Neutral Citation Number: [2009] IEHC 280

THE HIGH COURT

JUDICIAL REVIEW

2007 643 JR

BETWEEN

T.J.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Ms. Justice Mary Irvine delivered on the 26th day of June, 2009

1. The applicant is a Nigerian citizen from the Kalibari region of Rivers State. She was born on 10th December, 1968, is married and has seven children. She arrived in Ireland on 10th October, 2005 and applied for refugee status the following day. Her youngest child was born here in November 2005 and she was included in her application for refugee status.

2. By notice of motion dated 5th June, 2007, the applicant seeks leave to apply for an order of *certiorari* quashing the decision of the first named respondent made on 26th April, 2007 whereby the said respondent affirmed the recommendation of the Refugee Applications Commissioner that the applicant not be afforded refugee status.

3. The grounds upon which the applicant claims relief are many fold but may be summarised as follows:-

(a) An alleged failure on the part of the first named respondent to consider the applicant's alleged fear of persecution on grounds of political opinion (real or imputed);

(b) An alleged failure on the part of the first named respondent to consider country of origin documentation in relation to the applicant's claim for refugee status based upon political opinion (real or imputed);

(c) An alleged failure on the part of the first named respondent to consider a number of judgments of the Refugee Applications Tribunal alleged to be material to both of the grounds relied upon by the Applicant for seeking refugee status.

(d) An alleged failure on the part of the first named respondent to take into account evidence allegedly material to her claim, namely; a statutory declaration of age sworn on 30th January, 2005 and a medical report.

Background

4. The applicant completed the standard application for refugee status questionnaire on 24th October, 2005. In her answer to question 21 thereof as to why she left her country of origin, the applicant set out in great detail the events which she alleged had occurred in her village in September 2005. The applicant recounted that every five years in her village there was a masquerade in the course of which a ritual would be performed by elderly men and woman. A sacrificial rite was conducted for the purposes of making the village fertile and protecting it from invaders. The sacrifice involved, catching visitors who were fishing the local area and sacrificing them to the God which they worshipped.

5. The applicant maintained that women of child bearing age were told to stay indoors whilst the masquerade was taking place. The applicant stated that she went outdoors to pass urine because she was pregnant and saw the masquerade near to her home. Somebody involved in the masquerade saw her and she went back indoors immediately. Her husband then told her she had committed a big crime. The following day, she was advised that she was to be sacrificed in seven days time. She was taken into captivity and was there for five days before her husband arranged for someone to come to release her. She stated that two men took her to a village called Arusu-iari. In the days she was there she heard some shooting which she was told was due to civil war in the River State area. Police and mobile police allegedly had entered her village to arrest youths and supporters of a freedom fighter whose name was Asarai Dokubo ("A.D."). As a result of the violence, she believed that the villagers had been forced to hide in the bush. Mr. Benson, a fish customer, collected her in a flying boat and took her to Lagos. She was brought to an airport, given a sleeping tablet and then arrived in Ireland.

6. The applicant subsequently attended for her interview with the Refugee Applications Commissioner on 11th January, 2006. In the course of that interview she repeated her concerns regarding firstly her intended sacrifice in her own village and secondly her account of how youths thought to be A.D. supporters, were being arrested. The applicant did not say that she shared any political opinions with A.D. supporters and neither was there anything said from which it might have been inferred that she felt she was at risk of persecution on the basis that she might be associated with A.D. or his supporters. Likewise, the applicant did not contend that her family or her village were in any way at risk by virtue of any association with A.D.

7. The s. 13 report of the Refugee Applications Commissioner is dated 20th January, 2006. The Commissioner was sceptical as to the truth of the applicant's claim regarding the masquerade but concluded that in any event, even if her story was true that her alleged fear was of the local villagers who she claimed wanted to sacrifice her and that as the

State was not complicit in the applicant's difficulties that her case did not fall on its facts within the remit of the Geneva Convention. The Commissioner also concluded that there was nothing to suggest that the applicant would have been refused State protection had she sought it and that as her problem was of a local nature that internal relocation would have been a safe option for her in any event.

8. The Commissioner did not confine her considerations and decision to the applicants alleged fear of persecution at the hands of those in control of her village. She also concluded that insofar as riots were taking place in the area in which the applicant had been residing that there was nothing to suggest that she would have been singled out as an A.D. supporter and thus be at risk of persecution from those rioting in that village.

