

**THE HIGH COURT
JUDICIAL REVIEW**

[2013 No. 344 J.R.]

BETWEEN

O.P.E. (NIGERIA)

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL

MINISTER FOR JUSTICE AND EQUALITY

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on 27th day of November, 2015

1. This is telescoped hearing for judicial review seeking *certiorari* to quash a decision of the Refugee Appeals Tribunal (RAT) dated 5th March, 2013, affirming the negative recommendation of the Refugee Applications Commissioner (RAC) that the applicant should not be declared a refugee, and remitting the appeal of the applicant for de novo consideration.

2. The proceedings were originally issued with the second named respondent being named as the Refugee Applications Commissioner. Counsel on behalf of the respondents issued a notice of motion dated 15th November, 2013, seeking an order dismissing the proceedings against the RAC. Said order was granted by Mr. Justice MacEochaidh, dated 14th February, 2014. The RAC was removed as a respondent and the case proceeded with the three respondents named herein.

BACKGROUND

3. The applicant is a Nigerian national, from Edo state. Her stated date of birth is 14th February, 1992. The following is the applicant's account of the events that led to her arriving in this State and claiming international protection. The applicant was not certain of dates so the following is generally in terms of the timeframe.

4. The applicant lived with her father and stepmother in Edo, Nigeria. However, she stated the living arrangements were difficult and her stepmother maltreated her. The applicant claimed that she was raped and, as a result, gave birth to a son in 2005. The child was taken by a family friend because the applicant did not have the financial resources to support the child. The applicant could not remain with her father as he was not in a position to support the applicant. The applicant then discussed her situation with a friend from school and that friend, after getting the permission of her parents, allowed the applicant to stay. The two girls began a relationship but it was discovered by the community in December 2007, although the source of this discovery was unknown to the applicant. She stated that the youths in the community were against her as a result and they carried cutlasses while looking for her. She then met a man to whom she explained her problems, and he offered to pay for her travel and take her to Ireland.

5. The applicant left Nigeria on 20th December, 2007, transited through London, and arrived in Ireland on 24th December, 2007. She presented at the offices of the RAC on or around 23rd January, 2008. As her stated age was sixteen at the time of her application, an age assessment was conducted that day with a RAC authorised officer. In this short interview, the applicant was asked, in English, about her travel route to the State; the names of her family members; and her school qualifications. The authorised officer did not accept that the applicant was a minor, for the following reasons:

1. She did not provide a passport
2. She did not provide any verifiable documentation to prove her age
3. She appeared to be older in appearance
4. She appeared to have the maturity of an adult

As a result, the applicant was not referred to the Health Service Executive pursuant to s.8(5) of the Refugee Act 1996 (as amended).

6. The applicant attended at the RAC offices to complete a s.11 interview on 1st March, 2008. The interview was conducted in English, without a guardian or legal representative present as she was deemed to be of the age of majority. The RAC issued its negative recommendation on 5th March, 2008, by way of the s.13 report. In regards to the supporting documentation submitted by the applicant the authorised officer stated, at p.18 of the booklet:

"The following documentation was submitted by the applicant in support of her application:

- Sworn age declaration from the Magistrate's Court of Lagos
- Statutory declaration of age, issued by Nigerian Embassy, Ireland.

All of the documentation furnished in connection with the application has been fully considered.

ORAC is unable to verify the authenticity of these documents."

The decision then founded that, *inter alia*, the applicant lacked credibility; her answers at interview were vague and hesitant; and she could have sought the protection of the state authorities in Nigeria.

7. The applicant appealed the decision to the RAT and had procured the assistance of solicitors. The applicant initiated judicial review proceedings challenging the s.13 report. These proceedings were withdrawn by the applicant based upon the prevailing jurisprudence at the time that the applicant should exhaust all available remedies prior to bringing judicial review proceedings. The applicant's solicitors filed supplemental submissions on 11th January, 2011, which supplemented the form one notice of appeal issued to the RAT on 23rd March, 2008. The applicant argued that the RAT should disregard the s.13 report and details of the s.11 interview notes because of the manner in which these were collated. The applicant was interviewed by a tribunal member on 14th January, 2013. The applicant furnished her birth certificate to the tribunal member and her passport was on file. The passport had been supplied by the GNIB after the applicant was discovered to be working in the sex industry in Cork. The birth certificate is recorded as having been used to obtain her passport in Ireland in July, 2010.

