Neutral Citation: [2015] IEHC 61

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 706 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED) IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED) AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003, SECTION 3(1)

BETWEEN

T.U. (NIGERIA) AND G.D.U. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND T.U.) AND G.B.U (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND T.U.)

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 6th day of February, 2015

1. This is a telescoped application for judicial review wherein the applicants seek an order of *certiorari* quashing the decision of the first named respondent made on the 17th May, 2010, affirming the recommendation of the Refugee Applications Commissioner to refuse the applicants refugee status, and notified to the applicants not earlier than the 23rd May, 2010.

BACKGROUND

2. The information supplied by the first named applicant is that she was born in Nigeria on the 7th January, 1978; the second named applicant, her son, was born in Nigeria on the 24th September, 2003; and the third named applicant, also her son, was born on the 3rd April, 2008, in Ireland. In or around the month of November, 2006 the second named applicant was forcibly circumcised at the family home in accordance with the traditional practices and beliefs of his paternal family. The mother was four months pregnant with the third named applicant when she was informed by her husband's family that he would also be circumcised in accordance with tradition. The paternal family would not agree to a circumcision being performed in hospital. The husband, who had agreed with the views of his wife regarding the home circumcision left the family home and advised his wife to do likewise. The first named applicant's husband effectively abandoned his wife and child and there has been no contact with him since. The first named applicant states that she was threatened with death by the husband's family as she told them that they would never be allowed to circumcise her unborn child. She states that she left and slept in her church where she was kept in hiding for the following four months. The church subsequently organised the travel arrangements from Nigeria. The first and second named applicants arrived in Ireland on the 11th February, 2008, and claimed asylum. Following the birth of the third named applicant on the 3rd April, 2008, he was further added to the first applicant's asylum application.

3. The Refugee Appeals Commissioner (hereinafter the Commissioner) recommended that the applicant be refused a grant of refugee status, for reasons of credibility findings relating to the husband's abandonment of his family and travel arrangements to Ireland, and further a finding that persons seeking to avoid circumcision could relocate internally within Nigeria. The Commissioner recommended that the applicant could seek available support from NGOs who help women to avoid circumcision, stating that although the applicant wishes to avoid male circumcision, "there is no reason to believe women's groups could not support her". (p.69 of the booklet). The Commissioner made no finding with respect to the circumcision of the second named applicant or the likely exposure of the third named applicant to a similar circumcision were he to be returned to Nigeria and further failed to make any determination as to whether such treatment amounted to persecution within the meaning of the Convention.

4. All three applicants appealed the recommendation of the Commissioner to the Refugee Appeals Tribunal (hereinafter the tribunal) and it was submitted that their claim came within membership of a particular social group. A medical report from the general hospital in Agbor that stated that the second named applicant "was admitted in this hospital on 11th November, 2006, due to continuous bleeding and swollen scrotum as a result of the circumcision carried (*sic*) on him", was submitted to the tribunal, as was an additional letter from O[…] Emily, a friend of the first named applicants, which outlined how her child had died having been subjected to a traditional circumcision.

5. An oral hearing of the applicant's appeal was held on the 7th December, 2009. The decision of the Commissioner was affirmed by the tribunal dated the 17th May, 2010. The tribunal made credibility findings in respect of the abandonment by the husband/father, perceived inconsistencies in relation to addresses furnished, travel, initially claiming to be from Sierra Leone and errors in the birth certificate furnished. In relation to the hospital report and the letter from the friend, Emily, the tribunal held "[i]n the light of the credibility issues that arise with the Applicants (*sic*) claim, these documents are not sufficiently compelling to overturn the Section 13 recommendation." The tribunal further found that "internal relocation to a large urban area such as Lagos or Abuja would not be unduly harsh on the Applicants in all the circumstances."

SUBMISSIONS

6. Counsel for the applicants, Mr. Michael Lynn S.C. contends that the tribunal wholly failed to make any finding with respect to the evidence that the second named applicant had been subjected to a traditional circumcision or the potential exposure of the third applicant to a like circumcision, and thereafter to determine whether such treatment amounted to persecution. This was the core claim made on behalf of the applicants and Mr. Lynn argues that the primary function of the tribunal was to make a clear and unambiguous finding in relation to the claim based on traditional male circumcision; he refers to the case of *E.P.A v. Refugee Appeals Tribunal* [2013] IEHC 85.

