Neutral Citation Number: [2011] IEHC 437

THE HIGH COURT

JUDICIAL REVIEW

2008 1324 JR

BETWEEN

B A., H. A. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND B. A.),

AND A. F. A. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND B. A.)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

DONAL A. EGAN AS THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Mr. Justice Cross delivered on the 23rd day of November, 2011

1. This is an application for leave for judicial review by way of order of *certiorari* in respect of the decision of the second named respondent dated 1st November, 2008 (hereinafter referred to as "the decision") affirming the decision of the Refugee Appeals Commissioner that the applicant should not be declared a refugee.

2. A large number of grounds are proposed in the draft statement of grounds, however, counsel on behalf of the applicants, Mr. David Leonard, B.L., at the commencement of the hearing indicated that he had three grounds namely:-

> (i) Lack of clarity in the reasons given by the second named respondent for his decision which resulted in it being unclear as to the basis of the decision so as to consequently invalidate the same.
>
> (ii) If and insofar as the decision did turn on the alleged lack of credibility of the first named applicant that no valid reasons were given as to why the second named respondent was not satisfied as to the credibility of the first named applicant.
>
> (iii) If the decision is based on relocation that the second named respondent failed to take into account of the fact that the first named applicant's father in law was a man of influence over criminal gangs.

3. The first ground above is the applicant's main ground and the second and third grounds are subsidiary.

4. The first named applicant is a Nigerian mother and the other applicants are two of her children in respect of whom an application was made for asylum in 2008.

5. The first named applicant claims that she is a Christian and became pregnant and who married her husband who was a Muslim in 1999 and that her father in law who was a Iman and a fanatical Muslim did not approve of the marriage and started to threaten her. She claims that she moved from Lagos where she resided initially to Abeokuta in the Ogun State and that she lived there for approximately one year and then returned to her parents in Lagos and had difficulty with her husband's family and from persons whom she claimed to have been incited by her husband's family who assaulted her on occasions and culminating in her departure from Nigeria with the second named applicant on 24th February, 2008 and she arrived within the State and gave birth to the third named applicant on 29th February, 2008. She claims that she cannot return to Nigeria because her sons would be forced to become Muslims and she would be again threatened by her father in law.

6. The first named applicant applied for asylum on 5th March, 2008, she attended for her interview on 21st April, 2008, her application was rejected under s. 13(1) of the Refugee Act 1996 on 23rd April, 2008 and she filed a notice of appeal on 7th May, 2008 and the RAT issued a decision on 7th November, 2008 which was notified to the applicant in writing on 12th November, 2008.

7. The decision of the Refugee Appeals Commissioner was a reasoned decision which concluded that the applicant did not demonstrate a well founded fear of persecution in Nigeria.

8. The conclusions of the second named respondent dated 7th November, 2008 are contained in para. 6 and 7 of its decision and in view of the controversy should be quoted in full:-

> "6. Analysis of the Applicant's Claim
>
> The applicant's claim is that as a Christian married to a Muslim in 1999 she suffered persecution from her husband's father who strenuously objected to their marriage and that the State failed or refused to protect her. This alleged prosecution arises because of her Christian faith.
>
> This alleged persecution `was in the form of verbal and physical abuse from 1999 until 2007 when she left Nigeria i.e. a period of eight years. However during that period she lived with her husband in Abeokuta in Ogun State. This about 200km

from Lagos where her father in law lived and during that period she gave no evidence of being abused, either verbally or otherwise. There is a strong indication that if she and her husband moved to a different location in Nigeria they would not be at risk of persecution from her father in law. The issue of relocation arises only when an individual has established a fear of persecution in their home area.