IMPUGNED DECISION

8. The decision dated 5th March, 2013, and issued to the applicant by cover letter dated 17th April, 2013, affirms the negative recommendation of the RAC, that the applicant should not be declared a refugee. From p.120, under the heading 'analysis of the applicant's claim', the tribunal member states:

"The applicant has to demonstrate that there is a 'serious possibility' or a 'reasonable chance' or a 'real chance' of persecution. I do not accept that this applicant has a well founded fear of persecution for a convention reason. Serious credibility issues arise from her evidence.

In her ASY1 form, her questionnaire (Q.21), and at interview the applicant claims that she is at risk of being killed by members of her community because she is a lesbian. While she also states that she was raped as a result of which she had a child, she does not give evidence of any other basis for her claim. In her form 1 notice of appeal however, it is submitted on her behalf that she wishes to supplement her claim for asylum and that 'Her additional claims for refugee status arises (sic) from her claim that she suffered past persecution on account of her membership of a particular social group, namely, children in Nigeria who have been subjected to sexual assault. In particular the Appellant was a victim of rape when she was a minor in Nigeria and determined that she could not seek the protection of the state...' [...] It is submitted that there is no state protection available to the applicant as such a victim and that relocation is not an option for her.

The applicant's evidence in relation to her own alleged sexual orientation is somewhat vague. She states at interview that 'I have a girlfriend in Nigeria before' (Interview p4). She states that after she was raped and gave birth to her baby 'I was moving in with my girlfriend and she changed me into a lesbian. I never knew it was forbidden' (interview p7). Asked when she first realised she had homosexual feelings towards her girlfriend she states 'When we were staying together' (interview p8). She claims that they were together for two years. Asked if she had ever had a homosexual relationship before this she states 'Why I accepted the lesbian was because I was raped before' (interview p10). At hearing her evidence in relation to her sexual orientation was as follows: 'When living with Amass she would touch her in the night and she didn't want to say anything as she was giving her a place to stay. Later on she had no choice but to fall into being a lesbian... In cross examination she said she was a lesbian now. She had a relationship with Mr. O'F[...] but he drank too much and nagged her. She was asked whether if he didn't drink and nag her she would find him sexually attractive and she said yes. She said she didn't come across a lesbian since she came here. At the moment she can't call herself a lesbian as she hasn't got a partner here. She says she views herself as a lesbian.' Leaving aside the applicant's evidence relating to a Mr. O'F[...] and whether she finds him sexually attractive or not which is completely irrelevant to the question of her sexual orientation, the applicant's own evidence in relation to her alleged homosexuality displays an ignorance of the nature of her own sexual orientation which undermines the credibility of her claim to be gay in the first place [...] Given that the applicant claims to have fled Nigeria partly because she fears being persecuted for being gay her ignorant and ill-informed attitude to the question of what constitutes sexual orientation seriously undermines the credibility of her claim."

9. The analysis of the applicant's claim continues from pp.122-126, by setting out questions from the applicant's s.11 interview where it was perceived that she acted evasively and this undermined her credibility in the opinion of the tribunal member. On p.126, the tribunal member deals with the additional ground put forward on behalf of the applicant, the rape, as well as the documents submitted by her, as follows:

"Apart from giving some details about her rape the applicant gives no other evidence that allegedly being a victim of abuse gave rise to persecution. In fact she claims to have been the recipient of great kindness from Mama Ruth, her friend Amas and a mysterious stranger she encountered after leaving her lover's house though, as none of the evidence is deemed credible for the reasons outlined above, the applicant's claim to have been a victim of sexual abuse and to have a well founded fear of persecution on the basis of this claim is not accepted as credible.

While issues arising from the documents submitted by the applicant were broached at hearing and while the applicant's claim to be a minor were not accepted, the tribunal does not seek to rely on these matters and considers that the very numerous credibility issues which arise from her core story render it incapable of being believed."

10. The analysis concludes that the applicant's claim was being rejected because of a lack of credibility, and then affirms the negative recommendation of the RAC that the applicant should not be declared a refugee.

