

**THE HIGH COURT
JUDICIAL REVIEW**

[2004 1187 J.R.]

BETWEEN

SOLA OLATUNJI

APPLICANT

AND
REFUGEE APPEALS TRIBUNAL
(TRIBUNAL MEMBER: ANNE TAIT)

AND MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

Judgment of Ms. Justice Finlay Geoghegan delivered the 7th day of April, 2006.

Background

1. The applicant is Nigerian. She was born on 16th November, 1977. She is a Christian and of Yoruba ethnicity. Up to 1998 she lived with her father, mother and three brothers in Ibadan. Her father died in 1998. He appears to have been a businessman and considered wealthy. He left his property to the applicant's mother, who was his senior wife, and two other junior wives. Under the customary law, the father's family sought to appropriate his estates to the detriment of his wives and their children. By tradition, the wives were to be married to the deceased's brothers. One of the younger wives died and the other is stated to have gone mad and the applicant believes that this happened through the medium of magic and/or the use of Yoruba cursing.

2. The applicant's mother was to be married to her deceased husband's younger brother. She did not consent to the forced marriage and fled the house and ultimately came to Ireland, arriving on 15th October, 1998. She applied for asylum in Ireland and ultimately, by a decision of 25th October, 2000, by the Refugee Appeals Authority, it was recommended that she be granted asylum. She has been granted asylum in Ireland.

3. In the meantime, the applicant also left her deceased father's home and went to live with one of her father's brothers. He sent her back to the father's home and to the father's brothers living there. She remained there from 1998 to 2000, being looked after and supported by the dead father's brothers. In 2000, she states that they wanted to sell her father's home and attempted to force her to marry an old man of about 60 years. She did not wish to do this and upon refusing, her paternal uncles started to threaten her and she feared she would be killed. She states that she then left and went to her boyfriend's house in Lagos. She had known the boyfriend since secondary school. She was supported by her boyfriend in Lagos and initially, she states the relationship was all right. She then became pregnant and miscarried. Subsequently she became pregnant again and miscarried for a second time. Following the second miscarriage, she alleges that her boyfriend became abusive towards her. She also states that a man used to come to visit her boyfriend and give him a dried herb to take. The applicant overheard them talking and believed that she was going to be involved in rituals and was to be offered as a human sacrifice. She then left and went to a church for refuge and states that she met a friend of her deceased father's who helped her and arranged through an agent to get her out of Nigeria. With the assistance of the agent she travelled to Ireland via Germany. She arrived in Ireland on 15th November, 2002, and made an application for a declaration of refugee status. Thereafter in normal course she completed a Form ASY/1 and was interviewed by the Office of the Refugee Applications Commissioner on 15th April, 2003. In June, 2003 she received a copy of the reports and results of investigation pursuant to ss. 11(2) and 13(1) of the Refugee Act, 1996 from the Office of the Refugee Applications Commissioner in which it was recommended that her application for a declaration of refugee status be refused. She then appealed to the Refugee Appeals Tribunal. Her appeal was initially listed for hearing for 18th September, 2003. At the commencement of that hearing, counsel on her behalf sought a copy of the decision recommending that her mother, Grace Olatunji, be granted refugee status in the State. The hearing was adjourned to allow the Tribunal consider the request. The Tribunal subsequently refused to release or disclose to the applicant or her legal advisers the decision recommending that her mother be granted a declaration of refugee status. Judicial review proceedings were commenced and compromised on the basis of the release of the decision in her mother's case.

4. An oral hearing was held in the applicant's appeal on 21st October, 2004, and by letter of 26th November, 2004, she was furnished with a decision of the Tribunal Member dated 10th November, 2004, rejecting her appeal and affirming the recommendation of the Refugee Appeals Commissioner.

5. Leave to issue judicial review was sought by notice of motion dated 20th December, 2004. By order of 18th April, 2005, leave was granted. The applicant primarily seeks an order of certiorari quashing the decision of the first named respondent of 26th November, 2004, and the recommendation of the Tribunal Member of 10th November, 2004.

Claim for Certiorari

6. The claim of the applicant for an order of *certiorari* is made on multiple grounds in the statement of grounds. The application is grounded upon an affidavit of the applicant. The notice of opposition is verified by two affidavits sworn on behalf of the respondent. Those affidavits deal with one alleged factual error and the practice of the Garda National Immigration Bureau at Immigration Control at a port of entry. The affidavits do not dispute any averment of the applicant as to what took place at the oral hearing before the Tribunal Member.

