

**THE HIGH COURT
JUDICIAL REVIEW**

2007 726 JR

BETWEEN

B. J. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND T. J.),

**S. A. J. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND T. J.), So. J. (A MINOR, SUING BY HIS MOTHER AND
NEXT FRIEND T. J.) AND F. C. A. S. J. (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND T. J.)**

APPLICANTS

AND

THE REFUGEE APPEALS TRIBUNAL AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT OF MS. JUSTICE CLARK, delivered on the 18th day of March, 2009.

1. This is an application for leave to apply for judicial review of the decision of the Refugee Appeals Tribunal (RAT) to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner (ORAC) that the applicant should not be granted a declaration of refugee status. The application is grounded on the affidavit of the applicants' mother, who is acting as their next friend. Ms. Agnes McKenzie B.L. appeared for the applicant and Ms. Helen Callanan B.L. appeared for the respondents. The hearing took place at Kings Inns, Court No. 1, on the 5th March, 2009.

Factual Background

2. The applicants are four minors being two boys aged thirteen and nine and two girls aged eleven and six. They are from the Rivers State in the Kalabari region of the Niger Delta region of Nigeria and are of Ijaw ethnicity. They arrived in the State as unaccompanied minors and sought asylum at the offices of the Refugee Applications Commissioner on the 26th October, 2006. They were immediately reunited with their mother who had arrived in October the previous year and had sought asylum. Her claim was based on flight from the village elders where her husband lived. She said the elders believed that she may have observed a secret ritual forbidden to women of child bearing age and thus would have to be subject to a blood sacrifice to clean the village. She also relied on the general lawlessness in the area to ground her claim. There was no real advancement of any political element in her claim although riots from which she had fled were described as associated with the arrest of a local political leader. By the time her children arrived in the State, she was aware that her claim for refugee status had been rejected by the ORAC and that her claim had been found manifestly unfounded in accordance with s. 13(6) of the Refugee Act 1996, as amended, and that her appeal would be document based.

3. Since their mother left and before coming to Ireland the four child applicants lived with their grandmother in River State. The mother gave evidence at their s. 11 interviews on behalf of her children and filled in all their questionnaires. Those forms described a heart rending situation prevailing in the Delta region which although rich in oil does not share in the oil revenues or benefit from the income the oil produces. There is large scale illegal siphoning off of oil for resale leading to a dangerous state of lawlessness where armed rival militia and vigilante groups fight to share in the profits. They attack and harass government troops and private security employed by the oil companies and each other. The conflict between the rival militia leads to violence with much gunfire, arson and bombing and large scale human rights abuses. There are ethnic tensions associated with control over the illegal oil resources and revenue; the country is impoverished with very high crime rates and unemployment; there are very poor health facilities, the infrastructure is under resourced and shambolic, the environment is heavily polluted and life is generally unsafe from all these factors. All of this information is amply confirmed by objective Country of Origin information (COI).

Procedural Background

4. The applicants' mother applied for asylum but has failed to be recommended for refugee status. In addition to credibility problems the ORAC considered that her alleged persecution was not for a Convention reason as her problems - if true - were local and the alleged danger ceased as soon as she left the village.

5. The child applicants made individual applications for refugee status on the basis of the dangerous state of the Delta region and through their mother described how Ijaw people support the political party of the Niger Peoples Democratic Volunteer Party and as such are the targets of the rival Tom's Niger Delta Vigilantes (NDV) in the dispute over the ownership of oil revenues. Their parents as Kalabari were supporters of the NDPVF.

