

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 1 J.R.]

BETWEEN

F.B.S. (NIGERIA)

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND DEFENCE

REFUGEE APPEALS TRIBUNAL

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 19th day of November, 2015

1. This is a telescoped hearing for judicial review seeking *certiorari* to quash a decision of the Refugee Appeals Tribunal dated 16th November, 2011, and notified to the applicant by cover letter date-stamped 14th December, 2011, remitting the appeal of the applicant for *de novo* consideration by a different tribunal member.

PROCEDURAL ISSUES

2. An issue arose in the days preceding the hearing date, where the respondents stated on the Monday call over of cases on the asylum list that they did not consent to the matter proceeding by way of a telescoped hearing. The Court was informed in the written submissions of same. Both counsel for the applicant, Mr. Colm O'Dwyer S.C., and counsel for the respondents, Mr. Nap Keeling B.L., addressed the Court on their respective position. The applicant argued there had been ample opportunity to raise these objections and the case was listed and given a date for hearing on the basis that it was a telescoped hearing. The applicant argued that this amounted to tacit acceptance of this procedure and the removal of consent at this stage in the process would unduly affect the applicant, who is living in direct provision and eager to have his case progressed.

3. The proceedings were issued outside the fourteen-day period allowable to bring such application. The applicant applied for an extension of time and, in his grounding affidavit sworn on 23rd December, 2011, at para. 6 thereof, explained the delay as follows:

"I received the decision of the Refugee Appeals Tribunal on or about the 15th day of December, 2011 and made immediate contact with my Solicitor. I gave instructions to my solicitor and on the 21st day of December, 2011 my Solicitor briefed Counsel who, on the 22nd day of December sent draft proceedings to my Solicitor. I have acted with due expedition in this matter. I say I travel to Dublin today 23rd December however, I am informed that it is too late to file and issue same and due to the Christmas vacation these proceedings will not be issued until my Solicitor's office opens after same."

The notice of motion was signed and dated on 3rd January, 2012.

4. The respondents did not object to the extension of time. However, the respondents contended that due to the delay, the applicant receives a benefit, namely, the change in O.84 r.24 of the Rules of the Superior Courts. In summary, the change allows the Court to compel a telescoped hearing where previously, consent of both parties was essential. The reason for the respondents not consenting to a telescoped hearing related to the applicant's statement of grounds, which, counsel argued, were generic. The respondents stated that it was not until the applicant's written submissions were received did the complaint arise and maintained that they could not be criticised for the late application because the submissions are distributed in close proximity to the hearing date. The respondents argued that they do not know the specific case to be defended and are unduly prejudiced as a result.

5. First, I am satisfied that it is appropriate to grant an extension of time in respect of these proceedings and therefore, the amended O.84 r.24 applies, where the Court can direct a telescoped hearing without the consent of the respondents. In this particular case, I am satisfied that, in accordance with O.84 r.24, it is within my jurisdiction to direct that this matter would proceed on a telescoped basis. I do so in the interests of justice and, in particular, in relation to this case, in order for this hearing to proceed expeditiously. That is not to say, in an appropriate case, that the respondents would not be entitled to succeed in such an application. Each case will depend upon its own merits. I therefore, directed that the hearing proceed on a telescoped basis.

BACKGROUND

6. The applicant is a Nigerian national, born on 24th September, 1980. The following is the claim as put forward by the applicant, which led to him claiming refugee status in Ireland.

7. The applicant worked as pig farmer in the Niger Delta region of Nigeria. He joined the Movement for the Emancipation of the Niger Delta (MEND), as well as two other groups operating in the region. He participated in actions such as sabotaging pipelines and trying to stop drilling for oil. The applicant ceased in his support for MEND when, in 2005, the group started to kidnap foreign nationals working for oil companies, which he disagreed with as a tactic. He left the group in 2004 and fled to Lagos, where he was captured by members of MEND and brought to a prison in Bayelsa state. The applicant escaped and fled to Ghana, where he remained until 2007, until he was seen by members of MEND. He then fled to Côte d'Ivoire, remained there for seven months and then travelled to Ireland via France and the United Kingdom.

