Neutral Citation: [2014] IEHC 568

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 326 J.R.]

BETWEEN

O.O. (AN INFANT SUING BY HER MOTHER AND NEXT FRIEND T.T.O.)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND DEFENCE, REFUGEE APPLICATIONS COMMISSIONER, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered on the 25th day of November, 2014

Background

1. The applicant's mother maintained that she fled from her home in Jos, Nigeria, due to clashes between Muslims and Christians. She arrived in Ireland and applied for refugee status. This was refused by the Refugee Applications Commissioner ("the RAC"), and on appeal, by the Refugee Appeals Tribunal ("the RAT").

2. The applicant was born in Ireland on 21st June, 2010. On 19th November, 2010, an application for refugee status on behalf of the applicant was submitted by her mother. On 7th March 2011, the applicant's mother attended for an interview in connection with her daughter's application for asylum.

3. In the course of the interview, she was asked what she feared for her child if she were to go to Nigeria. She replied that the applicant's life would be in danger, that she would have no place to live and no place to return to. She was asked did she fear that someone would harm her child, to which she replied "*yes, because of the religious crisis in Jos, they are killing the women and children and this is why I left Nigeria*".

4. The applicant's mother confirmed that her child's fears were solely based on her own fear of returning to Nigeria.

5. She was asked whether there was anyone specifically in Nigeria that she feared would deliberately harm her daughter. She replied:-

> *"no, it's just that these things happen all the time, every so often in Nigeria. And she is only a child, a female child. Children can be easily harmed or get abused. There is always clashes happening between Muslims and Christians and she is only a little girl and can get harmed. I would not want this for my child".*

6. When asked whether she could relocate to another part of the country, such as to Lagos, she said "*it could happen anywhere in Nigeria*".

7. On the issue of the availability of police protection, she said:-

> *"these things could happen so easily and the police may not be there. They would not be able to offer protection immediately and it could be too late".*

8. It was put to the mother that her baby was born in June 2010, but that the applicant was not registered with the RAC until November 2010. She was asked to explain this delay. She gave the following explanation:-

> *"my baby was born in June and then I got a letter from Immigration to say to come for interview with her on October 20th. But she wasn't feeling well, so they asked me to fax a letter from the doctor, so I did. They said to bring her in when she felt better. So on 11th November, I brought her in and was then scheduled for interview in January but there were difficulties with transport".*

9. In a report dated 15th March, 2011, the RAC came to the conclusion that the applicant had not established a well-founded fear of persecution, as required by s. 2 of the Refugee Act 1996, as amended. On 23rd March, 2011, Ms. Gillian Gallagher recommended that the applicant should not be declared to be a refugee. She also recommended that s. 13(6)(c) of the Refugee Act 1996, as amended, was appropriate to the application.

10. By letter dated 11th April, 2011, the applicant's solicitor submitted a Notice of Appeal to the RAT. In the covering letter, the solicitor also asked that copies be made available to the applicant of reports of previous decisions of the RAT in relation to similar cases as that of their client. The applicant required this information so that she could consider, with her legal representatives, the basis on which the RAT dealt with such cases in the past and the reasons for the decisions made which will, in turn, assist her in deciding how best to approach her appeal. The letter also stated that if such documentation was not forthcoming, they would have no alternative to but to issue the appropriate proceedings without further notification. They concluded the letter by stating that the appeal was lodged without prejudice to any application for judicial review of the decision of the RAC that may be sought by their client.

11. There does not appear to have been any response to that letter. On 3rd May, 2011, the RAT gave its decision in the matter, which had proceeded as a papers-only appeal. The Tribunal dismissed the appeal and affirmed the decision of the RAC.

12. By a Notice of Motion issued in April 2011, the applicant commenced these proceedings.

The Applicant's Case

13. The grounds on which relief was sought was set out as follows in the applicant's statement of grounds:-

> *"a. The applicant herein, an infant, whose mother is from Nigeria, sought asylum in Ireland in or around the month of November 2010. Following interviews with servants or agents of the second named respondent, her application was refused in a decision/recommendation of the second named respondent dated 15th/23rd March 2011 ('the Decision'). The Decision was received by the applicant's mother on or about 4th April 2011.*
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> *c. (Not relevant)*
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> *d. No adequate regard has been had to the minimum standards mandated by the Procedures Directive and/or the Qualification Directive and/or S.I. 518/2006. In particular, and without prejudice to the generality of the foregoing, no country of origin information was consulted by the decision makers.*
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> *e. The UNHCR Guidelines in relation to internal relocation have not been applied. The question of the availability of State protection was not properly dealt with.*
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> *f. No proper objective or subjective analysis of the applicant's claim has been undertaken.*
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> *g. The second named respondent failed to carry out any or any proper forward looking test as is required by, inter alia, the UNHCR Handbook.*
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> *h. Insufficient or inadequate or no consideration of the applicant's application."*