9. For both of the above reasons the Commissioner concluded that the applicant had failed to establish a well founded fear of persecution in accordance with s. 2 of the Refugee Act 1996 (as amended) and recommended that the applicant should not be declared a refugee. She went on to recommend that s. 13(6)(a) of the Refugee Act 1996 (as amended) was appropriate to the application thus confining the Applicant to an appeal on the papers to be lodged with the Refugee Appeals Tribunal.

10. The applicant's solicitor filed a Form 2 notice of appeal. In that appeal, it was submitted, *inter alia*, on the applicant's behalf:-

> (i) That the applicant belonged to a particular social group i.e. women of child bearing age at risk of sacrifice in circumstances where they had witnessed a ritual masquerade and accordingly should have been considered to be a refugee. It was asserted that the applicant was part of a social group who was at risk of persecution by reason of her membership of that group.
>
> (ii) That the applicant had a well founded fear of persecution due to the severe fighting which had taken place in her village between A.D. supporters and the members of the Ateke group, a political association backed by the Nigerian Government. It was maintained on the applicant's behalf that anyone from the Kalibari region would have been identified as a supporter of A.D. and that the applicant would therefore be at grave risk of being killed by the Ateke group if returned to Nigeria.
>
> (iii) Finally, it was submitted on the applicant's behalf that the conclusions of the Commissioner in relation to State protection were unwarranted. In going to seek State protection, it was alleged that the applicant might have been caught by those from who she was fleeing. The applicant also claimed that A.D. opposition groups were backed by the government and that she would therefore not have received protection.

11. Subsequent to the delivery of the notice of appeal two further sets of additional submissions were lodged with the first named defendant. On 1st June, 2006 the Refugee Applications Tribunal was furnished with information indicating that the applicant had been sexually assaulted during the period when she had been held captive in her village. A medical report from a consultant psychiatrist was enclosed to the first named respondent wherein it was indicated that the applicant's main stressor was the fact that she had been refused asylum status. Further, on 27th February, 2007 additional submissions were furnished wherein reference was made to a number of cases dealing with applicants who had protested a fear of persecution from militia groups fighting in Nigeria and also precedent decisions in relation to fears of persecution having their origins in intended sacrificial rites. Also the Tribunal was furnished with newspaper cuttings relating to the alleged abduction of the applicants father.

Decision of the Refugee Appeals Commissioner
12. The decision, the subject matter of the within application is dated 27th April, 2007.

13. At Paragraph 5 of the decision, the Tribunal member, notwithstanding the fact that the applicant's appeal was confined to paper stated as follows:-

> "Having listened to the applicant's evidence and to the submission ably made on his behalf, having carefully perused the documents submitted to me and having carefully and individually considered the matters advanced in the course of this application, I am satisfied that the applicant is not a refugee and accordingly I affirm the recommendation of the Refugee Applications Commissioner above mentioned.
>
> In coming to the above decision, I have considered the applicant's notice of appeal and the grounds thereof, together with the supporting documentation, submissions and records, the recommendation of the Refugee Applications Commissioner, all documents and other information submitted to the Refugee Applications Commissioner and the Refugee Appeal's Tribunal in connection with this application and all country of origin documentation furnished, as well as the account of the applicant and the submissions made on her behalf."

14. The substance of the decision is set out at Paragraph 3 of the report of the Tribunal member. In that section, he summarised what appears to have been his understanding of the applicant's claim. At para. 3.2, he referred to the applicant's claim being based upon a fear that if returned to Nigeria that she would be killed because she had inadvertently witnessed a forbidden tribal ritual. Thereafter, the Tribunal member dealt with the issue of State protection and potential relocation prior to proceeding to deal with the country of origin material. In relation to the relevance of the country of origin documentation he stated :-

> "There is no country of origin material concerning the matters which form the basis of the applicant's claim, being a tribal ritual, the witnessing of which implies death".

The Applicant's Claim in the Present Proceedings
15. The applicant's principal submission is that there are reasonable grounds to contend that the first named respondent failed, in reaching his decision, to consider at all the second ground upon which the applicant had claimed refugee status. That ground was that she should be afforded asylum status on the grounds of political opinion (real or imputed) by reason

of her association with a social group known to be supporters of A.D. and was therefore at risk of persecution. Counsel for the applicant acknowledged that the applicant's claim for asylum on this basis was poorly made out in the applicant's questionnaire which was filled out by the applicant without the assistance of legal advice. She further conceded that at interview a claim for asylum on the same basis was also not fully ventilated. Nonetheless, a claim for asylum status based upon political opinion (real and imputed) was considered by the Refugee Applications Commissioner and was fully and clearly set out in the notice of appeal, the accompanying submissions and the country of origin documentation later furnished.

