submitted by the applicant. On the issue of internal relocation there was a failure to properly consider the applicant's country of origin information and apply the appropriate criteria.

9. The statement of opposition consisted of a full traverse of the applicant's grounds.

Submissions

10. Mr. de Blacam SC on behalf of the applicant submitted with regard to the issue of state protection, that the applicant had referred in her notice of appeal to four country of origin reports which indicated that in Nigeria, the police do not intervene in cases of domestic violence against women and view it as a private family matter. He argued that this material established a clear failure of state protection in cases such as that of the applicant. However, the Tribunal member ignored these reports and chose instead to rely on one report only to contrary effect and also on the fact that the applicant had failed to report the matter to the police despite that she had stated that there was no point in making such a report and the country of origin information bore her out.

11. He relied on the judgment of Edwards J. in *D.V.T.S. v. The Minister for Justice, Equality and Law Reform and Anor* [2008] 3 I.R. 476 to the effect that where the country of origin information was conflicting, the decision maker must engage in a rational analysis

of the conflict and justify preferring one view over the other on the basis of that analysis. He said that in this instance the conflict was not addressed at all

12. On the credibility findings, Mr. de Blacam was particularly critical of the Tribunal member. He said that on page 17 of the decision, she commenced her analysis by stating that a number of matters undermined the applicant's credibility. The decision maker then listed a number of facts which were said to undermine credibility but which in fact involved the Tribunal member accepting the truth of what she had been told and then reaching entirely illogical conclusions.

13. He described these findings as very troublesome because they demonstrated an intent by the member to cast around to find reasons to conclude that the claim lacked credibility to such an extent as to taint the whole decision as perverse and lacking in good faith. For example, in deciding that the applicant's failure to contact her children was very suspect, the member had chosen to entirely ignore corroborating evidence from a social worker in the Rotunda Hospital.

14. Finally, on the issue of internal relocation, he contended that this aspect of the decision was irrational and lacking in reasoning particularly in the light of the evidence that it was unreasonable to expect a person such as the applicant to relocate in the absence of family support which was not available to her. In that regard, he placed reliance on the judgment of Clark J. in *K.D. [Nigeria] v. The Refugee Appeals Tribunal and Anor* [2013] IEHC 481, which suggested that in order to come to a valid decision on the availability of internal relocation, the decision maker had to identify the relevant location, notify it to the applicant, consider conditions there and come to a conclusion as to whether it was reasonable for the applicant to go there.

15. For the respondent, Mr. Keeling BL, dealing with state protection, submitted that there was a presumption that a state protects its own citizens and this was recognised in the leading Canadian case *Canada (AG) v. Ward* (1993) 2 SCR 689 and the Tribunal member correctly and appropriately cited that authority. He said that the member was in fact correct in concluding that there cannot be a failure of state protection where the state has not been given an opportunity to respond to the harm in question. He argued that the applicant could not simply say there is no point in reporting it, the onus was on her to do so before she could claim a failure of state protection.

16. He submitted further that the member clearly agrees and accepts that there is a problem with policing in Nigeria and in reality there was little or no conflict between the country of origin information relied upon by the member and that referred to by the applicant. He said that in fact much of the country of origin information relied upon by the applicant was very much out of date. He also referred to *Manorath v. Canada (M.C.I.),* [1995] FCJ 134. He said it was never a requirement that the decision maker refer to every document mentioned by the applicant.

17. With respect to credibility, Mr. Keeling said that the applicant's argument that the decision was tainted by *mala fides* was in reality a complaint of bias which had never been pleaded. He said that in any event, the finding on state protection was unrelated to credibility and was severable. He relied on *Kramarenko v. Refugee Appeals Tribunal* [2004] 2 ILRM 550 and *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 353.