6. Their father appears to have played no role in the care of the children after their mother left and it was alleged at some s. 11 interviews that that he left home in September, 2005 and in others that he may have been abducted. He was said to be a member of the Niger Delta Peoples Volunteer Force (NDPVF) who fight the government and the state-supported agents the Tom's NDF. The NDPVF is claimed to be fighting for self determination and for greater control of oil resources for the benefit of the 8 million Ijaws in the region. The role of the applicant children's father was stated to be confined to attending meetings and encouraging other people to attend and know about the cause. It was alleged that the children's maternal grandfather was abducted on the 15th October, 2005 after their mother had left. A missing person full page notice was produced at the ORAC hearing and was before the Court. This notice purports to be a page from a publication known as the "Hard Truth" Advertorial dated 17th - 23rd November, 2005 and was submitted in support of the assertion that the grandfather had been abducted. The children's birth certificates were also produced. All of the birth

certificates were applied for on the same day in March, 2006.

7. Although the mother was alleged to face the threat of death from the village elders and the Delta region was described as incredibly dangerous it was accepted that neither the children nor their grandmother, who was caring for them, was personally threatened since their mother left Nigeria. Although almost all of the s. 11 interviews centred around the dangerous situation for the applicants in the Delta region, when the applicants' mother was asked if relocating might be a solution, it was asserted that relocation anywhere in Nigeria would not work as the children could not be safe anywhere in Nigeria as they would be recognised as their father's children and as Kalabari people who support the NDPVF. The government would kill the children because of this. They were very vulnerable as Kalabari children generally and the situation was even worse for girls because they faced the additional threat of rape.

8. Their applications for refugee status were refused at the ORAC stage and the children each appealed to the RAT. The ORAC decision in relation to each child noted that neither the children nor their mother were able to give details of their travel arrangements. Their mother stated that the children left Nigeria on 13th June, 2006 with an agent and she did not know what countries they travelled through. The ORAC decision was that the applicants had not demonstrated a well-founded fear of persecution for a Convention reason and that there was no evidence that they would be in danger if returned to Nigeria and they were not in need of international protection. The decision maker does not distinguish between the generally lawless state of the region and the asserted political connection between Kalabari/Ijaw and the conflict. The decision refers to COI which describes the NDPVF in very unflattering terms and ascribes their motives more to banditry and violence than to the advancement of the Ijaw ethnic group.

9. The applicants appealed this decision. Submissions were made on their behalf in well drafted and documented Form 1 Notices of Appeal. It was claimed that the children were in danger because of their imputed political opinion because of their father and grandfather's support of the NDPVF and because of their being members of the Kalabari-Ijaw clan who are known to be supporters of Asari Dokubu, the leader of the NDPVF. It was claimed that the children applicants were specifically targeted because of this association and that this point was ignored by the ORAC. It was a further ground that not all COI had been considered and that the Commissioner had failed to consider the risk of future persecution. Further grounds related to the failure to consider the absence of state protection, the U.N. Convention on the Rights of the Child, the benefit of the doubt and the assessment of subjective fear. Country of Origin information was furnished but no information directed towards any specific targeting of the children because of being Kalabari people or as the children of supporters of the NDPVF was submitted. A Human Rights Watch Report for 2004 was appended. It describes many brutal attacks between the NDPVF and the rival militia group known as the Tom's NDV in the Port Harcourt area and its environs. Another document from a more partisan source described that "the situation in Ijaw territory has reached the position where 12 million Ijaw were under threat of annihilation and that the situation in the Delta States was becoming an admix of Darfur and Iraq".

10. The RAT appeal was by oral hearing at which the applicants were legally represented and where their mother was present. An attendance note compiled by a caseworker who attended the hearing is before the Court. Although an incomplete note of the hearing, the attendance note remains a useful document. The two older of the four children gave evidence to the Tribunal Member and their mother gave evidence on behalf of the other two children and on behalf of the children generally. They gave evidence of the general problems over oil in the State and of the violence with fighting, shootings and bombing and of the many occasions when they had to hide in the mangroves, in empty buildings or under beds when shooting was occurring. They feared being caught in cross fire in the general violence which prevails. Children and girls were not safe in the Delta State.

11. The recommendation of the ORAC was upheld and the Tribunal Member held that the claims of the applicants amount to a generalised fear as a result of random and widespread violence in the Delta region but that this did not support a claim for persecution on the grounds of membership of a particular social group, political opinion or any ground set out in the Refugee Act 1996. That decision is the subject of this judicial review.