The Decision

7. The Tribunal Member has given a very detailed and thorough decision.

8. From the applicant's submissions, as noted in the decision, it appears that the claim for a declaration of refugee status was likewise made on multiple grounds. Nevertheless, in the operative part of the decision following the heading "Assessment of the applicant's claim" the Tribunal Member referred to evidence of the applicant "indicating a subjective fear of a forced marriage in Ibadan by her deceased father's family and a threat to her life and upon relocating to Lagos to her boyfriend a subjective fear that she would become the victim of a ritual practice". The latter in particular appears to have related to a fear of charms. It is by reference to these subjective fears that the Tribunal Member assessed the claim to be a refugee.

9. In relation both to the forced marriage (or risk to her life by reason of her unwillingness to cooperate) and subjection to ritual practices the threat was alleged to be from non-state agents. Counsel for the respondent submitted that this Court should treat the decision as being one which rejected the applicant's claim solely on the basis that the Tribunal Member had concluded that the applicant had not discharged the onus on her of establishing that Nigeria was unable or unwilling to give her protection against the alleged persecution from the non state agents. It was submitted that in accordance with the principles in the decision of the

Canadian Supreme Court in *Canada (Attorney General) v. Ward*, [1993], 2 S.C.R. 689, applied in this jurisdiction in *Kramarenko v. Refugee Appeals Tribunal*, [2004] 2 I.L.R.M. 550 that on the evidence the Tribunal Member correctly rejected the claim by reason of the absence of proof of Nigeria's inability to protect the applicant. It was further submitted that insofar as there were errors made in the assessment (which were not conceded) or there was a breach of s. 16(8) of the Refugee Act, 1996 or of fair procedures, that those were in relation to matters which were peripheral and not central or material to the decision.

10. The Tribunal Member considered the alleged fear of persecution to be of persecution by non-state agents and therefore quite properly considered whether or not Nigeria was unable or unwilling to provide protection to the applicant. However, it appears to me to be an inescapable conclusion from an overall reading of the decision that the Tribunal Member also considered the credibility of the applicant or the credibility of the claim made by the applicant and that such was material to her decision.

11. At the commencement of the assessment of the applicant's claim at p. 14 the Tribunal Member stated "The first question that must be determined is the Applicant's credibility". She then continued, "Having heard the applicant giving evidence and having seen the applicant present her evidence at hearing the following occurs to this Tribunal Member in relation to the applicant's credibility:". Thereafter the Tribunal Member set out in paras. 1 to 8 inclusive, her assessment and findings. In para. 8 on p. 19, she stated, *inter alia*:

"... it is found that the applicant has not discharged the necessary burden of proof and has not submitted a well founded fear of being persecuted of a credible calibre. ... As no credible evidence of persecution has been given the matter of internal relocation does not arise. ..."

12. Credibility was central to the decision reached. Further the credibility of the applicant in relation to why she did not seek state protection particularly in Ibadan is a material part of the decision. Accordingly, it appears that the Court must consider those grounds relied upon by the applicant which challenge the manner in which the Tribunal Member assessed the credibility of the applicant's claim or the basis upon which certain findings which relate to credibility were made.

13. The Tribunal Member rejected the credibility of the claim made by the applicant that in 2000 she was forced to leave her home and go to Lagos where she found refuge with her boyfriend, by reason of threats made against her by the uncles because of her unwillingness to enter into marriage with the 60 year old man. In assessing this part of the claim at the end of para. 4 on p. 16, having referred to certain country of origin information, the Tribunal Member stated:

"... It is noted that the applicant has been resourceful enough to move from Ibadan to Lagos and indeed from Lagos to this jurisdiction. These resources could have been applied to obtain police protection in the very large city of Ibadan, given that it was her father's family only she feared, and further, she might have applied her resources in the even larger city of Lagos to obtain police protection and to make due complaint in relation to the forced marriage. It is considered, overall, that she left Ibadan of her own volition to go to live with her boyfriend in Lagos."

