Neutral Citation: [2012] IEHC 554

THE HIGH COURT

JUDICIAL REVIEW

Record Number 2012/429 J.R.

Between:/

T. E. S., M. N. R. and B. F. R. [SOUTH AFRICA]

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, THE REFUGEE APPEALS TRIBUNAL AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT OF MS JUSTICE M.H. CLARK, delivered on the 18th day of December 2012.

1. The applicants, who are a mother and her two daughters, seek leave to apply for an order of *certiorari* quashing the decision of the Refugee Appeals Tribunal dated 7th March 2012 confirming the negative recommendation made by the Refugee Applications Commissioner in relation to their asylum application. They also seeks a declaration that because their appeal was conducted without the benefit of an oral hearing, in circumstances where the mother's credibility was at issue, the appeal was not an effective remedy in accordance with Article 39 of Directive 2005/85/EC of 1st December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status ("the Procedures Directive").

2. The leave application was heard on 17th October 2012 in Court 24. Mr Ian Whelan B.L. appeared for the applicants, instructed by Burns Kelly Corrigan Solicitors, and Ms Siobhán Stack B.L. appeared for the respondents, instructed by the CSSO.

3. The first applicant is a national of South Africa and is a widow. Her two daughters of 16 and 10 years accompanied her to Ireland in December 2011 and they were included as dependents under her own claim. By consent, the daughters have been joined to the proceedings as co-applicants. Their asylum claim as presented to the Commissioner was based on the first applicant's asserted fear of her husband's killer. She was with her husband in 2001 when as a random victim of extreme violence he was shot dead by an assailant attempting to rob him of his mobile phone. Although her husband's killer was a complete stranger, she was able to identify him at a police identification parade. However because of frailties in her identification which were not specified and not probed by the interviewing ORAC officer, the suspect was not prosecuted for her husband's murder but he was tried and subsequently convicted and sentenced to a term of imprisonment for other crimes. Some years later in January 2011, this convict was seen by the first applicant in her neighbourhood which caused her to feel terror. She reported the sighting to the police who told her that he had escaped from prison. He appeared to remain at large and although he did not in fact harm her, the first applicant became convinced that he was following her and would do her harm. She required medical treatment and was admitted to hospital. While very scared of him, she did not ever know his identity. Eventually, after enduring ten months of fear, she decided to leave South Africa when her daughters saw a (different) man with dreadlocks hanging about outside their school. She resigned her job and she and her daughters travelled via Germany to Ireland where her sister was living. In pursuance of her claim she furnished a death certificate relating to her husband and a sworn statement from her mother which affirmed that the first applicant's husband had been shot dead.

4. The first applicant was interviewed by an officer attached to the Office of the Refugee Applications Commissioner on 20th January 2012. She indicated that she feared "the same thing" for her daughters as she did for herself. The Commissioner recommended that she should not be declared a refugee. The report prepared by the officer under s. 13 of the Refugee Act 1996 contained a finding pursuant to s. 13(6) (e) of the Act which meant that the applicants' appeal to the Refugee Appeals Tribunal would be conducted without an oral hearing as the applicants are nationals of South Africa, a designated *safe country of origin*. While adverse comments were made on the first applicant's inability to name her husband's killer and on the contents of the death certificate furnished and the delay in fleeing their country, the thrust of the findings were that there was no nexus between their fears and the grounds set out in the Refugee Convention; that State protection was available to them and that relocation away from the man feared was an option. The s. 13(6) (e) determination was not challenged and the case went forward on a paper based appeal. The Refugee Appeals Tribunal upheld the Commissioner's recommendation by decision dated 7th March 2012.

5. In addition to their argument in relation to the lack of an effective remedy, the applicants argue that the Tribunal erred in law and breached the principle of *audi alteram partem* in failing to put specific matters referred to in the Tribunal decision to them and in failing to afford the mother the opportunity to present herself as personally credible to the Tribunal Member. They also argue that inadequate regard was had to the written submissions made and the country of origin information furnished to the Tribunal Member. The contents of the Form 2 Notice of Appeal dated 7th February 2012 were brought to the attention of this Court. The applicants complain although all their Notice of Appeal addressed all the inadequacies identified in the Commissioner's decision and although they furnished additional documents in support of their claim, these explanations and documents were ignored by the Tribunal.

