

**THE HIGH COURT
JUDICIAL REVIEW**

[2010 1374 J.R.]

BETWEEN

D.U.O (NIGERIA)

APPLICANT

AND

**THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, NEHRU MORGAN PILLAY SITTING AS THE REFUGEE APPEALS
TRIBUNAL, ATTORNEY GENERAL AND IRELAND**

RESPONDENTS

JUDGMENT of Mr. Justice Eagar delivered on the 18th day of February 2015

1. This is a telescoped application for an order of *certiorari* quashing the decision of the second named Respondent affirming the decision of the Refugee Applications Commissioner that the Applicant not be declared to be a refugee and seeking an order remitting the appeal of the Applicant for determination *de novo* by a separate member of the Refugee Appeals Tribunal.

2. The Applicant was born on the 14th April 1970. He is a married man. He has three children. A daughter born on the 1st April 2002 and twins born on the 23rd February 2010. In his ASY1 form the Applicant claimed he left his country of origin on the 9th April 2005 and arrived at Dublin Airport on the 11th April 2005. He applied for asylum on the 9th November 2009. He completed an ASY1 form on the 9th November 2009 and completed a questionnaire applying for refugee status on the 12th November 2009. He was interviewed on behalf of the Refugee Applications Commissioner on the 20th November 2009 and attended for a further interview with the Refugee Applications Commissioner on the 14th July 2010. The Refugee Applications Commissioner held the Applicant had not provided a reasonable explanation as to his failure to apply for asylum as soon as reasonably practicable and having considered the application the Refugee Applications Commissioner was satisfied that the Applicant had not established a well-founded fear of persecution as required by s. 2 of the Refugee Act 1996 (as amended). The Refugee Applications Commissioner further held that the Applicant's failure to provide a reasonable explanation for his failure to apply for asylum as soon as practicable brought s. 13(6) into play and that any appeal would be without an oral hearing.

3. A notice of appeal was lodged and the appeal was heard before the second named Respondent. The decision was given by the second named Respondent on the 28th September 2010 confirming that the Tribunal had considered all the relevant documentation in connection with the appeal including the notice of appeal, the Country of Origin Information, the Applicant's asylum questionnaire and his replies given in response to questions by or on behalf the Commissioner on the report pursuant to s. 13 of the Act.

4. It appears to me that the court is therefore obliged to analyse not only the decision of the Refugee Appeals Tribunal but also to have regard to the contents of the questionnaire and the interview with the Refugee Applications Commissioner.

The Applicant's claim

5. The Applicant was born on the 14th day of April 1970. He is a married man and he married T.O. on the 15th July 2008. She is an American citizen. He was a Pentecostalist of the Urhobo ethnic origin born in the Delta State in Nigeria. The Applicant has three children, one born in 2002 and twins born in 2010 and he claims that his wife and children reside in the United States. The Applicant claimed he had fourteen years of formal education between 1978 and 1995 and he claims he worked as an office assistant for nine years.

6. His claim is based on a stated fear of persecution due to membership of a particular social group, that of a practising gay man and a stated fear of persecution due to membership of this particular social group. The following documentation were submitted in support of his application:

- a) Copy of his birth certificate
- b) A copy of his marriage certificate
- c) Copies of documents showing the Applicant's presence in the USA.

7. In his ASY1 form the Applicant claims he left Nigeria on the 9th April 2005 and arrived in Dublin Airport on the 11th April 2005. He applied for asylum on the 9th November 2009.

8. The following are the information which were given in the ASY1 form, the questionnaire and the section 11 interview record. The Applicant claims he first left Nigeria in 1995 and he travelled illegally to the United Kingdom using a British passport. The Applicant claimed asylum in the United Kingdom on political grounds which were subsequently refused. The Applicant claims he received a letter from the UK Home Office in 1998 telling him to leave the United Kingdom or he would face deportation. As a result of receiving the letter saying that he should leave the UK or he will be deported he left the UK in late 1999 or early 2000. When he left the UK he went to the USA. He used a British passport in the name of JT which he said he obtained on the black market. He said he went there with a friend and said he did not know anything about Ireland at that time and he had never been there before. He said he remained in the USA for 18 to 20 months. He said he travelled on a visa waiver programme for UK nationals. He overstayed that visa. He said that he then returned to Nigeria as he did not want to be an illegal immigrant in the United States. He again used the British passport in the name of JT and travelled from the USA to Turkey and from Turkey to Nigeria in late 2002/early 2003. He stayed for two years in Nigeria and left Nigeria in early 2005 and came to Ireland. He used, according to himself, the British passport in the name of JT. When asked why did he not apply for asylum when he arrived in Ireland he said he did not know the process but was arrested in Ireland

around December 2005 and was in prison for approximately six months. He was arrested as a result of an argument he had with a shop keeper and he produced the passport to the Gardai when they were called and he was arrested and charged with possession of false documents.