Accepting that the applicant was persecuted in Lagos – and I am not entirely satisfied by the evidence that she was – relocation is appropriate in this case. The applicant has a good education and worked as an assistant nurse for a period before she was married. She is accordingly commercially mobile. Her husband studied Education Administration at university level and is accordingly also commercially mobile. In the circumstances it would not be unduly harsh or unreasonable for the applicant and her husband to move to another location in Nigeria. Nigeria is a vast country with many large cities and towns and she and her husband with their qualifications would be able to find work without any great difficulty. The alleged persecution inflicted on her emanated solely from her father in law and it is not unreasonable that they could relocate to some other area in Nigeria where her father in law would not be able to make contact with them. There is no evidence before the Tribunal that if the applicant returned to live in Ogun State where she lived for a period of twelve months without interference from her father in law that she would be at any risk of persecution from him in the future.

7. Conclusion

The Tribunal having considered all relevant documentation in connection with his appeal, including the Notice of Appeal, Country of Origin Information, the Applicant's Asylum Questionnaire and the replies given in response to questions by and on behalf of the Commissioner on the report made pursuant to s. 13 of the Act finds that the applicant's story is implausible. Accordingly, pursuant to s. 16(2) of the Act I affirm the recommendation of the Refugee Appeals Commissioner made in accordance with s. 13 of the Act. The applicant is not a refugee and the claim is dismissed."

9. The decision of the RAT is in essence contained in para. 6 and 7 and the substantive argument on behalf of the applicant is that whereas s. 6 refers to relocation, s. 7 indicates that the decision is based upon the fact that the applicant's story is implausible. It is submitted by Mr. David Leonard, B.L. on behalf of the applicant that the applicant is entitled to know the basis of the decision made against her so that, *inter alia*, she can ascertain whether she should or can judicial review the same.

10. Mr. Leonard relied first on the decision of Cooke J. in *A.S.O. v. Refugee Appeals Tribunal & Anor* [2009] IEHC 607 at para. 20:-

"It is questionable whether Regulation 7 places the onus of proof as to the unavailability of relocation as a solution upon an applicant in these circumstances. The regulations are structured on the basis that regulation No. 7 permits a protection decision maker to enquire into and to determine whether a person who is otherwise eligible for subsidiary protection or a refugee, is nevertheless not in actual need of protection because of the possibility of relocation in the country of origin. To make such a determination the decision maker must be satisfied that there is no risk of the particular persecution feared or of the serious harm in question occurring in the locality to which relocation is postulated."

11. Mr. Leonard further relied upon the decision of Clark J. in *W.M.M. v. Refugee Appeals Tribunal (Michelle O'Gorman) & Anor* (23rd April, 2010) in which she stated at paragraphs 11 – 19:-

"11. At an early stage of the hearing of the within application, the court expressed reservations as to a lack of clarity in the impugned decision. The court retains the view that it is unclear from the RAT decision whether the applicant was found fully credible or whether past persecution or serious harm had been established. In an unusual departure, the Tribunal Member commenced her analysis of the claim on the basis that the Convention is forward-looking and thereafter confined her analysis of the claim to the two separate issues of state protection and internal relocation. The past was left aside.…

16. In that context the court is concerned that the issue of whether the Tribunal Member properly or adequately addressed the question of whether there were (in accordance with the Regulation 5(2) proviso) any compelling reasons arising out of previous persecution or serious harm, cannot be fully explored because no finding was made on past persecution. The court's initial reservations as to the lack of clarity in the decision come to the fore and create a stumbling block, as it is not at all clear that the Tribunal Member actually found the applicant to have been credible in relation to her description of past harm….

17. … As a general principle, if an applicant is found to be entirely credible in her narrative of systematic and serious abuse suffered at the hands of a non-state actor, then this ought to be stated. Where a recommendation in favour of refugee status is withheld on the basis of the availability of state protection or internal relocation, the court's capacity to review the assessment of either antidote to refugee status should not be hampered by the absence of a conclusion on the nature and source of the risk faced by the applicant…

18. While the obligation to provide clear reasons is of importance in most administrative decisions, it is of more urgent importance in asylum applications as, pursuant to s. 16(17) of the Refugee Act 1996, the Commissioner's s. 13 report and the Tribunal's appeal decision must be furnished to the Minister to form part of an applicant's file before him in the event that an application for subsidiary protection and/or leave to remain on humanitarian grounds is made. An entirely credible applicant could be at an unwarranted disadvantage at that stage if the Minister's agents were unable to discern from the decisions of the asylum authorities that the applicant's account had been found credible and whether it was accepted that she would face a risk of serious harm within the meaning of the Geneva Convention….