7. Further the applicants submit that the tribunal is legally bound to give reasons for the rejection of significant aspects of the

evidence given by the applicants or elements of the claim and referred to the case of *E.R & ors. v. Refugee Appeals Tribunal & ors.* [2013] IEHC 165.

8. With regard to the credibility findings made by the tribunal member, the applicants assert that the tribunal should have considered the medical report and letter as part of the process of assessment of credibility, and the finding that "they are not sufficiently compelling" should not have been made when the critical adverse credibility findings had already been made. In this respect the applicants rely on *I.R v. Minister for Justice Equality and Law Reform & ors.* [2009] IEHC 353, *Bah v. Refugee Appeals Tribunal & ors. (*Unreported High Court, Barr J, 2nd October, 2014) and *Bukhari v. Refugee Appeals Tribunal* (Unreported, High Court, Barr J, 2nd October, 2014). Further the applicants contend that the findings relating to the credibility of the mother were based on conjecture in relation to peripheral matters and refer the Court to *Sango v. Refugee Appeals Tribunal & ors.* [2005] IEHC 395 and *C.C. v. Refugee Appeals Tribunal* [2014] IEHC 491.

9. The applicants contend that the finding in respect of internal relocation was made without making any assessment of the internal relocation alternative in accordance with the requisite legal principles and in particular referred to the judgment of Ms. Justice H. Clark in *K.D. (Nigeria) v. Refugee Appeals Tribunal* [2013] IEHC 481, and *E.I. & ors. v. Minister for Justice Equality and Law Reform & ors.* [2014] IEHC 27. Further, the applicants contend that the decision of the tribunal was irrational in light of the country reports before the tribunal, maintaining that the tribunal had preferential regard to the country of origin information. This approach, counsel submits, has been repeatedly criticised and in particular the Court was referred to the decision of Mr. Justice Edwards in *D.V.T.S v. Minister for Justice Equality and Law Reform & ors.* [2007] IEHC 305.

10. On behalf of the respondents, Ms. Ann Harnett O'Connor, B.L. submits that it was not conjecture on the part of the tribunal member to express her opinion in relation to the account given by the first named applicant in respect of the husband's departure. She stated this was simply not credible. She referred to the decision of Ms. Justice H. Clark in *A.A. v. Refugee Appeals Tribunal* [2009] IEHC 445 at para. 28 where she stated as follows:

> "An expression of opinion or the rejection of certain parts of a person's evidence does not amount to conjecture. It would only be conjecture if a Tribunal Member guessed or hazarded reasons or formed an opinion on the basis of no or very slim evidence."

The respondents submit that the inexplicable alleged departure of the first applicant's husband and father of her son at the time is incredeible in all the circumstrances. The respondents contend that it very much relates to the core claim as it undermines the first applicant's claim in relation to the support she claimed he had supplied in the previous three years and thus questions the account given by the first applicant about the alleged difficultuies in relation to the second applicant and the potential risk to the third applicant. The respondents further submit that the inconsistencies in the first applicant's account undermine her personal credibility and this in itself is central in determining her claim for asylum.

11. In relation to the documentation provided by the applicants to the Commissioner and to the tribunal, the respondents maintain that careful consideration was given to the documentation submitted by the applicants. The respondents submitted that it was reasonable in the circumstances, given the contradictions and inconsistencies in the applicant's story, for the tribunal member to find this negated any probative value these documents might have. The respondents further contend that it is the task of a decision-maker such as the tribunal to assess the coherency and plausibility of an applicant's story and submit that the tribunal carried out this task in accordance with law.

