

**THE HIGH COURT
JUDICIAL REVIEW**

[2011 No. 1102 J.R.]

BETWEEN

REAGAN OLOO-OMEE (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND BLESSING OLOO-OMEE)

APPLICANT

AND

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

RESPONDENT

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 9th day of November 2012

1. Interviews form an important part of the process by which applications for refugee status are determined. When the applicant is a minor, mistakes or missteps during interview by parents or those in like position should not be visited on the child and assessors must not confuse the voice of the parents with the voice of the child.

2. In this case, a mother sought asylum for her 4-year old son, she having previously been an unsuccessful refugee applicant. During an interview conducted by the Office of the Refugee Applications Commissioner, she was asked whether her son's claim was based on her own claim and she answered "Yes". This simple question and one-word answer has led to these proceedings written by the same member of the Refugee Appeals Tribunal. The mother's answer notwithstanding, the basis of her claim for refugee status was not connected with the case made for her son. Fear of kidnapping was advanced as the main ground for seeking protection for the son whereas no such circumstance was associated with the mother's failed claim. Thus, her answer to the question was, at least *prima facie*, an unfortunate mistake. It is suggested by the respondent that the son's solicitor must have known this as he had acted for the mother and would have known that the claims were unrelated. It is said he should have addressed the controversial answer given by the mother to the Commissioner in the appeal to the Tribunal.

4. By decision dated 3rd October, 2006, Ms. Margaret Levey B.L., a member of the Refugee Appeals Tribunal, rejected the mother's claim for refugee status which had been advanced on the basis of a fear that she would be forced to undergo scarification and that her daughter would suffer female genital mutilation. The applicant's mother's claim was rejected because her story of fearing scarification and fearing infliction of female genital mutilation ran counter to generally known facts about Nigeria.

5. On 20th June, 2008, the applicant was born in Ireland. On 25th February 2011, the applicant (*via* his mother) applied for refugee status. That application was commenced by completing a form which contains the following *précis* of the case made on behalf of the applicant:

"Applicant's mother states there are several children being kidnapped in Abia State where she is from in Nigeria at present. Applicant's mother states that she fears that her son would be kidnapped if he went to Nigeria because she has been living in Ireland for a number of years the kidnappers would think she is wealthy and could pay a ransom. Applicant's mother states that several of the children who were kidnapped are sacrificed at rituals so she also fears that this could happen to her son. Applicant's mother states that because her son's ethnic group is Igbo, he would be discriminated against by the people from Anambra State as some of these people do not believe in people from different ethnic groups getting married - this is where the applicant's father comes from."

6. In replies to questions 21, 28 and 29 of the questionnaire to be completed for the Refugee Applications Commissioner, the issue of kidnapping is repeatedly raised on behalf of the applicant by his mother. In addition, in reply to question 22 "On what grounds do you claim to have a fear of persecution?", the box referable to race and the box referable to political opinion are both ticked and it is indicated in manuscript that "My parent are from different ethnic groups I will be discriminated by people".

7. An interview in accordance with s. 11 of the Refugee Act 1996 was conducted on 2nd June, 2011. It took place over the course of one hour and twenty minutes in English. The interview was read back to the interviewee during the course of the interview page-by-page so that mistakes could be corrected as the matter proceeded and each page was signed by the interviewee. There was a further opportunity at the end of the interview to review the record of the interview and to correct mistakes again.

8. Prior to the interview, some documents had been submitted to the Office of the Refugee Applications Commissioner. The first of these, an article dated 11th May, 2011, is entitled '*Residents Panic as Kidnappers Resurface in Abia*'. The article states:

"In the last four weeks, no less than six kidnapping incidents have been recorded in the city and this seems to bring about fresh fears among the residents.

In April 2011, unknown gunmen in Abia kidnapped Justice Akomas, a retired Chief Judge. The same day, a Reverend Sister serving in a Catholic church within the city was also kidnapped. However, both victims regained their freedom two days after."