8. The applicant arrived in Ireland on 4th May, 2011, and applied for a declaration of refugee status on that date. The Offices of the Refugee Applications Commissioner (ORAC) issued a negative decision to the applicant by cover letter dated 12th August, 2011. The

form one, notice of appeal against the negative decision of ORAC was issued by the applicant on 2nd September, 2011, to the Refugee Appeals Tribunal. An oral hearing was held in respect of the applicant's appeal on 19th September, 2011.

IMPUGNED DECISION

9. The Refugee Appeals Tribunal decision, dated 16th November, 2011, affirmed the recommendation of ORAC that the applicant should not be declared a refugee. The decision is one that is based upon credibility. The tribunal member did not proceed to make findings on state protection and/or internal relocation as the applicant's claim was rejected on the basis of credibility. The tribunal member stated that he did not accept the applicant's story of persecution nor was it accepted that the applicant was a member of MEND. The tribunal member sets out reasons for said rejection, which can be summarised, *inter alia*, as follows:

- 1) On spelling the name of the group he stated he was associated with, MEND, he spelt emancipation as 'amciphation'.
- 2) The applicant claimed to have joined the group, MEND, in 2002. The country of origin information stated that the group was created after September, 2005.
- 3) The applicant had presented an inconsistent account of his escape from prison and whether a guard had helped him escape.

APPLICANT'S SUBMISSIONS

10. Counsel for the applicant submitted that the first credibility finding is a consequence of English not being the applicant's first language and this is seen throughout the application, where the applicant had made numerous spelling and grammatical errors. Counsel pointed to examples of such instances in documentation completed by the applicant himself. The applicant submitted that this finding is unreasonable and irrational.

11. The applicant contended that the other credibility findings are peripheral and minor in nature, none going to the core of his claim. The applicant contended that the tribunal member has failed to address the claim made by the applicant. The applicant argued that because credibility findings are cumulative in nature, this Court should be satisfied that all credibility findings were lawfully arrived at, if the decision is to stand. In support of that contention, counsel relied upon *Bisong v. Refugee Appeals Tribunal & ors.* [2005] IEHC 150; *Keagnene v. Minister for Justice, Equality and Law Reform & anor.* [2007] IEHC 17; *R.F.T. v. Minister for Justice, Equality and Law Reform & ors.* (Unreported, Faherty J., 14th April, 2015).

RESPONDENTS' SUBMISSIONS

12. Counsel for the respondents submitted that the tribunal member's decision not to proceed to address internal relocation or state protection is entirely correct in law, as confirmed in *G.O. v. Refugee Appeals Tribunal & ors.* [2013] IEHC 89. where at para. 12 MacEochaidh J. states as follows:

"The respondents argued that tribunal member in this case came to a clear view that the applicant's credibility was "found wanting to such a degree that the very basis of his claim [was] not believed" and, as such, the tribunal member's decision not to address internal relocation or state protection is entirely lawful."

13. In regard to the spelling mistake, the respondents submitted, the word 'emancipation' was spelt correctly by the applicant in other instances and this spelling differential would change the acronym of the organisation, MEND, to MAND. This, according to the respondents, is central to the applicant's claim and he would be expected to know at least that the first letter was 'e' and not 'a'. The respondents argued that his claim for refugee status is based upon him having been a member of MEND, and therefore, the tribunal member was entitled to find that this is central to his claim.

14. The respondents submitted that the findings made by the tribunal member, in relation to the year that MEND was established, and the applicant's differing version of events, was open to him and is referenced to relevant country of origin information; whereas, none of the country of origin information supports the applicant's version of events. The respondents argued the inconsistencies in the applicant's account of how he escaped from prison are clear and central to his claim of persecution and it was open to the tribunal member to find as he did. The respondents stated that the principles for the assessment of credibility enunciated by Cooke J. in *I.R. v. Minister for Justice, Equality and Law Reform & anor.* [2009] IEHC 353, were adhered to by the tribunal member. The respondents submitted that this Court must look at the manner in which the tribunal member came to the credibility findings and to consider whether those findings were open to the tribunal member to arrive at, based upon the evidence before him. The respondents argued that those findings were clearly open to the tribunal member and the credibility findings are central to the applicant's claim of persecution proffered.