19. The absence of any findings whatever on the question of credibility or past persecution distinguishes this case from the more usual situation where doubts as to the truth of the applicant's account are evident and the Tribunal Member goes on to assess state protection and/or internal relocation on an 'even if' basis, i.e. even if I do accept your account, which I don't, you could relocate or avail of effective protection…"

12. The applicant further relied upon the decision of Cooke J. delivered 15th January, 2009 in *T.M.A.A. v. Refugee Appeals Tribunal & Anor*, where he stated, *inter alia*, at para. 10 in dealing with the need for a reasoned conclusion:-

"In the first place it is to enable an applicant for refugee status who is adversely affected by the conclusion to know with sufficient detail and clarity why the negative finding is being made against him or her, including the reasons for rejection of the principal or material factors upon which the claim to a well grounded fear of persecution is based. The second

> purpose is that a decision of a tribunal of this kind, which is susceptible of judicial review before the High Court, must give the reasons for its decision in sufficiently clear and concrete terms to enable the High Court to exercise its judicial review jurisdiction so that if the Court on reading the decision and having regard to the totality of the material which is available to the Court, finds that it is unable to understand the basis upon which the conclusion has been reached, or apparently material factors have been discounted, then the statement of reasons in the decision is possibly defective."

13. Accordingly, Mr. Leonard stressed that as there is ambiguity between the reasons for rejection as set out at para. 6 and 7 of the decision of the RAT (see above) that the decision must fail and that is the main point that he makes.

14. The second and subsidiary argument Mr. Leonard advances that if the decision of the RAT was based on lack of credibility that no reasons were given as to why the Tribunal was not satisfied as to the applicant's credibility. Mr. Leonard contrasted the decision of the RAT in this regard with the decision of the Commissioner.

15. The third ground of Mr. Leonard is also a subsidiary one on the basis that if relocation was the basis of the decision that the Tribunal failed to take into account that the father in law was a man of influence over criminal gangs.

16. On behalf of the respondent, Ms. Sinead McGrath, B.L. replied the applicant had failed to advance any substantial grounds which would be necessary in order to seek in an application for leave.

17. Section 5 of the Illegal Immigrants (Trafficking) Act 2000, prescribes that in order for leave for judicial review to be granted in asylum cases the court must be satisfied that there are "substantial grounds" for contending that the decision is invalid or ought to be quashed.

18. The Supreme Court in Re Article 26 and Illegal Immigrants (Trafficking) Bill 1999 stated that:-

> "As regards the requirement that an applicant for leave to issue judicial review proceedings establish 'substantial grounds' that an administrative decision is invalid or ought to be quashed, this is not an unduly onerous requirement since the High Court must decline leave only where it is satisfied that the application could not succeed or where the grounds relied on are not reasonable or are 'trivial or tenuous'. This follows from a number of authorities where a similar requirement, as regards the Planning Acts, has been judicially considered."

19. Ms. McGrath contended that in answer to the applicant's submissions it is clear from a reading of the decision that the refusal of asylum was based on relocation in Ogun State. The issues of credibility or implausibility were raised in para. 7 in effect to meet the points made by Clark J. in *W.M.M.* dealing with the issue of credibility on an "even if basis" but the matter was decided in s. 6 on the basis of relocation. She further contended that the second ground of attack therefore that inadequate reasons were given as to why the respondent was not satisfied as to credibility does not really lie because it did not form the basis of the decision but that in any event it is clear from s. 7 of the decision that the implausibility arises from a perusal of the various documents referred to therein and the contradictions.