The Applicants' Submissions

12. The applicants' primary complaints in respect of the decision may be summarised as follows: there is a duty on both on the Commissioner and the Refugee Appeal Tribunal Member to ensure that the determination is conducted fairly and correctly. When issues are misstated, when documents are not noted, when country of origin information in the body of a long detailed notice of appeal is not considered or commented on, then the decision is flawed.

13. I turn first to address the alleged factual errors to which Ms. McKenzie B.L., counsel for the applicants, referred the Court.

(i) The birth certificates

14. The Tribunal Member stated in fairly trenchant terms that the applicants were undocumented and that in spite of assertions that they had produced birth certificates, no such documents were produced at any stage of the process. This was incorrect as the birth certificates were on the file with the ORAC from the first opportunity. Nothing much turns on the error but it may be indicative of a lack of care on the part of the Tribunal Member in reading the documents relied on. The respondents argue that the error made no difference to the decision as there was never any issue over the applicants' identity and they were not refused because of who they were. In the view of the Court, it is unfortunate that the finding was expressed in such strong terms but I agree that while such an error is best avoided, it made no difference to the decision, not being an error of substance.

(ii) Misstatements regarding the mother's claim

15. It was argued that the Tribunal Member dealt with the mother's appeal on the same day as the children's applications and made comments relating to the mother's claim for asylum in the decision relating to the children's appeals. It was argued that the Tribunal Member's negative view of their mother's application may have infected his view of the children's cases. In particular he stated erroneously that:

"The Tribunal notes that the applicant accepted that at the time when she applied for asylum she made no reference to a named political party and their activities to which she now ascribes responsibility in part, at least, for her decision to leave Nigeria."

16. The applicants argue that this incorrect and a significant error as the attendance note of the oral appeal hearing shows that the Presenting Officer merely either asked or stated the question and immediately went on to deal with other matters. The applicants' mother did not in fact make any response and it is therefore an error on the part of the Tribunal Member to say that she accepted this statement as true. It was submitted that as the Tribunal Member had dealt with both appeals on the same day and had also written both his decisions that day when facts would have been fresh in his mind, had he carefully read the notes of the mother's s. 11 interview, he would have seen that she did express concerns relating to the NDPVF. It was argued that this error served to infect the children's application and prevented them from having a fair hearing.

17. The decision of the RAT also states that:

"The applicants' mother was asked if anything bad had happened to the children since she left Nigeria and she said at the ORAC interview that she was not aware of any problems. At this hearing she gave a list of events and occurrences to which she made no previous reference."

18. It was argued that the answer that the applicants' mother gave to the ORAC interviewer was "None that I know only the shooting, people dying" which is not in accordance with what the Tribunal Member stated. It was argued that again, this misstatement gave the impression that the applicant's mother had changed her evidence and that this negative impression may have affected the children's appeals.

19. The respondents do not dispute that while the mother's application for asylum was rejected, the children's application was a separate matter which had to be considered on its own merits. It was submitted that their appeals were so considered. While the Tribunal Member undoubtedly referred to the mother's claim and made comments about her claim, he made no negative finding in relation to the applicants on the basis of these comments and in particular he did not say he did not believe them because of their mother's status. Counsel for the respondents cautioned reliance on what is an attendance note and not a transcript of the evidence given at the oral appeal hearing but she points out that if the note were correct, then there was no indication of any correction by the applicant of the fact stated nor was there any correction by the legal team present. In any event, counsel contended the mother's situation did not form part of the decision made by the Tribunal Member in relation to the applicants. Their claim failed because the Tribunal Member did not accept that the persecution claimed was for a Convention ground, that the risk facing the children was that of stray bullets and there was no question that they were targeted by anyone.

20. It is arguable that these asserted misstatements constitute substantial grounds for the purposes of leave on the basis of a lack of fair procedures. This is especially arguable when viewed in the light of the strong and erroneous finding - unimportant as a free standing error - that the children's birth certificates were never produced. To my mind these misstatements and the error in relation to the birth certificates are arguably indicative of a want of care.