16. Counsel for the applicant submitted that she had reasonable grounds for contending that the first named respondent failed, as he was obliged to do, to take into account the country of origin documentation submitted on the applicant's behalf when coming to his decision and that accordingly, his decision could be impugned on this basis.

17. Counsel for the applicant relied upon the decision of Clarke J. in *Idiakheua v. Refugee Appeal's Tribunal* (Unreported, High Court, 10th May, 2005) in support of her contention that there were reasonable grounds upon which it could maintained that the decision of the first named respondent should be impugned by reason of his failure to deal with previous Tribunal decisions submitted to him for his consideration and to which it is alleged he was obliged to have regard when reaching his conclusions. The applicant denied that the first named respondent was entitled to rely upon the content of para. 5 of his report which she alleged was a standard paragraph of a rote and formulaic nature routinely inserted into Refugee Appeal's Tribunal's decisions.

18. On the applicant's behalf if was further asserted that there were reasonable grounds to maintain that the Tribunal member in reaching his decision had not had regard to documents alleged to be material to his decision and which he was obliged to consider, namely a statutory declaration of age and a medical report concerning the applicant psychological welfare.

19. Finally, on the applicant's behalf, it was submitted that there were reasonable grounds to impugn the decision of the Tribunal member on the basis that he did not address, as he was allegedly obliged to do, the applicant's submission that she was entitled to refugee status on the grounds of her membership of a social group, namely women of child bearing age who were at risk of being sacrificed due to having witnessed a ritualistic masquerade.

The Respondent's Submissions
20. The respondent submitted that it was to be inferred from the Tribunal member's report that he had indeed considered the applicant's claim for asylum status based upon her alleged fear of persecution on the grounds of political opinion (real or imputed). This, counsel stated was to be inferred from para. 3.6 of the first named respondent's report. He asserted that from this paragraph, the court should infer that the Tribunal member considered this aspect of the applicant's claim but had discounted it on the basis that the claim had not been made in the course of the completion of the questionnaire or at interview with the Refugee Applications Commissioner.

21. In relation to the alleged failure on the part of the first named respondent to consider the country of origin documentation filed on the applicant's behalf, counsel claimed that the documentation had clearly been considered by the first named respondent. However, given that the first named respondent had decided to reject the applicant's claim for refugee status on the grounds of political opinion due to the fact that such a claim had not been maintained by the applicant in her questionnaire or at interview with the Refugee Applications Commissioner that there was no basis upon which the Tribunal member's decision to the effect that the country of origin documentation was irrelevant to the applicant's claim could be challenged.

22. Counsel for the respondent submitted that the Tribunal member's finding that the applicant was undocumented in this county was correct as a matter of fact in circumstances where a statutory declaration of age could not be considered to be a document of any substance such as a passport or like independent document. If he was wrong in this regard, counsel for the respondent submitted that the applicant had not established how his failure to have regard to this document materially impacted upon his decision.

23. Counsel for the respondent submitted that the first named respondent should be deemed, by reason of the contents of para. 5 of his decision to have taken into account the medical report lodged by the applicant's solicitors in the course of the appeal. He submitted that in the event of the court being satisfied that there was any default on the part of the Tribunal member for failing to consider this medical report that the applicant had not in any event how such failure had a material bearing upon his decision.

24. Finally, in respect of the applicant's contention that she should have been considered to a member of a political social group, namely women of child bearing age who were at risk of being sacrificed due to having witnessed a ritualistic masquerade, counsel relied upon the credibility findings made by the Tribunal member to the effect that her claim on the facts surrounding the alleged sacrifice were not credible. In such circumstances it was not necessary for the first named respondent to determine whether or not the applicant belonged to a member of a particular social group such as might afford her protection as an asylum seeker. In any event, counsel on behalf of the respondent maintained that as a matter of law, the applicant had not reasonable grounds to contend that she was a member of a particular social group that would entitle her to claim that she was a refugee. He relied upon the decision of Bingham J. in *Fornah v. Secretary of State for the Home Department* [2007] 1 AC 412

Decision
25. The burden of proof that is on the applicant in the present application is that set out by Carroll J. in *McNamara v. An Bord Pleanála* namely:-

> "In order for a ground to be substantial, it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous."