12. The respondents submit that the assertion by the applicants that the tribunal erred in law in failing to have any regard to the minor applicants' circumstances and reasons of persecution, separate from their mother, were difficult to understand. The claim of the first applicant is premised on the home circumcision of her first born son and the risk to her second son, born in this state, if returned to Nigeria. In this regard, counsel asserts that her fears are intrinsically linked to those of her sons and that her personal truthfulness is crucial to establishing their claims, which are included with hers and entirely dependent on the establishment of that credibility. Given this dependency, having found the first applicant to be lacking in personal credibility, the respondents argue that the tribunal correctly concluded that the minors' claims were not well-founded.

13. In respect of the assessment of internal relocation, in circumstances where the first applicant was found to be lacking in personal credibility and her claim therefore not well-founded, the respondent submit that the tribunal's finding on internal relocation can be severed from the decision and referred in particular to Mr. Justice MacEochaidh's judgment in *I.G. v. Refugee Appeals Tribunal & anor.* [2014] IEHC 207 and at para. 29 thereof he stated:

> "In any event, it is possible to sever the internal relocation finding made in this case from the various separate credibility findings made by the Tribunal Member. In my view, the various credibility findings and the finding on internal relocation are distinct and are not dependent on each other. As such, a flaw in the finding on internal relocation does not infect the credibility findings made by the Tribunal in this case as it is severed from the other robust findings. In reaching this conclusion I have regard to the decisions of *A.A. [Pakistan] v. Refugee Appeals Tribunal* (Unreported, ex tempore, MacEochaidh J., 18th September 2013) and *Talbot v. An Bard Pleanala* [2009] 1 I.R. 375 on the severability of findings."

14. The respondents further rely on the decision of Mr. Justice Barr in *A.M.G (Pakistan) v. Refugee Appeals Tribunal* [2014] IEHC 379 and at para 29(e) where he was also willing to sever a finding on internal relocation from a decision with regard to credibility findings.

15. Counsel for the respondents further submit that the findings in this case in relation to internal relocation amount to 'even if' findings in relation to internal relocation as per the *K.D (Nigeria),* decision referred to above, and accordingly the decision of the tribunal member should stand.

Findings

16. The core issue identified by Mr. Lynn S.C. in the oral submissions made before the Court was the manner in which the tribunal had dealt with the claim that the third named applicant was at risk of persecution because he was at risk of circumcision being carried out upon him in accordance with traditional rites and not under hospital and/ or medical conditions. The Commissioner held that this was not persecutory. The tribunal member did not address the issue at all. There were a range of adverse credibility findings made against the first named applicant which he contends relate to peripheral matters and do not address the core issue which was that the third named applicant was at risk of circumcision in accordance with the traditional rite if returned to Nigeria and if the third named applicant was at such a risk then the consequences of that risk were not considered. Documentary evidence was before the tribunal from the hospital, i.e., a medical report in relation to the second named applicant which stated that the second named applicant needed treatment in 2008 for a swollen scrotum (he having been circumcised in the traditional manner by the paternal family). Further there was a letter from a friend, Emily, who states that her own son had died following a similar procedure. The country of origin

information makes little or no reference to male circumcision. It has copious amounts of passages dealing with female genital mutilation (FGM), which does not form any part of this case.

17. In relation to the analysis of the applicants' claim which is set out at part 5 of the tribunal report, and at p.222 of the booklet, at the end of the first paragraph the tribunal member states as follows:

> "It is not credible that the Applicant's husband, who disapproved of his own parents' wishes and agreed with his wife, would simply abandon his pregnant wife and son because he was fed up with his family, particularly as the Applicant was not having problems with her husband at this time. The Applicants (*sic*) account in this regard lacks credibility."

18. This appears to be a speculative finding and the reasons for the conclusion are not set out or stated in the report. Paragraph 2 deals with various addresses the applicant stated that she resided at and perceived inconsistencies in her responses in the tribunal's views calls into question her general credibility. At the initial interview the applicant stated she was a national of Sierra Leone and changed her stated nationality when it was put to her that she was not from Sierra Leone. The applicant put forward an explanation at the interview that a Reverend David had told her to say she was from Sierra Leone. The tribunal member appears to reject this answer and states that this "further undermines the Applicant's general credibility".