DECISION

15. The tribunal member found against the applicant on grounds of credibility and did not proceed to consider the issues of internal relocation and/or state protection given the nature of the credibility findings made against the applicant. The respondents contended, and I accept, that once he had found against the applicant on the basis of credibility, he did not have to consider the issues of internal relocation and/or state protection. This is set out in *G.O. (supra)*, where at para. 12 MacEochaidh J. states:

"It is well established by case law that where the RAT fundamentally disbelieves an applicant's account, there is no legal requirement to examine further matters such as the question of internal relocation, the availability of state protection, etc."

16. It is not for this Court to substitute its own view for that of the tribunal member. The issue for this Court in judicial review proceedings is to decide whether those findings were arrived at in accordance with law. The credibility findings must be assessed with that in mind.

17. The applicant submitted that, because English was not his first language, he cannot be faulted for a spelling error. However, the name was, in the view of the tribunal member, something that the applicant should have been aware of, particularly since he had spelt the word correctly on other occasions. The name of the organisation, and its associated and widely used acronym, is central to the applicant's claim and this is a factor that the tribunal member is entitled to take into account when assessing credibility.

18. There is a clear inconsistency in the oral evidence given by the applicant at the s.11 interview and the oral interview with the tribunal member, in regard to the applicant's escape from prison. In the s.11 interview, at pp. 50-51 of the booklet, the following was recorded:

"Q.56. Why did they not kill you?

A. When they caught me they took me back to Bayelsa. I was put in the swamp prison. After I was beaten, I was locked there. It was one of the guards opened the gates for me.

Q.57 Why did he do that?

A. He did not want me to be killed. I heard that he was killed.

Q.58. Why would he release you, risking his own life?

A. He saw how badly I was beaten. He was from the same village.

Q.59. He would know how serious the group would take that. Why not run away with you?

A. He said that I escaped. When they asked him he said that he went to get fuel from the boat. Before he came back he said I had gone and it was not padlocked. It was a wooden gate.

Q.60. How do you know what he said?

A. When I ran away to Ghana, I talked to people who are from my village. They told me what had happened. (The people are members of MEND.)"

19. In the tribunal decision the evidence regarding the applicant's escape from prison is recorded as follows, at p.29 of the booklet:

"The Applicant claimed in his evidence at Appeal that when he was held in the cell in the creek he was guarded by a person who was from the same area as him. He claims that this individual went to get fuel for the boat and left him unguarded. He stated in his evidence at Appeal that this individual left him unguarded in circumstances where he believed that he wouldn't be able to stand and that there was no agreement made between them that he could run away. He stated in his evidence at Appeal that he used his own initiative to escape.

It was put to the Applicant at his substantive interview he had stated that this guard helped him escape. When this was put to the Applicant the Applicant denied having stated this. He says he said the person who was guarding him went to get petroleum. It was put to the Applicant that at his substantive interview he had stated that one of the guards opened the gates for him because he did not want him to be killed. When this was put to the Applicant he stated that when he referred to one of the guards helping him he meant that the guard left the place to get fuel. He says he means the guard helped the situation by leaving the place to get fuel. He says there was no agreement between them. He says that the guard was from the same community as him. This is not considered a reasonable or credible explanation and in all the circumstance the Applicant is considered to have presented an inconsistent account of his escape such that I do not accept that he was ever held in the circumstances he alleges."

This aspect is central to his claim of persecution and is not accepted as true by the tribunal member, based upon the evidence before him.

20. The next finding of adverse credibility made in the tribunal decision relates to the year of formation of MEND. The tribunal member was supported by country of origin information and the applicant did not offer any reasonable explanation for his error in this regard. The applicant's version, that MEND had been formed years before, was not supported by any country of origin information. Had the tribunal member had conflicting country of origin information before him, the case could have been different. Nothing was submitted by the applicant to support his testimony and the tribunal member was entitled to come to the decision he so did.

21. A further submission by the applicant related to the tribunal member failing to have regard to medical evidence before him. This submission is not borne out. The applicant's case falls on credibility issues and the medical evidence before him was not, in the eyes of the tribunal member, capable of rebutting that finding.

22. It seems to me the reasons given for rejecting the applicant's credibility are reasoned and rational, were open to the tribunal member to make, and based upon matters that are central to the applicant's claim. I therefore refuse leave.