APPLICANT'S SUBMISSIONS

11. Counsel for the applicant Mr. Michael Lynn, S.C. with Mr. Eamonn Dorman, B.L., submitted that the minimum standards in respect of unaccompanied minors are provided by article 17 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereafter referred to the Procedures Directive), and Ireland, at the time of the applicant's interview, had failed to transpose this article into domestic law. This article provides for additional protections for unaccompanied minors applying for refugee status. This article stipulates that member states should ensure, at a minimum, protections for minors below the age of sixteen. Counsel submitted that the applicant was fifteen years old when she arrived in the State. However, none of the application documents were completed nor were any of the interviews conducted until the applicant was sixteen. However, s.8 of the Refugee Act 1996 (as amended) provides as follows in respect of processing applications from unaccompanied minors:

"(5)(a) Where it appears to an immigration officer or an authorised officer that a child under the age of 18 years, who has

either arrived at the frontiers of the State or has entered the State, is not in the custody of any person, the officer shall, as soon as practicable, so inform the Health Service Executive and thereupon the provisions of the Child Care Act, 1991, shall apply in relation to the child.

(b) Where it appears to the Health Service Executive, on the basis of information available to it, that an application for a declaration should be made by or on behalf of a child referred to in paragraph (a), the Health Service Executive shall arrange for the appointment of an employee of the Health Service Executive or such other person as it may determine to make an application on behalf of the child.

(c) Any costs incurred by a person under paragraph (b) other than any legal costs arising from such application shall be paid by the Health Service Executive."

12. The applicant further relied upon the UNHCR's 'Guidelines on Child Asylum Claims', which provides guidance to decision-makers on how to deal with applications from minors under the age of eighteen. The applicants argued that in light of the legislative purpose of the Irish legislation, the EU secondary legislation, namely giving effect to the 1951 Refugee Convention and its 1967 Additional Protocol, the UNHCR guidelines are a legitimate source of guidance on the correct procedures that should be adopted by a decision-maker in determining whether a person is a refugee. In the Supreme Court judgments of *V.Z. v. Minister for Justice, Equality and Law Reform & ors.* [2002] 2 I.R. 148 at p.148 and *A.N. v. Minister for Justice, Equality and Law Reform* [2008] 2 I.R. 48 at paras. 56 and 62, the UNHCR Handbook on procedures and criteria for determining refugee status was relied upon by McGuinness J. and Finnegan J. respectively.

13. The applicant argued that by interviewing her as an adult, and processing her application on that basis, the RAC failed in its obligations under the UNHCR guidelines, in that, *inter alia*, neither the age assessment, nor the s.11 interview, were conducted in a safe, child-sensitive and gender-sensitive manner with due respect for human dignity, and a liberal application of the benefit of the doubt was not applied, as set out at para. 73 of the UNHCR guidelines, and the applicant was not provided with an independent guardian to protect her legal interests, as set out in para. 75 of the guidelines. The applicant submitted that particularly in circumstance where the applicant had claimed to be an individual subjected to sexual abuse in Nigeria as a child, who was raped and compelled to give birth while still a minor, and where her sexual identity was an issue in a country where homosexual identity is not tolerated, the RAC was compelled to provide the applicant with all available safeguards in the course of her s.11 interview but failed to do so.

14. The applicant, in her further grounds of appeal and submissions submitted to the RAT before the hearing, had requested that, due to the RAC's flawed age assessment, the tribunal should set aside the s.13 report as unreliable and in contravention of the UNHCR guidelines. Further, and in the alternative, the applicant had requested that if the tribunal were inclined to accept the s.13 report, then it should make certain directions in respect of the s.11 interview. The applicant argued that the tribunal failed to deal with these core submissions and instead relied on the s.11 interview to make adverse credibility findings against the applicant, without addressing the submission that no valid assessment of age had been carried out and that the applicant should have been accompanied by an adult guardian at the interview. Counsel stated that one obvious application that adult would have made would have been for an Edo interpreter where it is obvious from the documentation that the applicant's English was not of the necessary proficiency for undergoing detailed interviews. The applicant submitted that the tribunal acted unlawfully in relying on the s.11 interview where the applicant was an unaccompanied minor at the time of the interview. The applicant further argued that the tribunal acted unlawfully in failing to make a reasoned finding on the applicant's age.

15. The applicant submitted that the tribunal failed to make a reasoned determination of submissions made on behalf of the applicant and are obliged to deal with core aspects of the applicant's claim. Here, the applicant relied, *inter alia*, upon *E.P.A. v. Refugee Appeals Tribunal* [2013] IEHC 85; *B.O.B. v. Refugee Appeals Tribunal & ors.* [2013] IEHC 187; and *T.U. (Nigeria) & ors. v. Refugee Appeals Tribunal & ors.* [2015] IEHC 61.