19. The tribunal member then refers to the applicant's account of her travel to London en route to Ireland in reference to the fact that she did not seek asylum in the United Kingdom. The tribunal member found:

> "It is difficult to understand why the Applicant would have risked further travel to another country on false documents, particularly when she was heavily pregnant at this time. The Applicants (*sic*) actions in this regard are not indicative of a person fleeing persecution and section 11B (b) of the Refugee Act 1996 (as amended) is relevant to the Applicants (*sic*) claim."

20. The tribunal member continues:

> "The Applicant states that she travelled on a red passport to Ireland and that she did not know the country that was from (page 2, interview). She states that the passport did not contain her photograph. The Applicant stated that she had not been told what to tell immigration officials had she been questioned at Lagos or London airports. It is difficult to understand why Reverend David would not have advised the Applicant about how to answer questions that could be asked by immigration officials, particularly as the Applicant was travelling using false documentation. Had the Applicant been questioned by immigration officials at any point, the Applicant's lack of knowledge of her travel documents would have caused serious problems for the agent, the Applicant and her son. Section 11B (c) of the Refugee Act 1996 (as amended) is relevant to this claim."

S. 11B of the Refugee Act 1996 (as amended) states as follows:

> "The Commissioner or the Tribunal, as the case may be, in assessing the credibility of an applicant for the purposes of the investigation of his or her application or the determination of an appeal in respect of his or her application, shall have regard to the following…"

The section then proceeds to list items from a-m and the relevant parts in accordance with the decision of the tribunal member are ss.11B (b) and (c).

Section 11B (b) provides:

> "whether the applicant has provided a reasonable explanation to substantiate his or her claim that the State is the first safe country in which he or she has arrived since departing from his or her country of origin or habitual residence."

Section 11B (c) provides:

> "whether the applicant has provided a full and true explanation of how he or she travelled to and arrived in the State."

21. With regard to s.11B (b) Mr. Lynn referred the court to the decision of MacEochaidh J. in *F.T. v. Refugee Appeals Tribunal & anor.* [2013] IEHC 167 and at para. 10 thereof Mr. Justice MacEochaidh stated as follows:

> "It seems to me that it was not open to the Tribunal Member to state that he did not accept the explanations given by the applicant for his failure to claim asylum in France '*per* the terms of s. 11B of the Refugee Act 1996' where no 'first safe country claim' had been made by the applicant…There is a suggestion in the statement made by the Tribunal Member that the law requires an applicant for asylum to provide an explanation why asylum was not claimed in the first safe country encountered by the person in flight. There is no such rule of law. The provisions of s. 11B(b) of the Act are applicable where a claim is made by an applicant that Ireland was the first safe country encountered after he or she departed his or her country of origin. No such claim was made by the applicant in this case. It is, of course, perfectly permissible for a decision maker on an application for internal protection to have regard to the failure of an applicant to seek refuge in a safe country encountered en route to Ireland. However, given the mandatory terms in which s. 11B of the Act is expressed ("The Commissioner or the Tribunal … shall have regard to the following …") it seems to me that the provision should only be cited in the connection with a credibility finding where its strict terms are met. In these circumstances I find that the Tribunal Member erred in making the above finding in respect of the credibility of the applicant."

22. I would endorse the views of Mr. Justice MacEochaidh in the *F.T* case and I believe that the views stated therein are equally applicable to this case and that there was no basis in law for the tribunal member claiming that the provisions of s.11B (b) applied in this instance, as the applicants did not claim that Ireland was the first safe country in which she and her son travelled to. I am satisfied that the tribunal member erred in law in the finding in that regard.

23. In relation to s.11B (c), the applicant proffered an explanation at interview as to why and how she travelled and the nature of the documents she had been provided with by Reverend David. The tribunal member broadly states that s.11B (c) of the Refugee Act 1996 (as amended) is relevant to this claim. However it does not say why it is relevant or what relevance it is to the applicants' claim.

24. The tribunal member dealt with the number of pieces of documentary evidence submitted by the applicant at pp.24-25 of its decision (pp.224-225 of the booklet).