21. It seems to me that the applicants' mother did mention the political situation in her home state during the course of her ORAC interview even though this was not her primary reason for seeking asylum.

(iii) Failure to consider the special risk pertaining to the third named applicant

22. The third named applicant, S, was a little girl of ten who when sheltering from an attack on her grandmother's village was sexually assaulted by young boys who were also sheltering. This was referred to fully in the ORAC report and by the applicants' mother at their appeal hearing. While it is evidence of the special vulnerability of girls in situations when law and order break down, it is not an action attributable to the government troops or the Tom's NDV or attributable to her being of the Kalabari clan as her own clan were responsible for the assault. The failure of the Tribunal Member to mention this particular fact may not have been ideal but it made no difference to the actual case being made, i.e. that these children were targeted because they belonged to a particular social group. No grounds are made out here.

(iv) Failing to consider COI and failing to consider the applicants membership of the Kalabari as a social group

23. It was argued on behalf of the applicants that COI attached to the Notices of Appeal was not properly considered as if had it been the Tribunal Member would have understood and noted the nexus between the violence in the area, attacks and the Ijaw people. The COI indicates that the Tom's NDV directed its attacks specifically on Ijaw villages, towns and people by shooting, burning and bombing. The Ijaw were specifically the focus of the attacks because of their support for the NDPVF and the Kalabari are recognised as part of the Ijaw ethnic group. This information was not considered by the Tribunal Member in assessing the future risk to the children as being of the Ijaw tribe and as children of supporters of the NDPVF, one of whom was believed to have been abducted. Counsel for the applicants contended that an important document was the full page newspaper article reporting the disappearance of the applicants' maternal grandfather in October, 2005. That article was not commented upon at all by the Tribunal Member and may simply not have been considered. Counsel for the applicants contended that this evidence was capable of bringing the claim for persecution out of the general and into the specific if the grandfather was abducted for his political beliefs and because he was Kalabari/Ijaw. This could have separated these children's claim from those general victims of human rights abuses in the area: they were the grandchildren of a man abducted or killed because of his beliefs and were therefore fixed with imputed political beliefs of a targeted person.

24. Ms Callanan B.L., counsel for the respondents, argued that the poster does not bring the applicants within a specific group who are targeted, as opposed to a general group who are at risk by being Kalabari. The poster is an appeal from the family to know the whereabouts of their grandfather. It does not either establish what occurred with their grandfather or that he was abducted because of the political situation. Abductions are unfortunately quite a common occurrence in the Delta states. All the evidence in COI relates to large numbers of people in Idama or the Kalabari population being at risk from stray bullets. The children were in no different a position that the rest of the Kalabari population. The fear they had was a theoretical fear as they had not been harmed before their mother left or during the time that they remained with their grandmother. Counsel for the respondents relies on the judgment of Hardiman J. in *Adam v. The Minister for Justice, Equality and Law Reform* [2001] 3 I.R. 53 at p. 81 and submitted that the applicants had to establish particular acts directed against them rather than the generalized danger prevailing in the Delta region which did not qualify as persecution. She therefore submitted that insofar as the RAT decision is self-contained, any other issues (such as minor errors of fact) are extraneous.

25. In spite of those arguments by the respondents which are correct in themselves, I accept that when viewed as a

whole there have been too many errors, misstatements, association with the mother's failed asylum claim and lack of consideration of the discrete point relating to these children's ethnicity as Kalabari people and I consider that it is appropriate to grant leave to the applicants to argue the case further. The applicants have made out substantial grounds sufficient for leave that their assertion that they belonged to a particular social group - the Kalabari - and as such were targeted for attack by either government or government-backed militia was not considered at all or not adequately considered in the RAT decision.

Conclusion

26. In the light of the foregoing, I am satisfied that substantial grounds have been shown and accordingly, I grant leave.