The article concludes with a quotation from a city resident who says:

"Everybody is scared, the rich, poor, the elderly and the young. The wealthy ones have all fled the city, as they were first targeted, but the way things stand now, nobody is safe anymore."

Another article submitted, dated Monday 30th May, 2011, states that the Federal Government "deployed hundreds of soldiers to Abia in lawless Abia State to hunt down an armed gang holding fifteen schoolchildren hostage". The third article submitted related to the kidnapping of Justice Akomas.

9. During the course of the interview, the applicant was asked, "What do you fear would happen to your child if he was to go to your country, Nigeria?" The mother answered, having referred to the articles she had submitted and her general fear of kidnapping, "I have been here in Ireland for nearly six years now. If I go back with my children, they will assume that I have money, thinking that I've been in Europe for six years. But I'm only an asylum seeker". It was during the course of this interview that the mother was asked, "Is your child's claim wholly related to your own, based on your claim?" And she answered "Yes".

10. The mother's and son's claims are based on unrelated fears. Read literally, the mother's answer to the question posed is mistaken. But it may involve a misunderstanding. The mother is claiming asylum on behalf of her son, and she was asked whether her son's claim was based on her claim, it is possible she believed that the questioner was enquiring whether the son's case was that which the mother then sought to make out on his behalf, i.e. what she was claiming. English is not the first language of the applicant's mother. The interview was likely to have been a fairly stressful event. It may be that genuine confusion arose in relation to this question and answer, with neither side discerning the confusion at the time. The mother is an intelligent university graduate and it is highly improbable that she intended to convey what the literal meaning of her answer suggests.

11. The Commissioner's decision does not eschew fear of kidnapping in Nigeria as a basis for refugee status. However, it was found that the mother's fear that such might happen was improbable; that in any event, the authorities are becoming more successful at combating this crime and that the applicant could avail of State protection in Nigeria. In addition, the Commissioner was critical of the fact that 32 months had passed before an asylum application was made in respect of the applicant. It is noteworthy that no reference is made by the Commissioner to the suggestion that the present applicant's case for asylum was based upon his mother's (failed) claim.

12. Solicitors on behalf of the applicant instituted an appeal to the Refugee Appeals Tribunal against the finding of the Refugee Applications Commissioner. Two grounds of appeal were advanced and I note, without criticism, that these are fairly generic grounds alleging errors of fact and errors of law on the part of the Commissioner as the applicant, it is said, had established circumstances which would justify granting him refugee status.

13. A solicitor's letter accompanied the notice of appeal to the Refugee Appeals Tribunal which comprised a further submission on behalf of the applicant and advanced the following case:

"The appellants is claiming refugee Status on the basis of social group and imputed politics The applicant is Irish born and was born on 20th June 2008 and is now over three years of age The applicant resides with his mother and six siblings The applicants mother fears that if they were returned to Nigeria, that criminals would find out that they were living in Europe for six years and that they must have made money in Europe and fears that the applicant could be kidnapped in order to extract money" [sic]

14. The applicant's solicitors, at para. 4 of their letter, point out that country of origin information demonstrates that kidnappings occur in "all parts of Nigeria, that it was not safe to go to the police, that relocation in Nigeria would be impossible for a mother of seven with her children" and that "the applicant and his family are therefore being persecuted for being a large family of returned exiles who will be perceived to have made it rich in Europe and therefore easy pickings". I note that the claim made in respect of race and politics to the Commissioner was not pursued on appeal to the Tribunal.

15. Further country of origin information on the topic of kidnappings in Nigeria was submitted to the Tribunal. I have read and considered all of it.

16. The solicitor did not address the question of whether the applicant's claim for asylum was based on his mother's claim. This is hardly surprising as the Commissioner had not mentioned this as a factor in the refusal decision.

The Impugned Decision

17. The decision under review is dated 27th October, 2011, and was taken by Ms. Margaret Levey B.L., member of the Refugee Appeals Tribunal.