16. The applicant submitted that the tribunal failed to apply reg. 5(2) of European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518 of 2006) in relation to the applicant's submission in her additional appeal submission to the tribunal that she was subject to rape as a child in Nigeria. Counsel argued that the tribunal did not expressly or clearly dispute the essential facts in support of that strand of her claim, namely: (i) that the applicant was a minor under the age of sixteen before she left Nigeria; and (ii) she had given birth to a child in 2005. The applicant contended that these facts are, at the very least, dispositive evidence of statutory rape, which is not criminalised in Nigeria. The applicant submitted that the tribunal gave no consideration to country of origin information which addresses her claim on the grounds of membership of a particular social group, and other such information that addressed the prevalence of sexual abuse of minors in Nigeria and the fact that statutory rape is not unlawful.

17. The applicant submitted, in regard to the above, that the tribunal member made irrational statements in regard to evidence when stating, 'Apart from giving some details about her rape the applicant gives no other evidence that allegedly being a victim of abuse gave rise to any persecution'. Therefore, the applicant contended, the tribunal has failed to have regard to s.5(2) of the Refugee Act 1996 (as amended), which provides:

"(2) Without prejudice to the generality of subsection (1), a person's freedom shall be regarded as being threatened if, *inter alia*, in the opinion of the Minister, the person is likely to be subject to a serious assault (including a serious assault of a sexual nature)."

The applicant submitted that the tribunal has, thus, failed to conduct a proper assessment of the applicant's case and failed to apply reg. 5(2) of S.I. 518 of 2006.

RESPONDENTS' SUBMISSIONS

18. Counsel for the respondents, Mr. Tim O'Connor, B.L., submitted that the decision impugned herein was reached after a full, *de novo* hearing conducted when the applicant was almost twenty-one years old where she was legally represented at said hearing. The respondents stated that the provision of article 17(3) of the Procedures Directive would have applied to her, namely:

"Member States may, in accordance with the laws and regulations in force on 1 December 2005, also refrain from appointing a representative where the unaccompanied minor is 16 years old or older, unless he/she is unable to pursue his/her application without a representative."

19. The respondents further argued that the UNHCR guidelines can be useful; however, they cannot alter or displace substantive and established law. The respondents submitted that in deciding upon any appeal from a decision of the RAC, the tribunal is required by the provision of s.16(16) of the Refugee Act 1996 (as amended), to consider the s.11 interview and the s.13 report; it cannot be set

aside as a matter of law. The respondents submitted that applicant cannot ask this Court to set aside the decision of the tribunal on the basis that the tribunal complied with the statutorily mandated procedures.

20. The respondents submitted that the appropriate procedure, if she felt the s.11 interview and s.13 report were so irremediably incurable at appeal, would have been to pursue the judicial review of the first instance decision and not seek to launch a collateral challenge in this set of proceedings. The respondent argued that if any of the reliefs sought challenging the s.11 interview or s.13 report were granted, then the effect would be that no appeal at tribunal could be conducted in compliance with s.16, as required.

21. With regard to the applicant's submission that the tribunal member ignored her submission that certain directions be made in regard to the s.11 interview (para.29 applicant's written submission), the respondents contended that no evidence has been adduced to show that this has been ignored. The respondents relied upon a decision of Clark J. in *G.A. v. Refugee Appeals Tribunal & ors.* [2009] IEHC 157, where at para. 29 she noted:

"It is very difficult to see how it could be argued that he was prejudiced in any way by the absence of an express reference to any of the grounds advanced in his Notice of Appeal. I am guided by the judgment of Hardiman J. in *G. K & Others v. The Minister for Justice, Equality and Law Reform & Ors* [2002] 2 I.R. 418, where he stated as follows (at p. 426-427):

'A person claiming that a decision making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case'."

22. The respondents argued that the applicant's core claim was based upon a social group, namely, homosexuals in Nigeria and her minor status at the time of the initial application was peripheral to this. The respondents stated that the tribunal has no jurisdiction to adjudicate on the validity of the s.11 interview as this would solely be a matter for the courts upon judicial review. The tribunal, according to the respondents, may reject or accept evidence but it is required by law to consider it and the submission that the tribunal was required to decide upon the validity of the s.11 interview is premised on an error as to the role and jurisdiction of the tribunal.