14. At the hearing of this matter, and in the applicant's written submissions, the applicant put forward a number of grounds which appear to be new grounds for seeking relief. In particular, it was contended that reliance by the RAC on the previous decision refusing the applicant's mother's asylum claim, was unlawful. The respondent objected to this argument being put forward. They stated, firstly, that this was an attempt to introduce new grounds for the first time at the hearing of the judicial review proceedings. They objected to any extension of time to allow this claim to be made.

15. In the present case, no objection was taken to the time within which the Notice of Motion issued, being at some time in April 2011. The report of the RAC was dated 15th March 2011, and was signed off on 23rd March 2011. However, the respondent does object to the introduction of new grounds for seeking relief introduced for the first time in the written submissions of the applicant, which are undated, but one would assume that they were lodged some short time before the hearing of this matter on 23rd May 2014.

16. In circumstances where the grounds seeking relief are in somewhat general terms, it was inevitable that they would be made more specific as time went on. This particular ground, that it was unlawful to place reliance on the previous refusal of the mother's claim when considering the child applicant's claim, was covered by ground F in the statement of grounds, which was in the following terms:-

> *"No proper objective or subjective analysis of the applicant's claim has been undertaken."*

17. Accordingly, it is not necessary to extend the time so as to allow for any amendment of the statement of grounds.

18. Before coming to the substantive issue raised under this heading, it is necessary to deal first with a procedural point made by the respondent. The respondent argues that the applicant cannot pursue the judicial review proceedings, when she has elected to pursue an appeal to the RAT, albeit an appeal that was on the papers only.

19. In *MAB v. Refugee Applications Commissioner* [2014] IEHC 64, O'Malley J. considered the circumstances in which an applicant could pursue an application for judicial review rather than proceed by way of an appeal to the RAT:-

> *"On behalf of the respondents Ms. McGrath referred to A.D. v MJELR [2009] IEHC 77, also a decision of Cooke J. Having reviewed the authorities on the issue (including judgments dealing with non-asylum related issues such as State (Abenglen Properties Ltd) v Dublin Corporation [1984] I.R. 381) he set out the following summary of the principles arising therefrom:*
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> *A. Where the legislature has put in place an administrative and quasi judicial scheme postulating only limited recourse to the courts, certiorari should not issue if that statutory procedure is adequate and more suitable to meet the complaints upon which the application for judicial review is based.*
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> *B. The fact that an appeal against the impugned decision or measure is available to an applicant is not of itself a bar to the issue of certiorari by the High Court.*
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> *C. The Court should not exercise its discretion to refuse certiorari to quash a bad decision if its continued existence may produce damaging legal effects.*
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> *D. For the High Court to intervene in a statutory two-stage procedure such as is involved in planning and asylum matters, it is not sufficient to point to an error within jurisdiction on the part of the decision-maker at first instance. Some extra flaw in the decision must be shown such as to indicate that the decision-maker has acted out of jurisdiction and in disregard of one of the principles of natural or constitutional justice.*
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> *E. The essential question is whether the available remedy by appeal is the more appropriate remedy.*
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> *F. A variety of factors fall to be considered in assessing the appropriateness of the remedies including: the nature and scope of the appeal and the stage in the statutory scheme at which it arises; whether it [includes] an oral hearing; the type of error sought to be challenged in the decision and whether it can be remedied on appeal.*
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> *G. The fact that the appeal does not provide for an oral hearing, while relevant, is not itself a ground for granting relief.*

An oral hearing is not always an essential ingredient of a fair appeal.

Cooke J. considered that it followed that leave to apply for judicial review in order to quash a report and recommendation of the Commissioner should only be granted in exceptional cases, where it is demonstrated that there is 'some fundamental flaw or illegality in the Commissioner's report such that a hearing upon appeal before the Tribunal will be inadequate to remedy it.'

As an example of such a case he cited Stefan v The Minister for Justice [2001] 4 IR 203. In that case (which dealt with a two-stage process in operation before the enactment of the Refugee Act, 1996), Denham J. quashed a first instance decision made in the absence of a translation of a material document. Denham J. did not consider that the availability of an appeal was a sufficient remedy, on the basis that

'*A fair appeal does not cure an unfair hearing*.'"

