

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2011 No. 316 J.R.]**

**IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED) IN THE MATTER OF THE IMMIGRATION ACT 1999 IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003 SECTION 3 (1)**

**BETWEEN**

**B.Y. (NIGERIA)**

**APPLICANT**

**AND**

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

**RESPONDENTS**

**JUDGMENT of Ms. Justice Stewart delivered on the 5th day of February, 2015**

1. This matter was heard on the 14th day of November, 2014, by way of a 'telescoped' application for leave to apply for judicial review together with the substantive leave sought.

2. The applicant seeks an order of *certiorari* by way of an application for judicial review quashing the decision of the first named respondent to affirm the recommendation of the Refugee Applications Commissioner and notified to the applicant by letter dated the 7th April, 2011. The applicant further seeks an order remitting the appeal of the applicant for determination *de novo* by a separate member of the Refugee Appeals Tribunal (RAT).

**BACKGROUND**

3. The applicant is a Nigerian national born, on the 12th December, 1969. She was a police woman and was forced to flee Nigeria as a result of being repeatedly targeted by a criminal gang, who had already, she alleges, killed her mother, husband and daughter. She arrived in Ireland on the 24th November, 2010. She applied for asylum at the Offices of the Refugee Applications Commissioner (ORAC) on the 25th November, 2010, claiming a fear of persecution in Nigeria from a criminal gang. The applicant maintained during the asylum process that she had 9 years of formal education and had worked for 21 years as a police officer in Nigeria. She submitted a Nigerian 'police warrant card' dated 2nd July, 2004, as her only evidence of identity.

4. She completed an ASY1 form on the 26th November, 2010, and on the 6th November, 2010, she completed the application for refugee status questionnaire.

5. On the 27th day of January, 2011, she was interviewed pursuant to s.11 of the Refugee Act 1996 (as amended). The interview was conducted in English.

6. By letter in writing dated the 7th February, 2011, she was advised by ORAC that the recommendation was that she should not be declared to be a refugee and a s.13(1) report, pursuant to the Refugee Act 1996 (as amended), was included with the said letter.

7. The report concluded that the applicant had not established a well-founded fear of persecution as required by the s.2 of the Refugee Act 1996 (as amended). The report found, pursuant to s.13(6) of the Refugee Act 1996 (as amended), that the applicant had not sufficiently displayed over the course of the s.11 interview that she was a serving police officer in the city of Akure as claimed.

8. The Commissioner further found that the applicant had no supporting knowledge of a significant criminal event in that area of Nigeria with links to the police station she stated she had been affiliated to and had no documentation to support her contention that the events described in the questionnaire actually occurred.

9. Having regard to these findings, s.13(6)(b) of the Refugee Act 1996 (as amended) applied to this application; the effect of such was that any proposed appeal, by the applicant in respect of the Commissioner's findings, to the tribunal, would be by way of a paper review only.

10. The Commissioner found that the applicant made statements or provided information in support of the application of such a false, contradictory, misleading or incomplete nature as to lead to the conclusion that the application is manifestly unfounded.

11. By letter dated the 1st March, 2011, the applicant's solicitors wrote to the office of the Refugee Appeals Tribunal (RAT) enclosing a form 2 (notice of appeal) and submissions in respect of the appeal, addressing the matters on which the Commissioner had found against the applicant.

12. A letter in writing, which was undated, was sent to the applicant together with a copy of the decision of the tribunal member dated the 1st day of April, 2011.

13. The tribunal member affirmed the recommendation of the Refugee Applications Commissioner, which was to deny the applicant her application for refugee status.

14. It is against the findings of the tribunal member that these judicial review proceedings were commenced.

## SUBMISSIONS OF THE PARTIES

15. The applicant's submissions before the Court centred primarily on the provisions of s.13(6) of the Refugee Act 1996 and, in particular, focused on the fact that the appeal to the Refugee Appeals Tribunal was conducted on the basis of a paper review only.

16. Mr. Conlon S.C., on behalf of the applicant, submitted that under s.13 of the 1996 Act (as amended) there is a provision for an appeal to be made on the papers but permits this in limited and prescribed circumstances.

17. Section 13 (5) of the Refugee Act 1996 (as amended) provides as follows:

"Where a report under subsection (1) includes a recommendation that the applicant should not be declared to be a refugee and includes among the findings of the Commissioner any of the findings specified in subsection (6), then the following shall subject to subsection (8) apply:

a) The notice under paragraph (b) of subsection (4) shall, notwithstanding that subsection, state that the applicant may appeal to the Tribunal under section 16 against the recommendation within 10 working days from the sending of the notice, and that any such appeal will be determined without an oral hearing."

18. S.13 (6) of the Refugee Act 1996 (as amended) provides:

"The findings referred to in subsection (5) are –

(a) that the application showed either no basis or a minimal basis for the contention that the applicant is a refugee;

(b) that the applicant made statements or provided information in support of the application of such a false, contradictory, misleading or incomplete nature as to lead to the conclusion that the application is manifestly unfounded;

(c) that the applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State;

(d) the applicant had lodged a prior application for asylum in another state party to the Geneva Convention (whether or not that application had been determined, granted or rejected); or

(e) the applicant is a national of, or has a right of residence in, a safe country of origin for the time being so designated by order under section 12(4)."

19. The findings by the Commissioner in this case were pursuant to s.13 (6)(b) and the tribunal member proceeded to conduct the appeal by way of a paper review.