> "The Applicant has submitted a birth certificate. The certificate is stated to have issued from Ukpomaba local government area (LGA). No such LGA exists in Delta state. When asked to comment on this at the appeal hearing the Applicant stated that Delta State had a lot of LGA's (*sic*) and that Ukpomaba was within Agbor. In correspondence received post-hearing the Applicant instructs that there was a mistake on the birth certificate and the local government area that her Birth certificate issued from was Ika South. Further the section in the Birth certificate (number 2)- which gives the sex of the child the certificate relates to- is not completed and the Applicant is unable to explain at the appeal hearing why this was the case. It is difficult to understand why such a fundamental error such as an incorrect LGA would be given by the Registrar of Births and Death's (*sic*) on a government document and why the section to indicate the sex of the child- a very important section of any birth certificate- is not complete."

25. The decision continues:

> "The Applicant has also submitted her National Identity card. The ID states that the Applicant living at 12 O[…] Road in Agbor in 2005. The Applicant confirmed when questioned at the appeal hearing that she lived at 17 H[…] Street prior to her marriage and that after her marriage she lived at 87 T[…] Street. She stated at the appeal that since she was married in 2003 she lived at 87 T[…] Street and she had not lived elsewhere. When asked to explain why her National ID card contained a different address that (*sic*) that provided by her to date, the Applicant made no reply. She confirmed that she had personally obtained the ID card from the authorities. Apart from the ID card there is no mention on file or in the Applicant's testimony of ever having lived at 12 O[…] Road. Further the ID card and birth certificate spell the Applicant's maiden name in a different way which is unusual for documents issuing from a government."

26. The tribunal member goes on to state:

> "I have had regard to these documents and considering the issues which arise with the detail contained in these documents, the documents are of limited relevance or probative value in relation to the Applicant's asylum claim. I have also had detailed regard to the handwritten letter from the Applicants (*sic*) friend 'Emily' and a medical report from 'General Hospital Agbor' dated 18 November, 2006. The Applicant indicated at the interview that she did not have a medical report from the hospital her son attended as she was given medication for him (page 5, interview). During the appeal hearing the Applicant stated that after the interview her sister went to the hospital and asked for the report. The report is dated 18 November, 2006. In light of the credibility issues that arise with the Applicants (*sic*) claim, these documents are not sufficiently compelling to overturn a Section 13 recommendation."

27. It seems that the wording of the tribunal member's findings in relation to the reasons for the documents not being sufficiently compelling to overturn the s.13 recommendation implies that the authenticity of the documents is accepted by the tribunal member. If this is the case they are clearly relevant to the core claim of the applicants, i.e. whether G.B.U., the third named applicant, is at risk of male circumcision by the traditional method if returned to Nigeria. The documents would, *prime facie*, lend support to the core claim of the applicants that G.D.U., the second named applicant, has already been subjected to that procedure and that he afterwards required hospital treatment. These issue being the core issues of the applicants' case, and relevant, *prime facie*, corroborative documents having been put before the tribunal; they are simply rejected without the tribunal considering those documents and stated reasons given as to why they why they were being rejected. There was no assessment or finding as to whether or not a forceful circumcision was carried out on G.D.U. and if such a forceful circumcision was carried out on G.D.U., whether G.B.U. was at risk of being subjected to a similar procedure should he return to Nigeria.

28. Section 5(2) of the Refugee Act 1996 (as amended) provides that serious assault can constitute a type of harm that can prohibit *refoulement* to certain countries. I accept that forceful circumcision via the traditional route is an act which could constitute a serious assault and which, dependent on the circumstances of the particular case, could give rise to the need for international protection in accordance with s.5(2) of the Refugee Act 1996 (as amended).

29. In the light of the tribunal member's failure, in my opinion, to deal with the core aspects of the applicants' claim and to make findings in respect of those core aspects I am satisfied to grant leave and to further grant an order of *certiorari* quashing the decision of the tribunal member made on the 17th May, 2010. I will further make an order remitting the matter to the tribunal for a *de novo* consideration by a different tribunal member.

30. In light of the fact that I have acceded to the applicants' claim on the first ground argued before the Court I do not propose to proceed to determine the second ground of the applicants' claim in relation to internal relocation as it was purportedly carried out in circumstances where the core basis of the applicants' claims had not been addressed.