9. When he was in Cloverhill Prison he claimed that he applied for asylum. He said he completed the application form and handed it to the office in Cloverhill Prison. He was told by the prison staff that once he was out the Office of the Refugee Applications Commissioner would write to him and tell him what he should do next. In any event he came to the Office of the Refugee Applications Commissioner in November 2009.

10. He said he was released from prison in June 2006 and he was asked what had he been doing in the country between June 2006 and November 2009 and he said he was living with friends and floating about. He was asked for the British passport in the name of JT and he said that the Gardai took it back in 2005. He said that the British passport in the name of JT was issued in 1995 and expired in 1997 or 1998. He said his Nigerian passport was left in the UK and has not been renewed.

11. He said he met his wife in 2000 when he went to America. They had a child in 2002 and twins in 2010 after she had visited him. They were married on the 15th July 2008 in Ireland.

12. There were issues about the documents that he had produced to the Registrar of Marriages. He initially said that he had produced a copy of his birth certificate but according to the Registry Office he presented a Nigerian passport in his own name and this passport was shown to the Applicant during the section 11 interview and he said that his wife had this passport arranged for him. When asked where the original passport was he said it was taken back to America with his wife.

13. The Applicant's claim is that he was bisexual and that he realised he was attracted to men at the age of 30. In relation to his sexuality he was never beaten or attacked. The Refugee Applications Commissioner appeared to have made an unwarranted assumption that a gay man should be in a position to identify his sexuality before the age of 30. This seems to me to be an unwarranted assumption.

14. The Applicant claimed he realised he was bisexual while living in the USA between 2000 and 2003 and that his problems began when he started a relationship with another man.

15. The Applicant claimed that his own family became aware of this relationship with the other man and confronted him about it. The Applicant claims his family were not happy with this relationship and his brother threatened to call the police and the Applicant claims he was forced to leave Nigeria in early 2005.

16. The Applicant did not submit any evidence to show that he returned to Nigeria between 2002 and 2003 and stayed there until 2005. The Applicant stated that the British passport in the name of JT was confiscated by the Gardai after he was arrested. The Applicant was asked when was he in the United Kingdom and he said between 1994 and 1995.

17. In the course of his interview he said that he went to the United Kingdom on holidays. He was told that the UK authorities said that he had applied for asylum and his answer was "what did say was the outcome"? The Applicant said that he was refused asylum there in 1995 and the Applicant said "that is correct".

18. The Applicant claimed that an article was published in a newspaper in Nigeria called Vanguard. He said his name was mentioned but he did not say in what particular regard. He was not able to produce a copy of this newspaper article. The first finding of credibility by the second named Respondent was that it was not credible that the Applicant would be able to pass through at least four international airports with someone else's British passport and a British passport in the name of JT which he bought on the black market. It also held that his account of passing through immigration checks using a passport that did not belong to him bearing in mind the heightened security at various international airports was implausible. The second finding of the second named Respondent was that as a result of his history of being in Ireland for three years prior to coming to the Refugee Applications Commissioner's office, it was considered that the Applicant had not provided a reasonable explanation for his failure to apply for asylum as soon as reasonably practicable and that his explanation that he did not know the process was neither plausible nor credible.

19. The next finding of the second named Respondent was that that the Applicant had presented a case that was based solely on his unsupported personal claim which could not be verified. He held that the burden of proof lies with the person who submits a claim for asylum and quoted para. 204 of the UNHCR Handbook on procedures and criteria for determining refugee status in stating:-

"The benefit of the doubt should, however only be given when all the evidence has been obtained and checked and when the examiner is satisfied as to the Applicant's general credibility. The Applicant's statements must be coherent and plausible and must run counter to general known facts."

20. The second named Respondent quoted a decision of Peart J. in a case of *Ojelabi v. The Refugee Appeals Tribunal* [2005] IEHC 42:-

"The lack of credibility fundamentally affects the subjective element of a well-founded fear of persecution. The Applicant was simply not believable."