18. The author notes the requirements of s. 16(16) of the Refugee Act 1996 (as amended) which requires her to consider documents, representations and information submitted to the Commissioner in accordance with s. 11 of the 1996 Act. Counsel on behalf of the respondent, Ms Siobhan Stack, submitted that the author was obliged by statute to consider the controversial question and answer suggesting that the son's case was based upon the mother's case.

19. It was submitted by Ms Stack that no "*Convention reason*" had been advanced on behalf of the applicant which would enable refugee status to be conferred upon the applicant. However, the Tribunal made no such finding. Instead, the applicant's case is rejected because of a failure to demonstrate that there is a "serious possibility" or a "reasonable chance" or a "real chance" of persecution connected with kidnappings occurring. The author says (in relation to the mother's fear of kidnappings):

"This is pure speculation on her part. She has no concrete evidence that would lead her or anyone else to believe that there exists any persons who have any knowledge of her situation, any opinions about her prosperity or who bear her any ill-will whatever for any reason at all. The most that can be said about her claim in the context of the information submitted is that people get kidnapped in Nigeria. However, this is not a phenomenon unique to that country and her claim that she (and the applicant) would be a particular target for that treatment is based on a hypothesis entirely formulated by herself which has no basis in the reality of her personal circumstances."

20. The author does not say whether fears based on the phenomenon of kidnappings in Nigeria equate to fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion. It is beyond the purview of this judgment to say if that central question should have been asked and answered.

21. The author of the Tribunal decision seems to dwell on whether the fear is well founded. This particular finding by the author has attracted a claim of illegality expressed as follows:

"The Tribunal erred in fact or law and/or acted irrationally ... in (a) failing to have any or any adequate regard for the evidence and country or origin information and submissions in the notice of appeal relating to the claim that the applicant had a well founded fear of persecution from kidnapping, and (b) failing to give any rational analysis for rejecting the claim or treating it as speculative."

22. I am prepared to take judicial notice of the fact that the population of Nigeria was approximately 162.47 million people in December 2011. I note from the country of origin information that by July 2009, 512 kidnappings had been reported in the first half of that year, with 353 kidnappings for the whole of the previous year. Adjusting this for an Irish context would equate to about 10 kidnappings a year in Dublin.

23. It is clear that kidnappings are a serious problem in Nigeria and the information supplied indicates that non-Nigerians and wealthy Nigerians are particular targets, though some of the information also indicates that even poor people are the victims of this terrible crime.

24. None of the country of origin information supported the claim that Nigerians returning from lengthy periods seeking asylum in a European country would themselves be the victims of kidnapping, as they might be perceived to be persons of wealth.

25. It seems to me that the author of the Tribunal decision made no error of law or fact in concluding that the applicant's fears were not sufficiently connected to a real possibility that her fears would materialise. No irrationality attaches to her conclusion which suggests that the applicant and his family would be extraordinarily unlucky if, on returning to a country so populous and so vast, they would be singled out for kidnapping on the basis of having spent seven years in Europe. The conclusion does not offend reason and seems, moreover, to be based properly on the evidence adduced.

26. The second complaint made by the applicant relates to the manner in which the author of the Tribunal report referred to the failed asylum claim of the applicant's mother. The report is in the following terms:

"The applicant's mother made an asylum application following her arrival in Ireland. This application was rejected by the ORAC, a decision which was upheld by the RAT. At interview, the applicant's mother agreed that the applicant's case is based on/related to his mother's claim (interview p. 3).

In *Sotunde* (Unreported, High Court, Butler J. 1st October 2007) and *Atansov* (Supreme Court, 26th July 2006), the Court stated 'it is not that a member of a Tribunal is actually bound by previous decisions but consistency of decisions based on the same objective facts may, in appropriate circumstances, be a significant element in ensuring that a decision is objectively fair rather than arbitrary'. Thus, it is clear to the Tribunal that the findings in that claim are relevant to this claim. The applicant's mother's claim was deemed not well founded."