20. In dealing with the applicant's third point that if the decision was based upon relocation that it failed to take into account, the applicant's father in law being a man of influence over criminal gangs that the authorities provide that the reasons must be proper, intelligent and adequate but do not have to give details over every point in dispute however, it is clear from an analysis of s. 6 of the decision that the Tribunal concluded that the applicant was safe in Ogun State and would again be safe there.

21. The respondent relied upon the decision of Herbert J. on 7th February, 2007, in *Olga Kikumbi and Ilunga Kikumbi v. Offices of the Refugee Appeals Commissioner & Ors* and the decision of Cooke J. in *Doris Turay v. Minister for Justice, Equality and Law Reform & Anor* (Ex Tempore delivered on 3rd November, 2009).

Decision

22. Having reviewed the submissions of the parties and the authorities referred to, it is clear on the basis of all authorities and indeed of others that the applicant is entitled to a reasoned decision. She is entitled to that on the basis of any challenge by way of judicial review to know what decision is to challenge and she is entitled also to a reasoned decision if her credibility is going to be found against her in order not to affect her claims in any subsequent decision as to subsidiary protection or deportation.

23. I think that the dichotomy between para. 6 and 7 in the decision of the RAT is extremely unfortunate. It would have been far preferable had the Tribunal clearly set out for example that they were making their decision on the basis of relocation but also that they wanted to find that the evidence was not credible.

24. Rather than taking this clear step, the respondent seems on one reading to be saying one thing at para. 6 and another paragraph 7. Having carefully considered the decision, however, I am of opinion that the submission on behalf of counsel for the respondent is correct, it is clear that the basis of the decision is relocation and it is also clear on a careful reading that the purpose of s. 7 is to indicate what was highlighted as a doubt in s. 6 in relation to credibility is in fact real.

25. While I hold that there is much to be criticised from a stylistic point of view in relation to the manner in which the decision was set out, I do not think that the applicant has demonstrated substantial grounds so as to justify an application for leave for judicial review.

26. When dealing with the issue of relocation, in my opinion, in answer to Mr. Leonard's third point, it is clear that the decision maker found that the applicant would be safe if she were to relocate in Ogun State and this decision was taken after reviewing the evidence and it is clear from s. 3 of the decision that the respondent was aware of the allegations that the applicant's father in law was someone who was allegedly able to send thugs to beat her family. The fact that the applicant's father in law was a member of a political party (and in answer to various questions, the applicant indicated that he was a "street counsellor"), was not referred to in s. 6, however, I am not of the view it was necessary to do so or that the decisions given were flawed in this regard.

27. I accept the applicant's submission that the reasons given by the respondent for its findings on credibility were not adequate whereas the respondent did indeed refer to the various questionnaires and the decision of the Commissioner that he did not attempt any rational analysis on the issue of credibility.

28. It is my view that the statements as to credibility in the decision of the RAT cannot have any effect and should not be used against the applicant in any further decisions as to subsidiary protection or as to deportation given the unsatisfactory and incomplete nature of the reasons given for them. As this is an application for leave, I do not believe that I could make any formal declaratory

order to the effects that they be struck out but it would be clearly unfair for any party to use or rely upon such statements in any way and any decisions as to subsidiary protection or deportation should fall to be made without any findings as to credibility being suggested to have been made by the RAT.

29. However, given the fact that the impugned decision was in effect based upon relocation and that the applicant's substantive claim for relief by way of *certiorari* must fail.

30. I will hear the parties as to costs. In view of my criticisms of the initial ambiguity of the decision of the RAT between para. 6 and 7 thereof and the understandable confusion that this might cause and also in view of my criticism of the way in which the RAT purported to make findings as to credibility without any attempt of rational analysis being apparent from the decision, I am not of the view that the usual position of costs following the events should necessarily apply here.