Neutral Citation Number: [2010] IEHC 171

THE HIGH COURT

JUDICIAL REVIEW

2009 96 JR

BETWEEN

W. M. M.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL (MICHELLE O'GORMAN) AND MINISTER FOR EQUALITY, JUSTICE AND LAW REFORM

RESPONDENTS

JUDGMENT OF MS. JUSTICE M. CLARK, delivered on the 23rd day of April, 2010

1. This is the substantive hearing of the action to quash the decision of the Refugee Tribunal Member, Ms. Michelle O'Gorman, of the 9th November, 2008 which affirmed the recommendation of the Refugee Applications Commissioner that the applicant should not be granted refugee status.

2. The unusual feature of this case is that the applicant, who is a young woman with limited education from Lagos in Nigeria, was found by the Commissioner to have given "*graphic, credible details*" of the violence and abuse she suffered up to the age of 19 in Nigeria. She recited a harrowing story of sexual and physical abuse by her father and his associates, reaching back into her early childhood. The Commissioner found that her description of the abuse that she suffered was "*chilling*" and that she did not exaggerate the abuse when she had an opportunity to do so. The applicant recited that her domineering father also sexually and physically abused and bullied his wife, the applicant's mother. The applicant's only sibling quit the family home at 16 and has not been in touch since. The frequent rapes by her father caused the applicant to become pregnant on two occasions. On both occasions she was taken by her supportive mother to have an abortion carried out. The applicant's mother also took her to her mother's village some distance away but two weeks later her husband sought them out, beat them and forced them to return with him. They did not at any stage complain to the police of his behaviour and were unaware of the existence of any women's NGOs who could provide protection and assistance to make a complaint. Eventually, the applicant's mother sought assistance from their local pastor who advised that the daughter should try to leave the country. The mother saved for six months to provide the money for a person recommended by the pastor to bring the applicant to Ireland. This person brought the applicant to Ireland and brought her to the Commissioner's offices.

3. The applicant failed to be recommended by the Commissioner as a person to whom refugee status should be granted because it was found that the domestic and sexual abuse she suffered at the hands of her father was found not to amount to persecution "*as defined by the Geneva Convention 1951*". The issues of internal relocation and state protection were not addressed at that stage. The Commissioner's recommendation was appealed to the Refugee Appeals Tribunal. A first decision on appeal was challenged and subsequently quashed by agreement between the parties and a second oral appeal hearing took place. The Commissioner's negative recommendation was affirmed; that decision is now challenged.

4. The question of a Convention nexus was not addressed in the Tribunal decision. However, the appeal was not successful as the Tribunal Member found that state protection, though imperfect, might reasonably be forthcoming were the applicant to seek it and that internal relocation to a large city such as Port Harcourt would be a possibility. It was stated that the applicant fears her father and his friends and that she may not be able to accept that protection is available but that were she to be returned to Nigeria, "*it would appear that protection might reasonably be forthcoming were the Applicant to seek it and a variety of NGOs and women's organisations could assist her seek such protection.*" When reading the impugned decision, the applicant's personal circumstances can only be gleaned from different parts of the analysis rather than in a specific credibility assessment and finding. Those findings as to personal circumstances are that the applicant is no longer a child; she is a psychologically vulnerable person and will be unable to conceive without IVF because of fallopian tube damage. She did not report the abuse she suffered but rape is a crime punishable by life imprisonment in Nigeria.

Issues

5. The applicant challenges the validity of the Tribunal Member's decision and has obtained leave from Cooke J. to argue that:-

> *a. In concluding that the applicant was not a refugee because her claimed risk of persecution could be avoided by internal relocation in Nigeria, the Tribunal erred in law and in complying with the requirements of Regulation 7 of the European Communities (Eligibility for Protection) Regulations 2006 and with the duty to adhere to fair procedures by:*
>
> *i. Failing to identify a part of the country as a site for relocation and to conduct the necessary enquiries to verify whether it was a place where the applicant could be reasonably expected to stay without fear of being persecuted or real risk of suffering serious harm;*
>
> *ii. Identifying Port Harcourt for that purpose only after the appeal hearing without such inquiries and without affording the applicant an opportunity of commenting thereon.*
>
> *b. In concluding that the applicant ought not to be declared a refugee because state protection might reasonably be forthcoming to her on return to Nigeria if required, the Tribunal erred in law and applied a wrong legal test in that regard and failed to apply correctly Regulation 5(2) of the said Regulations, having regard to the applicant's personal history and to the effect of the country of origin information as to the ineffectiveness of state protection for victims of rape and sexual abuse.*