20. Counsel for the applicant opened at length to the Court the decision of Mr. Justice Cooke in the case of *S.U.N. (South Africa) v. Refugee Applications Commissioner, the Minister for Justice, Equality and Law Reform and Attorney General* [2012] IEHC 338, which was delivered on the 30th March, 2012,

21. It is accepted and apparent that the decision in the case before Mr. Justice Cooke was pertinent to subs.13(6)(e), i.e. the applicant is a national or has a right of residence in a safe country of origin for the time being so designated by order under s.12(4). However, the judgment does consider the problem presented to courts in relation to findings of credibility when the appeal is conducted by way of a paper review only.

22. Mr. Conlon S.C. identified two grounds in which the Commissioner found against the applicant, namely as follows:

(a) That the applicant was not a police woman in Nigeria

(b) That the Commissioner made an adverse finding in relation to her knowledge, and the extent of that knowledge, of a robbery that took place in or about Akore in Nigeria.

23. He points out that the State both in the written submissions and again before the Court states clearly that the tribunal member accepted that the applicant was a police woman in Nigeria and on that basis he submits that the impugned decision is flawed.

24. In relation to the second ground he submits that this was not addressed at all in the report of the tribunal member notwithstanding that it was raised in detail in the notice of appeal and the applicant further contends that the Commissioner, in the s.11 interview, misrepresented the newspaper report about the robbery in question. He further pointed out that s.16 (16) of the Act requires the tribunal member to consider the notice of appeal and complains that the tribunal member does not appear to deal with this matter in any way.

25. On this basis, he says that the second ground of reasoning in relation to the Commissioner's finding is also flawed.

26. He then contends that the tribunal member then went on to make credibility findings against the applicant which were not confined to the s.13 (6)(b) findings that the Commissioner had given. Thus, *a fortiori*, he submits that a problem arises when making a finding that is not related to the reasoning in the s.13(6)(b) decision. He submits that the tribunal member accepted that she was a Nigerian police woman and failed to deal with the inaccurate way the details of the robbery were put to the applicant at the interview and, on that basis, the applicant submits that it is not open to the RAT to base the judgement on a lack of credibility. The applicant submits that this raises question marks over the decision of the tribunal member.

27. Ms Sinead McGrath B.L., in response, maintains that this ground advanced by Mr. Conlon at the hearing was not pleaded and was not adverted to in the legal submissions. While I accept that it may not have been pleaded in the precise terms advanced before the Court at the hearing, it seems to me, having gone through the papers in detail, and the amended written submissions of the applicant, that it was clear that a main component part of the complaint in relation to the RAT decision was the lack of an oral hearing afforded to the applicant and that, notwithstanding her absence from the appeal process, adverse credibility findings were made against her which differed from those made by the Commissioner.

28. Ms. McGrath contends that no complaint was made at any stage in relation to s.13(6)(b) and that there was no application made

to amend the proceedings or attempt to serve a notice of motion to bring about same and that this ground should fail on that reason.

29. I do not accept this contention and I think this ground for complaint is properly before the Court and I propose to deal with the matter on that basis.

## FINDINGS

30. It is important to point out that this is of course a judicial review application so this Court is not concerned with the merits or otherwise of the decision of either the Commissioner and/or the tribunal member. The function of this Court is to satisfy itself as to whether or not fair procedures were adhered to and that the applicant has been heard.

31. It is accepted on behalf of the applicants that the legislation and the procedures applied for allow for a paper-only appeal when certain specific findings are made by the Commissioner. The question of a paper-only appeal was considered by Ms. Justice H. Clark in *V.M. (Kenya) v. Refugee Appeals Tribunal & Ors* [2013] IEHC 24. That case concerned a finding pursuant to s (13)(6)(a) of the Refugee Act 1996 (as amended) and, therefore, involved a paper-only appeal to the RAT. At para.21 of her judgment Ms. Justice Clark states as follows:

"One further aspect of this case of serious concern to the Court is that the appeal was conducted without an oral hearing. The Court is powerless at this remove to review or amend the Commissioner's finding that s.13(6) of the Refugee Act 1996 applied on the facts relied on in the applicant's claim. The Court therefore looks with heightened vigilance at the process of the documentary appeal in circumstances where an appellant has no opportunity to appear and explain or expand on any perceived inconsistencies or deficits in his/her claim. Unlike when the appeal is conducted orally, the Tribunal had no particular advantage over the Court in the assessment of credibility of an appellant as the same papers are before the Court as were considered by the Tribunal. At its core, the appeal concerned the evaluation of the validity of the s.13 negative recommendation and the applicant's written submissions on the availability of State protection from Mungiki defectors."

The quotation continues at para. 22:

"It is by now very well established that when considering a documents-only appeal, the standard required is of necessity one of extreme care as the Tribunal Member has no opportunity to form a personal impression of the applicant as at an oral hearing."

I would wholeheartedly endorse the views expressed by Ms. Justice Clark in the aforementioned decision in relation to the extreme care that is required by tribunal members when conducting paper-only appeals.

32. It is accepted that the applicant being heard does not necessarily entail her being present at the appeal hearing. However, if the tribunal member is to effectively ignore and/ or abandon the findings made by the Commissioner and upon which the s.13(6)(b) decision was arrived at and then proceed to make further adverse credibility findings in respect of the applicant, it seems to me that natural and constitutional justice, fair procedure and *audi alteram partem* require that the applicant should be afforded the right to be heard and/or have an input into the process prior to the matter being determined.

33. For the reasons as set out above I would grant leave and I propose to grant an order of *certiorari* quashing the decision of the tribunal member made on the 1st day of April, 2011, and I will further make an order remitting the appeal of the applicant for a determination *de novo* by a different member of the Refugee Appeals Tribunal.

34. Clearly the applicant remains bound by the s.13(6)(b) finding and is confined to a paper-only appeal. It is not for this Court to direct the RAT as to how it should deal with the practicalities of the rehearing. It is a matter for the RAT to devise a mechanism to facilitate the applicant in having her views heard on the issues of concern to the tribunal member.