6. A further complication is that on the 2nd March 2012, the applicants' solicitor informed the Tribunal that the second applicant M.N.R. had been raped in South Africa on her way to school in early November 2011 and that the rape had been reported to the police. A police report was furnished together with a copy of a sworn affidavit to the Johannesburg Central Community Services Centre setting out the mother's complaint of the incident and noting that M.N.R. had named the assailant. The applicants' solicitor explained that the rape had not been previously raised, even to them, as the mother feared her daughter's distress if she were interviewed about the rape. Extracts of reports on the appalling frequency of rape in South Africa were furnished and it was submitted that to return the applicants to South Africa would be in breach of s. 5 of the Refugee Act 1996 and Article 3 of the ECHR. A further extract from a 2012 World report on South Africa refers to the insecurity faced by women and girls arising specifically from sexual violence and the suggestion that the failure of the criminal justice system to investigate and punish sexual violence "*has created a culture of impunity for rape*".

7. The Refugee Appeals Tribunal considered the claim and made strong negative credibility findings which had not been made by the

Commissioner. The claim was described as having "*not one scintilla of evidence*" of a well founded fear of persecution. The mother's claim was said to have been "*undermined*" by the lack of news reports / police reports / death certificate, although a death certificate had been furnished to the Commissioner and the Tribunal together with a document referring to the police number accorded to the murder investigation. The decision describes that the claim "*did not stack up*", was "*diluted, utterly scant and attenuated*" due to the lack of any objective evidence that the man the mother feared had actually murdered her husband, had done her any harm or had raped her daughter. Arguably, the Tribunal Member missed the point. The first applicant never claimed that the man who raped her daughter was the escaped convict who she believes murdered her husband.

8. No real consideration was given to the allegation of rape although the Tribunal Member accepted the alarmingly high rate of rapes perpetrated upon children in South Africa but questioned the late disclosure of the rape and found that "*the SAP are working to protect children in this area……In the circumstances there is no clear and convincing evidence of a lack of state protection in this respect*." She relied on a 2008 US Department of State Report which, she said, indicates that "*there is a law in place in relation to child rape*". She made no reference to the later 2012 report on the appointment of the new Chief Justice and the undoing of the progress made in attitudes towards sexual violence.

9. The Tribunal Member ultimately concluded that there was nothing before her which would suggest that the alleged attacks on the husband and older daughter were not random, unconnected criminal attacks and that there was no clear and convincing evidence of a fear of persecution based on one of the Convention grounds. In the light of those findings the Court queries whether the Tribunal Member's remarks, described above, which served to undermine the mother's credibility in relation to the random attacks were either fair or necessary and the Court has concerns relating to their place in a paper based appeal where the applicant has no opportunity to orally explain or expand upon any facts in the claim.

10. If the case ended simply on the findings of the random nature of the attacks and the lack of a Convention nexus, there would be no reason for complaint. However, two major issues cause the Court some concern. One, the nature of the claim materially changed with the introduction of the assertion that the older daughter had been raped. Perhaps it was the major reason why the applicants left South Africa to come to Ireland. Perhaps the growing epidemic of the rape of young persons and babies only then came home to the mother and that, coupled with the earlier murder of her husband, tipped the balance for her, causing her to pack up and leave her country of birth. The Court simply does not know what the Tribunal Member made of the allegation of rape as the allegation was never investigated.

11. Clearly, an experience of rape *per se* has no Convention nexus and does not give rise to refugee status. The mother made no claim that her daughter was raped because of race, nationality, political opinion or religion and in the absence of any such claim it would perhaps be unduly onerous to expect the Tribunal Member herself to have conducted enquiries as to whether there was any such motivation for the rape. However, it seems to the Court that there is a reasonable and weighty argument to be made that in the light of the country of origin information furnished to the Tribunal Member, it was unreasonable to ignore any appropriate examination by ORAC of that claim or to exclude the possibility that the older daughter's experience of rape could have brought her (and indeed potentially her younger sister, too) within the Convention category of membership of a particular social group. This possibility was never explored and the young girl was never heard. In light of the allegation of rape, the Court has major concerns relating to the inclusion of MNR's asylum claim simply as a dependent under her mother's claim. While undoubtedly the young girl either shares or feels the effect of her mother's fears of her father's killer, she has a significantly different claim arising from being the victim of rape. It is the Court's belief that MNR should have had her claim assessed properly and thoroughly and independently of her mother's specific fears relating to her husband's killer and by reference to relevant, up-to-date country of origin information in accordance with the requirements of the Refugee Act 1996 and S.I. No. 518 of 2006. The Court is satisfied that substantial grounds have been established for the contention that such an analysis was not conducted in this case.