23. The respondents submitted that the tribunal made a clear decision that the applicant's core claim, based upon findings related to her credibility, and there is no challenge to those findings. The respondents contended that the applicant's submission that she was the victim of a crime is not sufficient to constitute past persecution on the basis of a convention ground.

DECISION

24. The applicant submitted to the tribunal her complaints about the manner in which the s.11 interview was completed, through the notice of appeal and additional submission. The notice of appeal, along with the s.11 interview notes and the s.13 report are all documents that the decision-maker at appeal stage is obliged to take into account when deciding an appeal. This is mandated by legislation. Section 16(16) of the Refugee Act 1996 (as amended) provides:

"Before deciding an appeal under this section, the Tribunal shall consider the following:

- (a) the relevant notice under subsection (3),
- (b) the report of the Commissioner under section 13,
- (c) any observations made to the Tribunal by the Commissioner or the High Commissioner,
- (d) the evidence adduced and any representations made at an oral hearing, if any, and
- (e) any documents, representations in writing or other information furnished to the Commissioner pursuant to section 11."

In *M.A.R.A. v. Minister for Justice and Equality & ors.* [2014] IEHC 71, Charleton J. explains the subsection as follows:

"Subsection 16 makes it clear that, in deciding an appeal, regard is to be had to evidence, to representations, to documents, and to argument."

It is clear from the foregoing that that the s.11 interview and the s.13 report must be taken into consideration by the tribunal upon deciding an appeal. These documents, just as the submissions made by the applicant, cannot be disregarded.

25. Notwithstanding the foregoing, the decision-maker is not obliged to blindly apply the findings or contents to her decision. Section 16(16) mandates that the documents shall be considered in the process. Taking all factors into account, the decision-maker must evaluate and balance the submissions, documents and evidence before her. The applicant's submission that there were issues at the first-instance stage, were not, in my view, taken into account by the tribunal member. The respondents argued that the applicant had reached the age of majority by the time of hearing before the tribunal and was legally represented there. What is clear from reading the tribunal decision is that the s.11 interview was heavily relied upon at appeal stage. The applicant had submitted that there were issues with these documents and particularly the s.11 interview. The probative value to be attached to evidence is a matter for the decision-maker; however, the applicant raised a complaint and that complaint should have been dealt with at appeal stage, as is mandated by s.16(16).

26. The applicant's evidence was that she would be persecuted because she had engaged in homosexual acts. The applicant labelled this as sexual orientation. However, the knowledge and understanding of sexual orientation that a teenager might have in Ireland is likely to be very different to a teenager growing up in a country where such practices are taboo or even criminalised. The decision-maker must look at the story presented in the context of the applicant's personal background, such as age and culture. Further, and what is clear from the papers is that this applicant is a vulnerable person and the presentation of her story should be taken in that context. The use of words such as ignorant is not helpful in the context of a decision on refugee protection, if ever at all.

27. The applicant raised additional grounds at appeal stage, and since she had not been legally represented at first instance, this is unsurprising. The second strand to her claim related to the minors being subjected to sexual assault in her country of origin. The decision-maker deals with the alleged rape as follows:

"Apart from giving some details about her rape the applicant gives no other evidence that allegedly being a victim of

abuse gave rise to persecution [...]

[A]s none of the evidence is deemed credible for the reasons outlined above, the applicant's claim to have been a victim of sexual abuse and to have a well founded fear of persecution on the basis of this claim is not accepted as credible."

However, throughout the decision this aspect is not dealt with and the applicant is entitled to reasons as to why her evidence is being disregarded, specifically in relation to the allegations of sexual assault. It appears from the face of the decision that the tribunal accepted that the applicant was a minor and gave birth to a child in 2005. However, her evidence is then deemed not to be credible. Counsel for the respondents, in written submission, maintained that this was a criminal matter without a convention nexus. However, the applicant submitted evidence to the tribunal that statutory rape was not a crime in Nigeria. These are all matter to be dealt with by the tribunal and not this court upon judicial review but, in my view, they have not been appropriately dealt with.

28. In light of the foregoing, I grant leave and, since this is a telescoped hearing, I grant an order of *certiorari* remitting the matter to the tribunal for reconsideration by a separate tribunal member.