

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2006 486 JR**

**BETWEEN**

**O. A. AND R. A.**

**APPLICANTS**

**AND**

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

**RESPONDENTS**

**AND**

**THE HUMAN RIGHTS COMMISSION**

**NOTICE PARTY**

**JUDGMENT of Ms. Justice Clark, delivered on the 4th day of February, 2009.**

1. The applicants, who are mother and infant son, are failed asylum seekers and seek leave to apply for judicial review by way of *certiorari* of the decision of the Refugee Appeals Tribunal (RAT), dated 28th March, 2006, and received on the 3rd April, 2006, affirming the recommendation of the Office of the Refugee Applications Commissioner (ORAC) not to grant a declaration of refugee status to the applicants.

2. The notice of motion seeking leave to bring judicial review proceedings is dated the 26th April, 2006 and is eleven days out of time. The application for *certiorari* is based on an alleged error of law in that the decision-maker made unsustainable findings based on errors of fact and in failing to consider all the evidence called when coming to an adverse credibility finding. The applicant was originally represented by the Refugee Legal Service (RLS) and is now represented by a firm of private solicitors. It was established at the commencement of the case that the applicant, O. A., was bringing this application on her own behalf and on behalf of her infant son, R. A., who was born in Ireland on the 21st October, 2005. I am satisfied that the short delay in bringing the proceedings has been adequately explained and I allow the extension of time necessary to bring this leave application.

**Background to this application**

3. The applicant says that she fled Nigeria in fear of political persecution by reason of her husband's political beliefs and that she would remain in fear were she to return. She was born on the 3rd March, 1979, and is now 29 years old. She speaks English fluently and has had an extensive education. She was married in 2005 and is a native of Ogun State in Nigeria. Her husband is a political activist and an elected representative of the ruling party. She herself has never been involved in politics. Her husband was kidnapped from their flat one evening in April, 2005, but she was unharmed. For her own safety she moved an hour from her home into a safe house provided by security vigilantes from her street. While there, her husband telephoned her to say that the people who had kidnapped him were dangerous and she should keep away from the family home lest she be harmed by these people. She nevertheless left the secure house to return to her flat but while she was there she was forced to flee out a back window when people called to her door and refused to identify themselves when asked. She then went to her parents' home in a village which was two hours from her flat and remained there for six weeks. She left her parents' village because she had become ill as the water quality was bad and she was pregnant.

4. When she was returning to her family home she was approached by two men in the street who told her they knew where she lived and that she had 24 hours to produce her husband or she would be in trouble. She then went to a friend of her husband, who is a Member of Parliament, who with other friends made arrangements for her to leave Nigeria immediately. She arrived in Ireland on the 15th September, 2005, when she applied for refugee status. She travelled through London and Dublin airports without a passport and applied for asylum at the Refugee Application Centre and not at the airport. Her son was born five weeks after her arrival in the State.

5. At both stages of her asylum application she was found lacking in credibility and several discrepancies in her narrative were highlighted. The story presented was a relatively simple one stretching over a short, five month period. It was recounted first in her questionnaire and then in her interview with ORAC. The two accounts were found to be in conflict in material details which were raised at the interview and outlined at length in the s. 13 (1) report. The s. 13(1) report provides several other reasons for why the ORAC interviewer did not consider the applicant a refugee within the definition set out in s. 2 of the Refugee Act 1996.

6. The subsequent negative findings in the section 13(1) report were rejected in lengthy submissions made on the applicant's behalf in her Notice of Appeal. In particular the findings that the applicant was not targeted by anyone while living in the safe house in the village or while at her parents were criticised and the discrepancies which were identified in the s. 13(1) report were corrected or explained. At her appeal hearing, the applicant was further questioned in respect of the ORAC findings and the appeal submissions. Again the details of the five month period following the alleged kidnapping varied and the applicant was found to be vague. She now invites the Court to hold that the findings made by the RAT were factually wrong, based on conjecture and not supported by the facts.

7. As the variations in the key details of the applicant's story became material to findings of credibility, it is important to

view the various versions of the history which precipitated the applicant from a position of the pregnant wife of a member of the ruling party in Nigeria to a failed asylum seeker. The key issues on discrepancy appear to be (a) where she spent the immediate period following the alleged kidnapping, (b) how long she spent there and (c) whether she had contact with her husband following his kidnapping. There are other credibility issues which do not concern discrepancies in the detail of the applicant's narrative and I will return to those later.