26. Applying this test to the present proceedings, the court has come to the conclusion that it is certainly arguable that the decision maker failed to take into account, in coming to his conclusions, the applicant's claim for refugee status based upon political opinion that might be imputed to her as a possible supporter of A.D. Having so held, the court further concludes that the applicant has made out a reasonable case to maintain that the first named respondent accordingly did not consider the relevant country of origin documentation material to her claim for asylum status based upon her alleged

political opinion (real or imputed) as a support of A.D.

27. In coming to the aforementioned conclusion, the court is not convinced that the interpretation which counsel for the respondent sought to place on para. 3 of the first named Tribunal member's report, is necessarily correct. In reading through the conclusions which run from paras. 3.1 to 3.10 inclusive, the court would have expected to find, had he considered it, the first named respondent's recitation of the fact that the applicant applied for asylum on the grounds of political opinion (real or imputed) set out in a separate paragraph of his report before he moved on to deal with the issue of State protection at paragraph 3.3. Further, the court is not at all convinced that the interpretation which counsel for the respondent sought to ascribe to para. 3.6 of the decision of the first named respondent is necessarily correct. The court agrees with counsel for the applicant that there is a reasonable case to be made that the Tribunal member was, at that point in time, solely concerning himself with the applicant's claim for refugee status based upon her being at risk from a tribal ritual and thus found himself dismissing the country of origin documentation as being immaterial to the claim which he was considering. Accordingly, the court cannot be certain, as is contended for by counsel on behalf of the respondent that it should conclude from para. 3.6 that the Tribunal member considered the applicant's claim for refugee status based upon actual or imputed political opinion and then discounted it by reason of the fact that the claim was made late and accordingly was an embellishment of the original claim which had been solely confined to a fear of being persecuted in the course of a tribal ritual.

28. In coming to its aforementioned conclusions, the applicant has made out a reasonable case that the first named respondent did not consider both grounds upon which refugee status was sought and the documentation lodged in the course of the appeal merely because of those facts recited by him at para. 5 of his decision. The court has had regard to the decision of Hardiman J. in *G.K. v. Minister for Justice Equality and Law Reform* [2002] 2 I.R. 418 where he stated:-

> "That a person claiming that a decision making authority had, contrary to its express statement, ignored representations which it had received needed to produce some evidence, either direct or inferential, of that proposition before he could be said to have an arguable case."

29. In the present case, the applicant has made out a reasonable case to argue that para. 5 of the first named Tribunal member's decision in this case should be treated as a formulaic statement of words particularly having regard to the Tribunal member's error in recording that he had "listened to the applicant's evidence and to the submissions ably made on his behalf". In further support of the applicant's claim in this regard is a fact noticed by the court only after the conclusion of the proceedings and that is that the first named respondent, having set out his conclusions at pp. 14 and 15 of his report at paras. 3.1 to 3.10 inclusive went on immediately on the following page of his report without including any para. 4 to record his decision in paragraph 5. It therefore appears to this Court that the applicant has made out a *prima facie* case that the Tribunal member did not consider both grounds of appeal submitted by the applicant nor the documentation lodged in support of the same.

30. The court concludes that the finding of the first named respondent to the effect that the applicant's claim for refugee status was not credible based upon her account of events in her village involving the masquerade and potential sacrificial rite was clearly sustainable on the evidence. This Court, as advised by Peart J. in *Imafu v. Minister for Justice, Equality and Law Reform* [2005] IEHC 416 should not fall in to the trap of substituting its own view on credibility for that of the Tribunal once it is satisfied that such a finding was open to the Tribunal member on the facts. In circumstances where the first named respondent rejected the applicant's claim for refugee status based upon the lack of credibility which he attached to her account of the events upon which her application was predicated, the first named respondent cannot be criticised for failing to proceed to make any determination as to whether or not the applicant belonged to any social group which might have entitled her to refugee status.

31. The court accepts the respondent's submission that the applicant has not made out any case to maintain that the Tribunal member's decision can be impugned on the basis that in the course of his decision, he relied upon the fact that the applicant was undocumented. The court does not believe that the applicant has made out any reasonable case that the statutory declaration of age in any way undermines this finding of fact. Further, even if the Tribunal member should have considered the statutory declaration of age to be a document such that would preclude him from concluding that the applicant was undocumented in this jurisdiction, the applicant has not shown that his finding of fact in this regard was material to his decision. The Tribunal member in the course of his decision appears to have accepted the applicant's age and nationality which are the only facts truly vouched by the statutory declaration.

32. For all of the aforementioned reasons, the court will grant the applicant leave to seek the relief claimed at para. A, B, C and D of her notice of motion on the grounds set forth at para. E(iv), (ix) of the statement required to ground the application for judicial review.