27. The applicant submits that the reference to his mother's case by the Tribunal carries with it an inference that the rejection of her refugee claim infected her son's claim and was part of the reason why his claim was refused. In addition, it is said that the reference by the author to the mother's failed claim was an unfair procedure which was done without notice, and notwithstanding that the process did not involve an oral hearing, that there should have been an opportunity to comment on the reference by the Tribunal to the mother's claim. As against this, the respondent has sworn that a copy of the mother's claim or decision was not on the son's file and that the Tribunal member did not have a copy of the mother's decision. And it is also said by Ms Stack that in any event it was the mother who caused the problem by apparently saying that her son's claim was based on her own claim. It is suggested that the solicitor acting for the son was on notice of the issue as he had acted for the mother and knew or ought to have known that the mother's words during the interview were wrong and unhelpful.

Conclusion

28. It seems to me that unfortunate but understandable errors have occurred in the decision making process, errors which, but for the fact that the applicant is a vulnerable 4- year old child, I might have been willing to overlook. On the one hand, the child's mother uttered words which seemed to mean that the child's case was based upon the mother's failed case. This makes no sense. Why would a mother seek to base her son's claim (fear of kidnapping) for asylum upon her own (fear of scarification and female genital mutilation) failed claim? It may be that the mother in this case misunderstood the question, but whatever the explanation, no fault - self-evidently - can be found with the 4 year old infant applicant for the content of the interview conducted on behalf of the Refugee Applications Commissioner. When the Tribunal came to assess matters, no reference having been made by the Commissioner to the mother's odd assertion, and this matter not having been taken up in the notice of appeal to the Tribunal, the Tribunal asserts that the findings "in the mother's claim" are relevant to the [son's] case. I find this statement to be erroneous. As indicated above, the basis of the mother's claim was not related in any way to the fear of kidnappings. Her claim could not have been and was not relevant to the son's claim even if she seemed to say something to the contrary. Having found that the mother's claim was relevant to the son's claim, the Tribunal notes that "the applicant's mother's claim was deemed not well founded", leaving one with an impression that the manner in which the mother's claim is said to be relevant to the son's claim is related to the fact that the mother's claim was unfounded.

29. It is well established law that decision makers may not make findings based on material obtained after the case has been closed to a decision maker. See *Tierney v. An Post* [2000] I.R. 536. But this principle does not quite capture what happened here.

30. My view is that regardless of why the infant applicant's mother said that his claim for asylum was based upon her failed claim, this could not have been and was not the case. Once the Tribunal found, as it did, that the mother's case was relevant to her son's case, a serious error entered the decision making process and may have caused the Tribunal to conclude that as with the mother, so with the son.

31. I find that the Tribunal took account of irrelevant material for which the infant applicant bore no responsibility, and in respect of whom the persons whose function it was to protect his interests made simple but possibly fundamental errors. The special position of children in the asylum system has been recently addressed by the Supreme Court in *Okunade v Minister for Justice, Equality and Law Reform* [2012] IESC 49. The court described the principles governing injunctions to prevent deportations prior to applications for leave to seek judicial review. A four year old child was caught up in the saga and Clark J said at para 11.2,

"However, I feel that it is not possible, on the facts of this case, to overlook the fact that one of the applicants is a child of some four years of age who has known no country other than Ireland. It is hardly the fault of that child that the substantial lapse of time involved in this whole process has led to such a situation".

32. Similarly in this case, it is hardly the fault of the infant applicant that his mother asserted that his claim for asylum was based on

her failed claim and neither is it his fault that the Tribunal found that his mother's claim was relevant to his claim when it clearly was not. Therefore I make an order quashing the decision of the Tribunal.

33. I have a slight concern about a simple remittal of this matter to the Tribunal. If the matter is to proceed as if the Notice of Appeal had just been delivered, the Tribunal could possibly make the same error again - though I admit this is unlikely in view of this judgment. It may be necessary for the applicant's solicitor to recast the Notice of Appeal (to deal with this issue but only this issue) and demur to the mother's comments or explain them. I will hear the parties as to the appropriate form of Order.