8. The correct approach which a Court must take in reviewing a decision is to look at the decision as a whole rather than at isolated findings unless it can be shown that materially incorrect findings were the basis of a negative credibility assessment. I have therefore scrutinised all the material furnished including the agreed note of the RAT hearing.

### **The questionnaire**

9. In her application form the applicant described the kidnapping and the period thereafter. She said that that she contacted the street security the next day but

*"for two months I see that they cannot still say precisely or found out where my husband has been taken to. One day after my husband has been kidnap for about 3 months I heard a call from him and he told me what he has passed through and how he got escape from them. He also told me how dangerous they are and if they find him they will kill him."*

10. She then described how she was in her flat when she heard knocking at the door by people who would not identify themselves. She escaped through a back window and went to security men again. Seeing that her life was not safe she ran to a village in Ago-Iwoye about two hours away where she stayed for 6 weeks. She had problems with the lack of light, good food or good water and returned to her village where she was threatened by two men. There is neither mention of a safe house in this form nor any suggestion that she left the flat where she lived prior to her husband's abduction.

### **The ORAC interview**

11. At her interview with ORAC she said that after the abduction she stayed with the vigilantes for three weeks but as they did not do anything she went back to her flat where she heard knocking at the door and when they did not identify who they were she escaped through the window and went to Mamu where she stayed for six weeks. She left and was returning to her own home where on the way she was threatened by the two men so she went to her husband's friends who arranged her travel to Ireland. She said that she had no contact with her husband after he was kidnapped.

12. She was asked to explain the discrepancy between the period of her husband's kidnap and her flight from Lagos if she spent three weeks with the vigilantes and 6 weeks in the village which would bring her only to June. She then said that she spent 3 months with the vigilantes and not 3 weeks. When asked if she sought the assistance of the police at any point she answered no and the reason was that she did not think they could do anything and some of them are corrupt in Nigeria. Neither she nor her husband had any problems with politics or the police previously.

13. She confirmed that her only problem at her parents' village was with the water which was bad and that made her ill. When asked about her travel arrangements, she said that she had stayed one hour in London before coming to Ireland. She did not have a passport and merely followed the man who she did not know. Her husband's friend had shown him to her. She didn't know how much the journey cost as her husband's friend had paid for it.

14. There were variations between her answers in the questionnaire relating to contact with her husband and her responses at interview. In her questionnaire she said that she had been contacted by her husband three months after he was kidnapped when he told her he had escaped, but at interview said that she had had no contact with him. When questioned specifically about this discrepancy she explained that she meant since she was in Ireland. She then said that the last contact she had had with her husband was early August in Nigeria. When asked why he did not travel with her to Ireland, she answered that *"perhaps he had been kidnapped again."* Thus there were discrepancies in the two descriptions of where she spent the period following her husband's abduction and when and if she had contact with him.

### **The section 13 (1) report**

15. The applicant failed in her claim for asylum. The negative recommendation covered her dependent, R.A., who was born in the State on the 21st October, 2005. The Commissioner furnished a detailed report as to why the applicant was not considered to be a refugee and identified certain credibility issues surrounding her testimony. The factual findings were:-

- The applicant is not a member of any political party in Nigeria;
- She was never harmed in Nigeria because of her husband's political activities and was not harmed when he was kidnapped.
- She remained in her village for three months after her husband was allegedly kidnapped and was not targeted during that period;
- When she went back to her home after three months, she heard a knock, asked who was there and they didn't answer. As a result she escaped out the back window. While there was no objective evidence to suggest that the people who knocked at the door were her husband's political opponents and if they were, it is reasonable to expect them to have had someone guarding the back of the house to prevent the applicant escaping in the manner she described;
- There was a discrepancy in her testimony in relation to whether she had contact with her husband after he was kidnapped. At the interview she said she had no contact with her husband after he had been kidnapped, whereas in her questionnaire she said that he had contacted her three months afterwards. This discrepancy was put to the applicant and she explained that she meant he had not contacted her since she was in Ireland.
- The discrepancy between her interview and her application form relating to the length of time she stayed with the vigilantes was fully described

- If the applicant was being targeted by her husband's political opponents in Nigeria, internal re-location was an option and the U.K. Home Office Report was quoted.
- She stayed for six weeks in Mamu village without any contact from her husband's opponents. She left because the water was bad.
- She said she did not stay in Lagos because she didn't know anyone there. This was considered an unreasonable explanation considering her level of education.
- She did not contact the local police at all. She should have tried to contact the police before she could validly assert they could not help her particularly as her husband was allegedly a member of the ruling party.
- Her travel arrangements without a passport were deemed unlikely given the security procedures currently in place in international airports.