20. In *Uzoh v. Minister for Justice, Equality and Law Reform* (Unreported, Birmingham J., 10th April, 2008), the court refused certiorari of the RAC decision and held that the applicant should pursue his remedy by way of appeal to the RAT. Whereas in *Stefan v. Minister for Justice, Equality and Law Reform* [2001] 4 I.R. 203, at the hearing of the matter at first instance, part of an answer at interview was not translated. The decision was given against the applicant. The High Court granted *certiorari* of the first instance decision. On appeal to the Supreme Court, it was held that the decision at first instance was reached in breach of fair procedures and therefore *certiorari* rather than an appeal was the correct procedure. In the course of her judgment, Denham J. stated as follows:-

> *"The original decision was made in circumstances which were in breach of fair procedures and which resulted in a decision against the appellant on information which was incomplete. The appeals authority process would not be appropriate or adequate so as to withhold certiorari. The applicant is entitled to a primary decision in accordance with fair procedures and an appeal from that decision. A fair appeal does not cure an unfair hearing."*

21. In *TTA v. Minister for Justice, Equality and Law Reform* [2009] IEHC 215, it was held that while it is possible for the court to intervene to quash a finding made by the RAC, notwithstanding the existence of a right of appeal to the RAT, the court should only do so in "*exceptional and clear cases where it is necessary to do so*". In the course of his judgment, Cooke J. stated as follows:-

> *"It follows from this case law in the Court's view, and it is accepted by both sides in the present case, that certiorari can, in principle, issue to quash the report and recommendation of the Refugee Applications Commissioner under the Act even where an appeal is available and has been initiated in good time. However, it is now equally clear that this Court should only intervene in exceptional and clear cases where it is necessary to do so. Once again, I express my agreement with the appraisal by Hedigan J. in his description of the circumstances which can call for such intervention given at para. 45 of his judgment in the N case where he says:-*
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> > *'It is clear that it is only in very rare and limited circumstances indeed that judicial review is available in respect of an ORAC decision. The investigative procedure with which ORAC is tasked must be properly conducted but the flaw in that procedure that entitles an applicant to judicial review of an ORAC decision must be so fundamental as to deprive ORAC of jurisdiction. The Courts, the applicants themselves and the general public have a right to expect that no such fundamental flaw should ever occur in such an application. An applicant must demonstrate a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal to the Refugee Appeals Tribunal. When such a clear and compelling case is not demonstrated, the applicant must avail himself of the now well established procedure that has been set up by the Oireachtas which provides for an appeal to the Tribunal.'*
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> *In my own judgment in the Diallo case I endeavoured to summarise the applicable criteria when I said at para. 21:-*
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> > *'It follows accordingly from this case law, that leave to apply for judicial review to quash a report and recommendation of the Commissioner should only be granted in exceptional cases and that to bring an application within the category of such cases it is necessary to advance substantial grounds for the existence of some fundamental flaw or illegality in the Commissioner's report such that a rehearing upon appeal before the Tribunal will be inadequate to remedy it.'"*

22. I am satisfied that in the circumstances of this case, the applicant should be allowed to pursue her judicial review proceedings, notwithstanding that she had submitted an appeal to the RAT and that that body had issued its decision based on a papers only appeal. There cannot be an estoppel against the applicant because, in the letter accompanying the notice of appeal, it was stated that it was being lodged without prejudice to the commencement of judicial review proceedings against the RAC decision.

23. As the RAC had determined that the appeal in this matter should be based on the papers only, due to the delay in making an application for asylum on behalf of the applicant, it is an appropriate case in which to permit the applicant to proceed by way of judicial review of the RAC decision.

The Substantive Issue

24. One can now turn to consider the substantive issue, which was whether the RAC acted unlawfully when it had regard to the findings in the mother's application when considering the applicant's application for asylum. Detailed adverse credibility findings had been made against the mother in her application to the RAC and on appeal to the RAT. Both bodies found against the applicant's mother in her application. On the basis of her inability to answer simple questions regarding the physical features in Jos, it was doubted that she was from the Jos area at all. Her identity was not accepted, it being stated that "*her true identity is also in doubt*". The route that she took to Ireland was not accepted, nor was it accepted that she had been in Nigeria during the period referred to in her claim.

25. The applicant has submitted that in these circumstances, it was unsafe and unfair to rely entirely on the dismissal of the mother's claim in disposing of the applicant's claim. It was submitted that the RAC should have carried out a separate appraisal of the case from the infant's point of view.

26. In this case, the applicant's mother had confirmed at interview that her child's fears were solely based on her own fears of returning to Nigeria. The following is the relevant section from the s. 11 interview:-

"Q.7 Do you fear that somebody would harm her in any way or persecute her?