14. It is to be noted from p. 4 of the decision that the Tribunal Member did ask questions of the applicant. She asked about her failure to contact the police in Nigeria and the applicant confirmed that she never sought police protection. She is recorded as stating that she had no money and that in Nigeria the police would not help without money.

15. The materiality of the question as to whether the applicant voluntarily left Ibadan to go to Lagos to the reasoning of the Tribunal Member in relation to the availability to the applicant of internal protection in Nigeria is apparent from the last portion of para. 6 of the assessment on p. 18 of the decision, where the Tribunal Member stated:

"It is considered that this applicant could have accessed internal protection as she has not offered any evidence to suggest that this protection would either be unforthcoming or would be ineffective and/or ineffectual. It is considered that she did not seek internal protection in Ibadan as she left to go to Lagos of her own volition to live with her boyfriend. ..."

16. It is in relation to the conclusion in the last sentence in particular that complaint is made on behalf of the applicant. In the grounding affidavit of the applicant at para. 19, she denies that she ever indicated to the Tribunal that she left the home controlled by her father's brothers because of her desire or wish to go and live with her boyfriend in Lagos. Further, she states that at no stage during the hearing was it ever suggested to her by any party, including the Tribunal Member or the Presenting Officer for ORAC that she left for Lagos because she wished to, nor was the credibility of the account of events that she presented in relation to being forced out of her home by reason of being forced into a marriage against her will ever questioned, nor was it suggested to her that her account of events was untruthful or implausible or not to be believed. Further at paragraph 30 of her affidavit, she states (and it is not disputed) that her legal advisors had told the Tribunal Member that her mother was available to give evidence if any issue arose regarding credibility in relation to her family circumstances and at no stage the Tribunal Member indicated that such an issue arose.

17. I was referred to the decision of Clarke J. in *Idiakheua v. Minister for Justice, Equality and Law Reform and R.A.T.* (Unreported, High Court, Clarke J.,

18. 10th May, 2005) in which he considered the requirement on a member of the R.A.T. to put matters of concern and/or perceived discrepancy to an applicant and give them an opportunity of dealing with same. In that decision, he stated at pp. 9-10:

"If a matter is likely to be important to the determination of the RAT then that matter must be fairly put to the applicant so that the applicant will have an opportunity to answer it. If that means the matter being put by the Tribunal itself then an obligation so to do rests upon the Tribunal.

...

This remains the case whether the issue is one concerning facts given in evidence by the applicant, questions concerning country of origin information which might be addressed either by the applicant or by the applicant's advisors or, indeed legal issues which might be likely only to be addressed by the applicant's advisors.

In setting out the above I would wish to make clear that the obligation to fairly draw the attention of the applicant or the applicant's advisors to issues which may be of concern to the Tribunal arises only in respect of matters which are of substance and significance in relation to the Tribunal's determination."

19. I would respectfully agree with the above. On the facts of this application and having regard to the manner in which the Tribunal Member approached the applicant's claim, the question as to whether the applicant was or was not forced to leave her home is a matter which was of substance and significance in relation to the Tribunal's determination. Accordingly, prior to the Tribunal Member being entitled to reach a conclusion, adverse to the applicant's claim that she left Ibadan of her own volition to go to live with her boyfriend in Lagos, the Tribunal Member was under an obligation to put to the applicant the relevant matters which appeared to the Tribunal Member to support such a conclusion and give the applicant an opportunity of commenting or dealing with same.

20. On this ground alone, I would allow the claim and grant an order of *certiorari*. As the matter must be reheard it appears appropriate to consider certain of the further grounds relied upon.

Failure to disclose relevant information

21. The applicant submits that the decision of the Tribunal Member indicates that the Tribunal Member relied upon three pieces of information which were not disclosed to the applicant and which the applicant and her advisers had no opportunity of commenting upon. This is stated to be in breach of s. 16(8) of the Refugee Act, 1996 which provides:

"16-(8) The Appeal Board shall furnish the applicant concerned and his or her solicitor (if known) with copies of any reports, observations, or representations in writing or any other document, furnished to the Appeal Board by the Commissioner copies of which have not been previously furnished to the applicant pursuant to section 11 (6) and an indication in writing of the nature and source of any other information relating to the appeal which has come to the notice of the Appeal Board in the course of an appeal under this section."