13. The basic finding was that a well founded fear was not established due to lack of credibility and also because she could return to Nigeria without a fear of persecution for any of the Convention reasons.

#### **The appeal**

14. The applicant was legally represented when she appealed the ORAC decision to the RAT. The facts relied on were essentially those presented to ORAC. The appeal submissions specifically pointed out a number of alleged factual mistakes in the s. 13(1) Report. The Notice of Appeal states that the applicant did not live in the village but that on the night that her husband was kidnapped she stayed in a neighbour's house and the following day she reported the incident to a vigilante group and was taken to a safe house in another area of Ogun State. She travelled for approximately one hour to the house and remained there for three months. It was asserted that the findings that she was not targeted were based on incorrect findings of fact. It was submitted that the finding in relation to contact with her husband had been explained at interview and that this was a reasonable explanation. Similarly, in respect of the time that she spent with the vigilante group, she explained that it was not three weeks but three months. The other points of appeal considered the law on internal re-location and pointed out that country of origin information confirms the applicant's assertions that many members of the ruling PDP or individuals with ties to the Party were victims of recent killings and targeting.

15. It was argued that country of origin information confirms that Nigerian police forces are frequently corrupt and confirms torture and extrajudicial killings by the police and that the police were either unable or unwilling to provide meaningful protection. In relation to the s. 11B findings, the applicant asserted that there was nothing inherently implausible about the story that she had been brought here on false documents provided by and carried by the trafficker and that her account of travel was a true and accurate account. Most of the other grounds related to submissions made on credibility issues. A document was filed with the Notice of Appeal dealing with errors of recall and credibility to the effect that while omissions and discrepancies in successive statements can reasonably be said to undermine credibility of testimony, current research on memory shows that stories can change for many reasons and the changes do not necessarily indicate that the narrator is lying.

16. The applicant was represented by counsel at the appeal hearing and there is an agreed note of the hearing which formed part of the bundle of documents furnished to this Court. At the hearing, the applicant described the incident which occurred in April, 2005, as commencing with a knock on the door when she was at home with her husband. When she came out, her husband was gone; she ran to a neighbour who said that she should not go back to her home and she slept at that house overnight. The next day she went to the private security company who patrolled the street but they didn't help her. She did not go to the police as she did not think they could do anything because most of them are corrupt. She went to Ago-Iwoye where she stayed for three months in Sagamu which is about one hour from her home address. She was kept by the security people in a room where she could not go out and could not do anything so she decided to leave. After three months, her husband called her. He tried to explain to her that the men who kidnapped him were dangerous men and she should not stay in their house again. This contact was by mobile phone while she was still in Sagamu. She then went to Mamu which is two hours from Sagamu. Both Mamu and Sagamu are in Ogun State. In Mamu she stayed with her parents for six weeks but she had no further contact with her husband as there is no light and no phone there. She had problems with the quality of the river water so she left and went back to the apartment to see if things had calmed down. She said thugs could find her in Mamu. She met two men close to her home who said *"if you don't produce your husband within twenty four hours, then you are in trouble"*. They knew who she was and she thinks they knew where she lived. She then went straight to her husband's friend's house. She told him everything. They called some other friends of her husband. She stayed the night with this friend and then left Nigeria. She presented documents to the Tribunal which were sent to her by e-mail from her husband's named friend, Mr. Rasaq. These documents referred to attacks on party candidates during elections. When asked if she was in contact with her parents she replied:-

*"They are in the village and there is no phone. I call my Dad's cousin. He phoned me three weeks ago and he told me that some people came to the village to look for me. They beat my Dad and then they rushed my Dad to the hospital and three weeks ago they tell me that my Dad is dead"*.

17. Strangely enough the next question asked by her own counsel was not a follow up question on this new information but *"what do you think would happen to you if you were sent back to Nigeria?"* The answer was *"I think they can harm me."* She was then asked about her passport and said that she had no travel documents, she merely followed the man who was looking after her and when she arrived at Immigration nobody asked her for her passport.

18. When asked by the presenting officer about her education the applicant said she had a diploma in accounting following a two year course in a polytechnic but when asked how old she was when she left secondary school in 1997 she hesitated for a long time and counted on her fingers before answering "20 or 21".

19. The various versions of the events which are relied upon for the two negative decisions and the current application for leave to seek *certiorari* are extensively detailed as the detail of the decision forms the substance of the grounds relied upon for *certiorari*.