6. Mr. Woolfson B.L., counsel for the applicant, is critical of the Tribunal Member's assessment of the availability of state protection. He argued that the country of origin information sources quoted in the decision could not invoke confidence in the availability of an *effective* legal system which investigates, tries and punishes perpetrators of domestic violence and rape. The information before the Tribunal Member and quoted in her decision indicates that societal pressures reduced the percentage of reports of rape and the penalties imposed for conviction. Family violence was not really taken seriously by the police; few rapes were reported because of societal stigma and the difficulty in obtaining medical evidence; NGOs are available to provide help and advice to women but poor, illiterate or uneducated people may be unaware of the existence of the availability of the support and protection provided by the extensive network of NGOs.

7. Mr Woolfson argued that Regulation 2 of the Protection Regulations {*European Communities (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006)} requires "*an effective legal system in place for the detection, prosecution and punishment of acts constituting persecution or serious harm, where the applicant has access to such protection".* He argued that it was not enough to look at whether the criminal code provides that rape is a crime carrying a possible life sentence on conviction; it was also necessary to assess the *effectiveness* of the police force which would detect and prosecute that crime and the courts that would punish it. He further argued that the Tribunal Member ought to have had regard to the applicant's history and particular personal circumstances being that she was ill educated, psychologically fragile, without family support and fearful of her father and then should have asked whether this particular applicant would have access to protection. In other words, the test is not simply whether there is a system in place but whether the system is effective and available to the applicant. It was not sufficient to simply state that, although the system is not perfect, the applicant could have regard to NGOs who would help her to access the system.

8. The argument continued that if the Tribunal Member had taken note of the applicant's history of almost fifteen years of rape by her father and the sexual humiliation before her father's friends, she should have gone on to assess whether there were compelling reasons arising out of that past persecution which would render her eligible for refugee status as is recognised in the proviso set out in Regulation 5(2) of the Protection Regulations, which 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." (Emphasis added)*

9. Ms. Emily Farrell B.L., counsel for the respondents, argued that the applicant's construction of Regulation 5(2) was unsound as in order to be declared a refugee, the applicant is required to demonstrate a well-founded fear of persecution in the future. The respondents' position is that in this case, the inference must be that the Tribunal Member accepted that the applicant had suffered serious harm in the past. When the definition provided by the House of Lords in *Horvath v. Secretary of State for the Home Department* [2001] 1 A.C. 489 that "*persecution = serious harm + lack of state protection*" is applied, it is clear that the Tribunal Member was not satisfied that the applicant has a well-founded fear of persecution in the future because it was found that, although there may be a risk of serious harm, state protection might reasonably be forthcoming if she were to seek it out. As the Tribunal Member's finding was that state protection would be available, a crucial element of the "persecution" definition was absent. The respondents further argued that Regulation 5(2) merely provides that where it is accepted that an applicant suffered persecution or serious harm in the past, this is to be taken as an indication that there will be persecution in the future.

10. The applicant further argued that the assessment of internal relocation was deficient by reason of a failure to nominate a specific relocation site and to assess the reasonableness of expecting the applicant to relocate to that site, having regard to her personal circumstances and the conditions prevailing there. The assessment of internal relocation was defended by the respondents as being in accordance with the UNHCR Guidelines on Internal Relocation but it was also argued that, as an alternative remedy, if the assessment of internal relocation was found to be deficient in any way, it could be severed from the decision. The decision would stand on the determination that state protection might reasonably be forthcoming to the applicant which, in the respondents' submission, was arrived at by reference to the correct legal test and is reasonable in the light of the COI before the Tribunal Member.

Decision

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.

12. Among the court's concerns were the future implications for the applicant if this decision were at a later stage being considered by the Minister for subsidiary protection and / or leave to remain. If the decision stands and the Minister accepts the Commissioner's recommendation, the applicant will be viewed as a failed asylum seeker who made no attempt to access available protection in Nigeria or to seek internal relocation before seeking the protection of the Irish State. It is the view of the court that in the unusual circumstances where the applicant was found to be entirely credible by the Commissioner, if she had been found similarly credible by the Tribunal Member, then in fairness to the applicant, that finding should have been clearly stated.