He also quoted a further decision of Peart J. and a decision of Hedigan J.

21. The next finding of the second named Respondent was that if the Applicant had a genuine fear of persecution in Nigeria he would have claimed asylum when he had the opportunity to do so and held on the balance of the Applicant's "testimony" falling short of what would be required in terms of credibility for him to be given the benefit of the doubt with regard to the material elements of his claim.

Submissions

22. Counsel for the Applicant argued that the second named Respondent failed to adhere to the standards contained in the judgment of *I.R. v. Minister for Justice Equality and Law Reform* [2009] IEHC 353 a decision of Cooke J. dated the 24th July 2009. The Applicant submitted that the credibility findings were based upon gut feeling and conjecture, are unsupported by reasons of without proper consideration of the "evidence" in fact by the Applicant.

23. Counsel quoted the Council Directive 2005/85/EC in respect of minimum standard and procedures in Member States for granting and withdrawing refugee status and in particular Article 8 (2). Counsel argued that the claim was not assessed objectively as required

by the Directive. He argued there was no objective assessment of whether the Applicant's story in whole or in part could have happened.

24. Counsel for the Applicant also submitted that the submissions which were delivered on the notice of appeal were ignored. It was in breach of the Applicant's right to good administration, fair procedures and natural justice and the right to be heard. The highlights of the notice of appeal were that the document that he travelled here with (the British passport in the name of JT) was confiscated by the Gardai and there was an obligation on the Tribunal to make necessary inquiries with Cloverhill Prison. The second issue related to the decision of the Refugee Applications Tribunal that it was more likely that the Applicant would have discovered his true sexuality at a much younger age.

25. Counsel on behalf of the second named Respondent submitted that the Tribunal Member painstakingly went through the Applicant's statements in the section 11 interview. He points to the number of discrepancies in the Applicant's position with regard to applying for asylum but admits that when this evidence was put to the Applicant he accepts the position. Counsel also argued that the Applicant presented no documentation at all in relation to the account of his claim. He quotes Finlay Geoghegan J in *Kramarenko v. The Refugee Appeals Tribunal* [2004] 2ILRM 550:-

"The subjective element requires the Applicant to establish that he or she has a fear of persecution for a Convention reason if returned to his/her own country. An assessment as to whether an Applicant has such a fear will normally involve an assessment of credibility. The objective element involves the assessment as to whether the subjective fear is well-founded or, as sometimes put, objectively justifiable."

26. Counsel for the second named Respondent also cited *I.R. v. The Minister for Justice Equality and Law Reform* and the relevant principles of Cooke J. He referred to the Country of Origin Information with regard to lesbian, gay, bisexual and transgender persons. It is clear from the Nigerian code under the laws of the Federation of Nigeria that same sex relations between men were illegal and punishable up to 14 years imprisonment.

27. The legal basis for a decision by the Refugee Appeals Tribunal is based on the Refugee Act 1996 (as amended). That Act pursuant to s. 13 provides statutory basis for recommendations and reports of Commissioners and s. 11(A) states:-

"Where, at any time during the investigation of an application by the Commissioner under section 11, it appears to him or her that an Applicant—

(a) is a national of, or has a right of residence in, a country standing designated by order under section 12(4) as a safe country of origin, or

(b) had lodged a prior application for asylum in another state party to the Geneva Convention, then the Applicant shall be presumed not to be a refugee unless he or she shows reasonable grounds for the contention that he or she is a refugee."

It is interesting to note that the grounds on which the Applicant had previously made an application for asylum in the United Kingdom were not the same as the application for asylum in Ireland. Section 11 (A) (3) states:-

"Where an Applicant appeals against a recommendation of the Commissioner under section 13, it shall be for him or her to show that he or she is a refugee."

28. Section 11 (B) of the Refugee Act 1996 (as amended) provides that the Commissioner or the Tribunal in assessing the credibility has to regard to the following:-

"(a) whether the Applicant possesses identity documents, and, if not, whether he or she has provided a reasonable explanation for the absence of such documents;

(b) whether the Applicant has provided a full and true explanation of how he or she travelled to and arrived in the State;

(c) where the Applicant has forged, destroyed or disposed of any identity or other documents relevant to his or her application, whether he or she has a reasonable explanation for so doing;

(d) whether the Applicant has adduced manifestly false evidence in support of his or her application, or has otherwise made false representations, either orally or in writing."