20. The appeal was unsuccessful and the RAT confirmed the view that the applicant and her infant son were not refugees

within the meaning of section 2 of the Refugee Act 1996. The applicant was found to be vague, hesitant and unconvincing in a number of aspects of her narrative in relation to her conversation with her husband three months after his kidnap and her claim that thugs on her street who asked her to produce her husband was sufficient for her husband's friends to organise her departure, even though she was eight months pregnant.

21. It was found that she lived in relative safety for approximately three months in the village called Sagamu where the vigilante/private security force had helped to re-locate her. It was found reasonable to suppose that on the occasion when she returned to her flat, if the people at the door were intent on doing her harm they would have had somebody guarding the back of her home to prevent her escape. Her application and account were found to be non-credible for four stated reasons:-

- (1) She never sought State protection even though her husband was a member of the party in power;
- (2) There was conflicting evidence concerning where she spent the months following her husband's kidnapping. She told the RAT that she lived in safety and was not targeted during this period. Similarly when she went to Mamu she suffered no persecution and left because of the quality of the water;
- (3) If her husband's political opponents were intent on targeting her, they could have done so between April and September; and
- (4) Her travel arrangements, her lack of documentation and her apparent ease in coming through international airports were not plausible.

### **The Submissions**

22. The various versions of the events which are relied upon for the two negative decisions are extensively detailed as the applicant complains that:

- a. No reasons were given for the finding that she was vague, hesitant or unconvincing
- b. Errors of fact were made by the Tribunal Member in finding that she had not left her own village when she was in hiding with the vigilante group;
- c. That the finding that the men who came to the door if intent on doing her harm would have had someone guarding the rear was merely conjecture and an insufficient basis for a decision on appeal;
- d. That country of origin information confirms that police are often corrupt which would explain why she did not report her husband's abduction to them; and
- e. That no consideration was given to the new event which had occurred since the ORAC hearing and that was that her father had been beaten up by people looking for her and that he had died.

23. In order for the applicant to succeed, she must establish that the assessment of the credibility by the Tribunal Member was based on a significant error of fact which produced the adverse result to the applicant. It is well accepted that conclusions must be based on correct findings of fact and that errors of fact can cast doubt on the integrity of the decision-making process. However the reverse is also true and where the decision is grounded on an assessment of credibility based on demeanour and the presentation of shifting detail in a relatively simple narrative, it is highly likely that the finding will not be disturbed.

24. In this particular case, the discrepancies in the applicant's questionnaire and interview were very clearly brought to the attention of the applicant at interview and detailed in the s. 13(1) report. The same issues were rehearsed in the Notice of Appeal so that the minutiae of the applicant's story were parsed, taken apart and reassembled at the appeal as they were again at the hearing of the within application. I can find no error of fact as asserted in the applicant's grounds. The finding was that she spent three months in Sagamu and six weeks in Mamu which accords with the details of the applicant's appeal submissions. It is noted that the applicant never actually identified her village giving her address as either "Awolow House" or "Awolow Street" or "Awolow, Hospital Road, Ogun State". At the end of the day, the core finding of the Tribunal Member is that the detail of the applicant's story did not stand examination for four specified reasons – that she never sought State protection, that she was unharmed while in Sagamu and Mamu, that if her husband's political opponents were intent on harming her they could have done so in the two locations where she spent the time after her husband's abduction, and very importantly that her travel arrangements were found not credible.

25. As was pointed out by Mr. Patrick McGrath B.L., counsel for the respondents, s. 11B of the Act of 1996, as amended, provides:-

"The Commissioner or the Tribunal, as the case may be, in assessing the credibility of an applicant for the purposes of the investigation of his or her application or the determination of an appeal in respect of his or her application, shall have regard to the following:

(a) whether the applicant possesses identity documents and, if not, whether he or she has provided a reasonable explanation for the absence of such documents; [...]

(c) Whether the applicant has provided a full and true explanation as to how he or she travelled to and arrived in the State.

26. The fact that the RAT decision did not refer to the new allegation that her father was beaten up and had died is not extraordinary in the context in which it was presented at the hearing and then ignored by her counsel to whom it may well have come as a surprise. The RAT decision gives reasons for why the applicant was found vague, hesitant and unconvincing in relation to her husband's phone call and requires no further comment from me. The other findings were

based on what has every appearance of a rational and evidence-based determination and do not involve conjecture. The applicant has not made out any arguable grounds of a substantial nature sufficient for leave to bring judicial review. The application fails.