18. He also contended that the findings on internal relocation were appropriate.

The Law

19. In *A.B.O. and Ors v. The Minister for Justice, Equality and Law Reform and Anor* [2008] IEHC 191, the applicant, a Nigerian national, made an application for subsidiary protection which was refused by the respondent on the ground, *inter alia*, that state protection was available to her in Nigeria. Birmingham J. dealt with the issue as follows:

> "29. I turn now to the first ground on which the applicants challenge the Minister's decision on subsidiary protection, namely the Minister's conclusion that the applicants can avail of State protection in Nigeria. At the outset, I would note that the onus lies on the applicants to provide clear and convincing proof of a state's inability to protect its citizens. This was established by the Supreme Court of Canada in the seminal case of *Canada (A.G.) v Ward* [1993] 2 SCR 689. LaForest J., giving the judgment of the Court, observed as follows:
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> > 'Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus […] it should be assumed that the state is capable of protecting a claimant.'
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> 30. This approach was found by Herbert J. to be 'both persuasive and compatible with the jurisprudence of this State' in *D.K. (Kvaratskhelia) v Refugee Appeals Tribunal & Anor* [2006] 3 I.R. 368, at p.373. The Ward approach was also adopted by Feeney J. in *Llanaj v The Refugee Appeals Tribunal & Ors* [2007] IEHC 53 and *O.A.A. v The Minister for Justice & Anor* [2007] IEHC 169. In Llanaj, Feeney J. remarked as follows:-
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> > 'That does not mean that there is not an obligation on the respondents to assist in relation to inquiring into the case, but that does not and cannot remove the onus on the Applicant or remove the obligation of establishing by 'clear and convincing proof the absence of State protection.'
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> 31. The approach set out in *Ward* and interpreted in the above judgments is an approach which I propose to follow.
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> 32. The applicants contend that they are unable to avail of State protection in Nigeria because the police do not investigate claims of domestic violence adequately and consider such claims to be family matters. In support of the contention that this is the case and that in consequence they are in need of international protection, the applicants submitted the following documentation, which they say supports their claim:
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> a. Country of Origin information reports;
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> b. Sworn Affidavit from the Nigerian Police and Extract from Nigerian Police Station Diary (26th December, 2005).
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> 33. Though submitted at various stages of the process, each of these documents was before the Minister when making his decision on subsidiary protection.
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> 34. The first named applicant contends that she sought State protection when in Nigeria and that it was not forthcoming. She lays particular emphasis on the statement in the extract from the Police Station diary, which purports to detail the

complaint that she made in respect of the alleged kidnapping of her son, that the matter was referred for `discreet investigation'. Counsel for the applicants submitted that this indicates that the police were not proposing to press their investigations, in line with the alleged policy of the Nigerian police not to investigate incidents of domestic violence.

35. Country of Origin information, in the form of a UK Home Office report and an Amnesty International report, was also submitted by the applicant. These reports have been cited to support the contention that the response of the Nigerian State, and more particularly of the Nigerian police, to domestic violence or violence in a family context was to a large extent ineffective. The Minister's analysis was that while there were problems in Nigeria with the police, it is generally accepted that State protection is available there…

37. The task facing the applicants in seeking to establish that the conclusion reached was not open to the Minister is a formidable one. I have already referred to the *Canada (A. G.) v Ward* line of authorities. It must also be borne in mind that where a decision-maker has reached a decision reasonably on facts before it, this Court may not overturn that decision even when the Court might not have reached the same conclusion on the same facts. As noted by Peart J. in *Ali v Minister for Justice, Equality and Law Reform & Anor* [2004] IEHC 108:

> 'I do not have to agree with the decision arrived at by the Tribunal, or decide that I might have arrived at a different conclusion. If there is material or information available to the Tribunal on which it could base its decision […] then the decision is a valid one on that ground.'

38. My role, therefore, is to consider whether it was reasonably open to the Minister to reach the conclusion that he reached, based on the information before him. Having regard to the observations of Charleton J. in *N, E and O* [2008] IEHC 107, to which I have referred, the decision can stand only if it is a rational one fairly supported by Country of Origin information."

Analysis

20. It seems to me that the authorities establish that there is a presumption that a state is capable of protecting its own citizens. Whilst that presumption can be rebutted, it requires clear and convincing proof to do so. If the decision maker arrives at a conclusion in this regard, the court cannot substitute its own judgment for that conclusion and will only interfere where it is established that the conclusion is one which no reasonable decision maker could have arrived at based on the evidence. It is immaterial whether the court agrees with the conclusion or not.