A. Yes, because of the religious crisis in Jos, they're killing the women and children and this is why I left Nigeria.

Q.8 Are your child's fears solely based on your own fears in returning to Nigeria?

A. Yes.

Q.9 Who do you fear would harm her, is there anyone specifically in Nigeria you fear will deliberately harm her?

A. No it is just that these things happen all the time, every so often in Nigeria, and she is only a child, a female child. Children can be easily harmed or get abused. There are always clashes happening between the Muslims and Christians and she is only a little girl and can get harmed. I would not want this for my child."

27. The applicant has submitted that in light of the decision in *MM v. Minister for Justice, Equality and Law Reform* (Case C – 277/11), no reliance should have been placed on the mother's refusal of refugee status. That refusal should not have been before the decision maker at all.

28. The *MM* case involved the right to make separate representations and to have these considered when making an application for subsidiary protection after a failed application for refugee status. In the present case, a separate case was put forward on behalf of the infant applicant. It was the infant's mother who expressly confirmed in the s. 11 interview that the child's fears were solely based on her own fears in returning to Nigeria. Thus, it was the infant's mother who provided the link between her case and the infant's case.

29. In *JO (A Minor) v. Minister for Justice, Equality and Law Reform* [2009] IEHC 478, Cooke J. stated as follows in relation to the analysis of a claim put forward by a mother on behalf of her three month old child:-

"9. It has not been suggested that there is any other fact, circumstance or consideration peculiar to the child's claim to asylum that is not part of the mother's claim. Her prospect of being declared to be a refugee is entirely dependent upon the fate of her mother's claim. It is true that each claimant is entitled to have his or her claim to asylum subjected to individual examination and decision but that does not mean in the Court's judgment that the Commissioner is obliged to conduct some sort of pro-forma separate investigation into the potential claim of a three month old child when the claim explicitly made on the child's behalf is that of her mother and no distinct fact or consideration is put forward as to how or why the child's risk of persecution is in any way different from that of the parent. This is particularly so where the claim to a fear of persecution is not based on some external threat or on the general conditions in a country of origin to which members of some ethnic or social group are exposed but on the purely domestic, private source of potential harm, in this case, the threats of the father's family.

10. It must be borne in mind that the function and duty of the Commissioner is to examine the application, to interview the applicant, to carry out any enquires that might be appropriate to verify the claim made and then to report on this to the Minister with the recommendation as to whether the applicant has or has not established the ingredients of refugee status. In circumstances where this three month old child's claim is identical to and dependent upon the claim made by the mother, it is difficult to envisage what further investigation or enquiry might have been carried out into the child's claim, nor has any been illustrated or suggested on her behalf."

30. See also the decision in *KS (A Minor) v. Refugee Applications Commissioner* [2007] IEHC 338, to like effect.

31. I am satisfied that the RAC was entitled to have regard to the mother's application and the findings thereon when considering the applicant's claim herein. In reality, an eight month old child cannot have fears of persecution; her fears had to be the same as her mother's. The fact that the RAC and RAT had disbelieved the mother and had not accepted her complaints of past persecution, was something to which the RAC was entitled to have regard when considering the applicant's claim to asylum.

State Protection

32. Although it was not necessary to do so, the Commissioner went on in her decision to consider the issue of the availability of State protection in Nigeria. As the applicant had never been to Nigeria, it had not been necessary for her to claim State protection. The Commissioner noted that it had been put to the applicant's mother that she would have the option of reporting her fears to the police in Nigeria if she thought that her daughter was at risk of being harmed. She stated:-

"These things could happen so easily and the police may not be there. They would not be able to offer protection immediately and it could be too late."

33. The applicant submitted that the failure to address country information was unlawful in light of the mother's assertion as to what might occur in Nigeria if the applicant were to be returned there.

34. The respondent submitted that the applicant's fears involved non-State persecution. It was submitted that there is a presumption that a State can provide protection for its citizens, unless the applicant shows otherwise (see *Ward v. Canada* [1993] 2 SCR 689 and *Horvath v. Secretary of State for the Home Department* [2000] IMLR 15).

35. I am not satisfied that the Commissioner was entitled to make this finding in the absence of any evidence that State protection would in fact be available to the applicant should the need arise. This finding of the Commissioner cannot stand.

Internal Relocation

36. The question of internal relocation had been raised with the applicant's mother at interview. She was asked if she could relocate to another area of Nigeria, such as Lagos, to avoid the religious clashes in Jos. The mother stated: "*it could happen anywhere in Nigeria*".