12. The second matter which caused the Court concern relates to the future: if the decision of the Tribunal is not challenged, then (subject to the findings of the CJEU in *MM v. The Minister* (C-277/11, 22nd November 2012)) the negative credibility findings made by the Tribunal Member in her decision could be relied upon by the Minister when dealing with any subsequent subsidiary protection and / or humanitarian leave to remain application, depending on the nature of any such application. While it is certainly arguable that the first applicant's subjective fears of her husband's assassin do not amount to persecution within the meaning of s. 2 of the Refugee Act 1996, it is not so certain that notwithstanding South Africa's classification as a safe country, the level of rape and violence and tribal strife in the cities and towns of South Africa may support a claim of eligibility for subsidiary protection under Article 15(b) or (c) of the Qualification Directive (Directive 2004/83/EC) or a claim for humanitarian leave to remain under Article 3 of the ECHR which according to the CJEU in *Elgafaji* (C-465/07, 17th February 2009) essentially corresponds to Article 15(b) of the Qualification Directive. It seems to the Court that the making of superfluous and inappropriate negative credibility findings at the Tribunal stage has the potential to negatively influence the Minister's decision-making processes at the subsequent stages. The Court finds that there are substantial grounds for the contention that this appeal determination contravenes the requirements of natural and constitutional justice and might indeed be incompatible with the requirements of the Qualification Directive.

13. The applicants require a 6-week extension of time. The reasons given by the applicants for the delay are that their solicitor was on leave and they had to wait for an appointment with their caseworker and another with their solicitors. They changed solicitors but a further delay occurred as a page from the negative decision was missing. The respondents did not object in strong terms to the extension of time. It seems to the Court that these are the sort of administrative delays which can and do occur and should not be held against the applicants and so, the Court is prepared to extend the time.

14. While the applicants concentrated to a great extent on the issue of the unfairness of the documents-only appeal, the situation undoubtedly is that if the applicants were unhappy with the s. 13(6) (e) finding from which the restriction to a paper based appeal flowed, they could and should have challenged the initial ORAC decision. They did not do so and now, quite improperly, seek to attack the consequences of the s. 13(6) (e) after the Tribunal decision has been delivered. The Court is not prepared to consider setting aside the s. 13(6) finding on the ground that the written appeal was not an effective remedy at this stage. Had the challenge been brought, it is unlikely in light of the decision of Cooke J. in *S.U.N. [South Africa] v. The Refugee Applications Commissioner & Others* [2012] IEHC 338 (30th March 2012) that the application of s. 13(6) (e) would have survived the challenge. While the Court is generally critical of reliance on the application of s. 13(6) and therefore paper based appeals in cases which are not manifestly unfounded, it remains the responsibility of an applicant, who is under the present procedures always legally represented, to challenge such a decision at the earliest opportunity and not after the appeal has been considered. Leave on these grounds is refused.

15. The Court is satisfied that the applicants have identified other substantial grounds for further argument on the basis that the appeal was conducted in breach of the requirements of fair procedures and natural and constitutional justice and in contravention of the Refugee Act 1996 and S.I. No. 518 of 2006. Pursuant to the Court's jurisdiction under Order 84, rule 20 (4) (a) (as amended by S.I. No. 691 of 2011), leave will be granted to pursue reliefs (i), (vii) and (viii) on the following grounds:-

(1) The Tribunal Member failed to properly consider the claim made in respect of the second applicant's experience of rape in breach of the requirements of fair procedures, natural and constitutional justice and the provisions of the Refugee Act 1996 and S.I. No. 518 of 2006;

(2) In circumstances where the Tribunal Member did not have the opportunity of hearing the applicants give oral evidence and of assessing their demeanour and credibility in that context, the Tribunal Member acted unreasonably and irrationally and in breach of S.I. No. 518 of 2006 insofar as she made unnecessary, superfluous and exaggerated findings as to the personal credibility of the first applicant, with potentially negative consequences at the next stage of the protection process.

(3) The Tribunal Member failed to consider the up-to-date country of origin information furnished by the applicants' solicitor properly or at all, and made irrational and unreasonable findings on state protection based on a selective analysis of the totality of the country of origin information which she had before her.