21. Where findings are made by a decision maker following an assessment of all the evidence, particularly where it includes the oral evidence of the applicant which the decision maker has had the opportunity of hearing and of observing the demeanour of the applicant and the manner in which his or her evidence is given, the court will be slow to conclude that such findings were not open to the decision maker.

22. The applicant says that the conclusion reached on state protection ignored the content of four reports referred to in the notice of appeal. The first report referred to appears to be that of an organisation called "Project Alert" which is said to confirm increasing violence on Nigerian women. No other information is given about this report nor its date. A sentence from another undated report from the University of Ibadan is quoted which suggests that domestic violence is not customarily acknowledged. A report dating from May 2003 from a group called "Asylum Aid" says that the police are reluctant to intervene in domestic violence cases and complaints are not taken seriously. This report is clearly very out of date.

23. Finally, reference is made to a 2009 UK Border Report dealing with domestic violence against women by husbands or partners which says that police do not intervene in domestic disputes. In this case, the applicant says she was raped by her brother in law and threatened with infection and poisoning and whether the police would regard such complaint as a merely domestic dispute is of course a matter of conjecture. The Tribunal member concluded that the applicant could not claim a failure of state protection where the applicant had not, over the course of some 9 years, made any complaint to the police and thus the state had no opportunity of responding to the complaint. The applicant says that this finding is unfair because there was no point in making a complaint. However, it is not clear that this was in fact the reason for the applicant's failure to report the matter to the police. In the course of her interview with the Commissioner's officer, she was asked:

> "Q19. I find it hard to understand why you did not go to the police about this man.
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> A. In my country, before you take things to the police, you deal with them in the family first."

And later in the same interview:

> "Q47 It is difficult to understand why you did not go to the Nigerian police for help regarding your situation or why they would not offer you protection, if the need arose. It is also difficult to understand why you did not engage legal assistance or why you could not do this if the need arose. Can you explain this to me please?
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> A. At times they will not help."

24. One assumes that in addition to this, the Tribunal member also had the benefit of hearing the applicant's oral evidence on this topic. The member in considering the relevant country of origin information had regard to the Report of a Joint British-Danish Fact-Finding Mission to Lagos and Abuje, Nigeria 2007-2008, a report which is incidentally referred to in a document submitted by the applicant on the internal relocation issue from the UK Border Agency dated 15th January, 2010. It is not suggested that the country of origin information considered by the member was unsatisfactory in any way and the member's decision refers to the applicant's supporting documentary evidence without quoting it. There was in my view no obligation on the Tribunal to set out and analyse every document submitted by the applicant.

25. It is not clear to me that the member necessarily ignored the applicant's country of origin information or discounted it without explaining why she was doing so. The complaint appears to be that there was a failure to take on board a sentence in one report which says that the police do not intervene in domestic disputes. However, it seems to me that the member was perfectly entitled to conclude that this statement in itself was of marginal relevance to the facts of the applicant's case if indeed she did so conclude

26. In my view, the Tribunal member was entitled to come to the view on the evidence before her that there was no clear and

convincing proof of the absence of state protection in the applicant's case. In the circumstances, I do not think that the matters referred to by Edwards J. in *D.V.T.S.* arose for consideration in this case.

27. With regard to the Tribunal member's findings on credibility, I accept the applicant's submission that at least some of these appear to be somewhat irrational. However, I cannot agree that this is evidence of perversity on the part of the member such as taints the entire decision. This was not pleaded as a ground and although Mr. de Blacam was at pains to say that he was not making a case of bias against the member, it is difficult to avoid the conclusion that this is in reality what is complained of. In any event, I am satisfied that the findings on state protection are quite divorced from any considerations of credibility and stand on their own merit.

28. Finally on the issue of internal relocation, although I do not think it is essential to my decision to determine this, in my opinion the Tribunal arrived at a conclusion which was reasonably open on the evidence. The member considered that the applicant is a mature business woman with considerable education and initiative and having regard to the facts of the case and credible country of origin information it should be possible for her to relocate. Whilst the applicant is critical of this in the context of the country of origin information submitted by her, the same considerations apply to this aspect as to the state protection issue and once there was evidence which could be objectively viewed as supportive of the finding, the court ought not seek to go behind that.

29. Accordingly I will dismiss this application.