29. Criticism was made of the Refugee Applications Tribunal in not seeking to obtain information from Cloverhill Prison in relation to the existence of the passport which the Applicant said was seized from him from An Garda Síochána. However it seems that there is no evidence to suggest that the solicitors acting on behalf of the Applicant had written to the Governor of Cloverhill Prison or the relevant Garda Station to seek a copy of the document. There is also no evidence of correspondence to the Governor of Cloverhill Prison or the Irish Prison Service in relation to the assertion of the Applicant that he had made an application for refugee status. It is unlikely that the Governor of Cloverhill Prison would have retained copies of these documents and it is much more likely that the arresting members would have possession of the document and may have passed it to the Garda National Immigration Bureau. However no search seemed to have been made by or on behalf of the Applicant in this regard and I am satisfied that there is no onus on the Refugee Applications Tribunal to seek this documentation having regard to the legal burden on the Applicant.

30. The next legal provision is the European Communities (Eligibility for Protection) Regulations 2006 which gives effect to the Council Directive on the minimum standards on procedures in Member States. Section 5 of the Regulations provides for the assessment of facts and circumstances. Section 5 provides as follows:-

"5. (1) The following matters shall be taken into account by a protection decision-maker for the purposes of making a protection decision:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the protection Applicant including information on whether he or she has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the protection Applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the Applicant's personal circumstances, the acts to which the Applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the protection Applicant's activities since leaving his or her country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for protection as a refugee or a person eligible for subsidiary protection, so as to assess whether these activities will expose the Applicant to persecution or serious harm if returned to that country;

(e) whether the Applicant could reasonably be expected to avail himself of the protection of another country where he or she could assert citizenship."

Subsection 2 provides:-

The fact that a protection Applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, shall be regarded as a serious indication of the Applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated, but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the Applicant is eligible for protection."

31. Regulation 2 of the European Communities (Eligibility for Protection) Regulations 2006 provides that actors of persecution include that state or parties or organisations controlling a state and non-state actors.

32. Regulation 10 of the European Communities (Eligibility for Protection) Regulations 2006 provides, *inter alia*, that a group shall be considered to form a particular social group where members of that group share an innate characteristic.

Decision of the court

33. The second named Respondent indicated at his conclusion that he had taken into account the relevant documentation in connection with the appeal including the notice of appeal, the Country of Origin Information, the Applicant's asylum questionnaire and the replies given in response by or on behalf of the Commissioner on the report made pursuant to s. 13 of the Act. It appears to me that the relevant issues in the notice of appeal while not directly referred to appear to have been dealt with appropriately by the second named Respondent.

34. In this case I am particularly conscious of the words of Cooke J. in *I.R. v. The Minister for Justice Equality and Law Reform & The Refugee Appeals Tribunal* [2009] IEHC 353:-

"1. In most forms of adversarial dispute the assessment of the credibility of oral testimony is one of the most difficult challenges faced by the decision-maker. The difficulty is particularly acute in asylum cases because, almost by definition, a genuine refugee will be someone who has fled home in circumstances of stress, urgency and even terror and will have arrived in a place which is wholly strange to them; whose language they do not speak and whose culture may be incomprehensible. Inevitably, many will have fled without belongings or documentation from areas in a state of anarchy or from the regimes responsible for their persecution so that the obtaining of any administrative evidence of their status and even identity may be impractical, if not impossible.

2. In such cases the decision-makers at first instance have the unenviable task of deciding if an Applicant can be believed by recourse to little more than an appraisal of the account given, the way in which it was given and the reaction of the Applicant to sceptical questions, to the highlighting of possible discrepancies or to contradictory evidence from other sources. Recourse will also be had in appropriate cases to what is called "country of origin information" but in most cases this will be of use only in ascertaining whether the social, political and other conditions in the country of origin are such that the events recounted or the mistreatment claimed to have been suffered, may or may not have taken place.

3. It is because in such cases the judgment of the primary decision-maker must frequently depend on the personal appraisal of an Applicant, that it is not the function of the High Court in judicial review to reassess credibility and to substitute its own view for that of the decision-maker. Its role is confined when a finding of lack of credibility is attacked, to ensuring that the process by which that conclusion has been reached is legally sound and not vitiated by any material error of law."

35. I am satisfied that the findings of credibility by the second named Respondent are not such as can be found at fault by this court and in those circumstances I decline the relief sought by the Applicant and refuse to make an order of *certiorari* in accordance with the notice of motion.