22. The information which allegedly was not disclosed is:

(1) The UNHCR position paper on "a fear of being charmed" referred to in para. 2 at p. 15.

(2) The information in relation to African culture and family from which the Tribunal Member concluded at the end of para. 3 on p. 15 that the applicant at twenty years of age going on twenty-one years of age would have been considered to be independent of her parents.

(3) Up to date information (October, 2004) from the Garda National Immigration Bureau in relation to the procedure at Dublin Airport referred to at para. 7 on p. 18.

23. The obligation in s.16 is a mandatory obligation. The obligation would appear to include all information relevant to the appeal. The Tribunal Member appears to have considered each of the above relevant to the appeal insofar as she has referred to them and relied on them in her reasoning. The third matter appears of particular importance insofar as it appears from the findings made in para. 7 that the Tribunal Member relied upon this information to reject entirely "from a credibility point of view" the applicant's account of her arrival and passage through Immigration at Dublin Airport and hence relevant to the assessment of the applicant's overall credibility.

24. I would also grant *certiorari* on this ground.

Factual error

25. There is an acknowledged factual error in the decision of the Tribunal. When the applicant left her boyfriend's home in Lagos, she went to a church for refuge. There she met her deceased father's friend who said he would help her and he arranged through an agent to get her out of Nigeria. This is correctly recorded at p. 3 of the decision. However, in her assessment, the Tribunal Member at two places, refers to the fact that the applicant sought assistance whilst in the church, of her deceased father's brother. This is in para. 5 on p. 16 and para. 6 on p. 18. In both instances, the protection of this individual is identified by the Tribunal Member as being relevant to the ability of the applicant to access internal protection. On p. 16 the Tribunal Member stated:

"She sought the assistance of the Church and she further sought the assistance of her father's brother. It is implausible to this Member that her father's brother and/or the Church might not have sought police protection on behalf of the applicant and/or that the applicant might not have sought police protection on her own behalf in circumstances of such a threat as becoming the victim of a ritual practice. It is rejected that there was no protection available to the applicant..."

26. And on p. 18:

"It is further considered that she could have accessed internal protection in relation to her suggested difficulties with her boyfriend in Lagos. Further, it is obvious that she continued to have the protection of her father's brother and his assistance, which protection and assistance compels this Member's view that together internal protection could have been accessed which internal protection is, as disclosed by Country of Origin information effective in such circumstances."

27. Ms. Anne Roche, an Executive Officer with the Tribunal, swore an affidavit in support of the notice of opposition in which she stated that when this matter was drawn to the attention of the Tribunal Member that she "confirmed that she was aware that the person in question was not the applicant's father's brother and that where this is stated in the decision is simply an error". It is further stated by Ms. Roche that the Tribunal would propose correcting the error made in the references to the applicant's father's brother where this appears on pp. 16 and 18 of the decision, pursuant to para. 5 of the Refugee Act 1996 (Appeals) Regulations, 2003 (S.I.No. 424 of 2003) but that this is not being done in the course of these proceedings.

28. This Court can only deal with the decision in the form in which it exists at the date of the hearing. No correction has been made. If this were the only ground of challenge then the Court might as a matter of discretion take into account any *intra vires* correction of an error sought to be made prior to determining the challenge. However, on the facts herein, this is not the only ground of challenge. I would also observe that where the Tribunal seeks to correct a decision which was already subject to an application to the court that the correction should be made by the member who made the decision and any necessary explanation also given by the member on affidavit.

Other Grounds

29. As already stated multiple grounds were advanced on behalf of the applicant. It is unnecessary having regard to my conclusions above to consider them all. However as the matter must now be reheard I think it appropriate to indicate that it appears to me that the Tribunal Member correctly considered that family reunification was not a matter for the Tribunal. The appeal related to the applicant's personal claim for a declaration of refugee status and was not advanced on the basis that she was dependent on her mother.

30. Also I would reject the ground advanced that the applicant was entitled to a presumption of refugee status by reason of her mother's declaration. Whilst the mother's history and decision are relevant to an overall assessment of the applicant's claim and should be taken into account, the factual basis of the claims are different and the Tribunal Member correctly decided that the applicant's claim must be separately determined without the benefit of any special presumption.

Relief

31. There will be an order of certiorari on terms of paragraph D of the statement of grounds.