37. The Commissioner found that the applicant was an eight month old infant who would have the support of her mother in Nigeria. She found that it would not be unduly harsh for the applicant to live with her mother in a part of Nigeria, such as Lagos, to avoid the problems in Jos.

38. The applicant submitted that the onus of proof in relation to the availability of internal relocation lay with the RAC. It was

submitted that this onus of proof was not met by the Commissioner. The appropriate inquiry should have extended beyond the supposed safety of the applicant in a place of relocation, to the reasonableness of such suggestion in the light of the personal circumstances of the applicant.

39. The respondent submitted that the Commissioner had regard to the Regulations and noted that even where there is a well founded fear of persecution that a decision maker can look at whether an applicant could reasonably be expected to stay in a part of her country where there is not such fear. The Commissioner considered the individual circumstances of the applicant, namely, that she was an eight month old infant who would have the support of her mother in Nigeria and also the issues of safety and reasonableness. It was noted that the mother claimed that her daughter was at risk in Jos and that the issue of whether she could relocate to Lagos had been put to her at interview. It was not accepted that the applicant could not relocate to that city.

40. I am satisfied that the issue of internal relocation had been canvassed with the applicant's mother at interview. The Commissioner's finding that the applicant's mother had not provided sufficient evidence to indicate that her daughter would not be safe if she were to be with her in an area away from Jos, such as Lagos, was a finding that was reasonably open to the Commissioner in the circumstances. This finding should not be disturbed.

Failure to Apply a Forward Looking Test
41. The applicant submitted that the assessment of the applicant's claim required a proper forward looking test regardless of the credibility findings. The applicant referred to *GY v. Refugee Appeals Tribunal* [2008] IEHC 424, where Edwards J. stated as follows:-

> *"Fourthly, the court is of the view that the Tribunal Member does appear to have foreclosed on speculation regarding the possibility of the applicant being exposed to future persecutory risk because of the doubts that he had with respect to the applicant's credibility. He should not have done so. In Da Silveira v. Refugee Appeals Tribunal (Unreported, High Court, Peart J. 9th July, 2004), Peart J. stated:*
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> > *'A lack of credibility on the part of the applicant in relation to some, but not all, past events, cannot foreclose or obviate the necessity to consider whether, if returned, it is likely that the applicant would suffer Convention persecution.'"*

42. Reference was also made to the decision in *IB v. Refugee Appeals Tribunal* [2013] IEHC 467, where Mac Eochaidh J. considered the requirement to apply a forward looking test in the following terms:-

> *"The first ground of challenge advanced by the applicant is that the Tribunal failed to inquire whether there was a risk of future persecution if the applicant were repatriated, negative credibility findings notwithstanding. In support of his claim, Counsel for the applicant refers to M.A.M.A. v. The Refugee Appeals Tribunal, the Minister for Justice, Equality and Law Reform and the Attorney General [2011] 2 I.R. 729. I accept that this case is authority for the proposition that there are circumstances in which an asylum decision maker is required to apply a forward looking test, in spite of negative credibility findings. In other words, even when aspects of an asylum applicant's narrative are disbelieved, a decision maker might be required to ask whether there is a risk of future persecution should the applicant return home. Cooke J. (in M.A.M.A. supra) said as follows:*
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> *'[17] ...The sole fact that particular facts or events relied upon as evidence of past persecution have been disbelieved will not necessarily relieve the administrative decision-maker of the obligation to consider whether, nevertheless, there is a risk of future persecution of the type alleged in the event of repatriation. In practical terms, however, the precise impact of the finding of lack of credibility in that regard upon the evaluation of the risk of future persecution must necessarily depend upon the nature and extent of the findings which reject the credibility of the first stage. This is because the obligation to consider the risk of future persecution must have a basis in some elements of the applicant's story which can be accepted as possibly being true. The obligation to consider the need for 'reasonable speculation' is not an invitation or pretext for gratuitous speculation: it must have some basis in, and connection to, the apparent circumstances of the applicant.'"*

43. Mac Eochaidh J. continued at p. 5 of his judgment:-

> *"Where the decision maker has come to the firm view that no past persecution happened because of political opinion and activities, there is no need to examine whether there is a risk of future persecution because of political opinions and activities. No believable part of the applicant's claim required the decision maker to consider the risk of future persecution."*

44. I am satisfied that where the Commissioner had regard to the fact that no part of the applicant's mother's claim had been found to be credible, there was no obligation to apply a forward looking test in the circumstances. The Commissioner's decision cannot be faulted on this ground.

Conclusion
45. For the reasons set out herein, I refuse the application to quash the report of the Commissioner dated 15th March, 2011, and confirmed on 23rd March, 2011.