13. While the court accepts the respondents' submission that a well-founded fear of persecution in the future is a prerequisite of eligibility for refugee status, the court finds itself unable to assess the interesting arguments advanced by the applicant in relation to Regulation 5(2) due to the lack of clarity in the decision. Cooke J. in *Temaj (M.S.T.) v. The Refugee Appeals Tribunal* [2009] I.E.H.C. 529 and Charleton J. in *Neosas (Fr N) v. The Minister for Justice, Equality and Law Reform* [2008] I.E.H.C. 107 found that Regulation 5(2) does not alter the fundamental requirement of a well-founded fear of future persecution to be established nor does it operate so as to create a distinct new criterion for entitlement to subsidiary protection over and above that contained in Article 4(4) of Council Directive 2004/83/EC (the "Qualification Directive") which states:-

> *"The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is 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."*

14. The effect of Regulation 5(2) was described by Cooke J. in *Temaj* as being to "*permit some limited extension to the conditions of eligibility prescribed in article 4.4 designed to allow some latitude in according subsidiary protection based exclusively upon the fact of previous serious harm when it is accompanied by compelling reasons.*" Cooke J. further held that:-

> *"Regulation 5(2) tells the decision maker that the fact of previous serious harm suffered, when proven, is a serious indication that the risk is real in such a case and if that harm gives rise to compelling reasons for considering that international protection is necessary, that fact alone may be enough even if it is possible that the same fact may not be repeated."*

15. In the view of the court, although Cooke J. was dealing with Regulation 5(2) in the subsidiary protection context, his reasoning in relation to "*some latitude*" could be applied to a refugee applicant to whom Regulation 5(2) also applies. In those circumstances, it is certainly valid for the applicant in this case to argue that the Tribunal Member ought to have had regard to her past persecution when considering whether or not to affirm the Commissioner's recommendation. When considering whether the proviso in Regulation 5(2) could have any application in this case it must be recalled that the medical reports before the Tribunal Member confirmed that the applicant was a psychologically and physically damaged young woman and that this damage was attributed to the actions of her father who had for fifteen years subjected her to rape, sexual humiliation, pregnancy, infection and abortion. Although it is, of course, the role of the Tribunal Member to assess whether effective protection would be available to an asylum applicant, it seems to the court that a relevant consideration would have been that she is, through lack of education and financial independence, unlikely to have a personality sufficiently assertive to take on societal and institutional prejudices relating to incest and domestic sexual abuse in making a complaint to the Nigerian Police.

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. The respondents argued that the applicant's credibility must be taken as accepted as no negative credibility findings were made and the sole basis on which the applicant was found not to be a refugee was that state protection would be forthcoming and / or that she could relocate within Nigeria. While a silence as to credibility may lead to the inference that credibility is accepted in some cases, the court is not convinced that this situation can be assumed in all cases and especially not in this case where the absence of a positive finding may have adverse consequences for the applicant at a future stage of the immigration process. 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. Unless the determination of credibility is spelled out, it can be difficult, if not impossible to assess the validity of a decision to affirm a recommendation that the Minister ought to refuse refugee status.

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, the Refugee Act 1996, or the Protection Regulations, if returned to her country of origin.

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*. No finding either way was made in this case and the absence of clarity impairs the court's ability to review the legality of the Tribunal Member's decision having regard to Regulation 5(2). The opacity in the decision on the issue of credibility also impedes the assessment whether the Tribunal Member considered the reasonableness of internal relocation by reference to the applicant's personal circumstances.

20. In those circumstances, the court is satisfied that the negative decision falls to be quashed as it fails to meet the requirement that decisions should be so couched that "*the addressee can ascertain from the decision why the appeal failed and … the court is placed in a position to exercise its function of judicial review": Pamba v. The Refugee Appeals Tribunal & Anor* (Unreported, High Court, Cooke J., 19th May, 2009). This judicial review Court has been unable to ascertain fully why the appeal failed and will therefore refrain from addressing the applicant's arguments on state protection and internal relocation.

Conclusion

21. The court is satisfied that the applicant is entitled to an order of *certiorari* quashing the Tribunal Member's recommendation of 9th December, 2008 and an order of *mandamus* remitting the applicant's appeal to the Refugee Appeals Tribunal for fresh adjudication by a different Tribunal Member.

Approved: Clark J.