Neutral Citation [2013] IEHC 164

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2009 / 303 J.R.

Between:/

S.B.H.,

O.A.H. (A MINOR, SUING BY HER MOTHER AND NEXT FRIEND, S.B.H) AND O.A.O.H. (A MINOR, SUING BY HER MOTHER AND NEXT FRIEND, S.B.H.)

APPLICANTS

-AND-

THE REFUGEE APPEALS TRIBUNAL AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT OF MS JUSTICE M. CLARK, delivered on the 21st day of March 2013.

1. The applicants are a mother and her twin daughters who seek ***leave*** to apply for judicial review of the decision of the Refugee Appeals Tribunal dated 2nd February 2009 to recommend that they should not be granted refugee status. Their application for leave was heard on 12th March 2013. Mr Mark de Blacam S.C. with Mr Garry O'Halloran B.L. appeared for the applicants. Ms Denise Brett B.L. appeared for the respondents. While in their written submissions the applicants invited the Court to determine the leave application substantially on the papers or to treat the application as if it were the full judicial review application, the application was dealt with before the Court in the ordinary way.

2. The asylum claims of the infant applicants were entirely dependent on the claim made by their mother and no separate fear of persecution was expressed in respect of them. The Court will therefore refer to the mother as "the applicant" in the course of this judgment.

The Asylum Application

3. The applicant is a national of Nigeria. She was very close to her delivery date when she applied for asylum on 17th April 2008. She gave birth to her twin daughters in Ireland on 24th May 2008. She said that a friend helped her to complete her asylum questionnaire because she cannot read or write very well. She presented to the Refugee Applications Commissioner as a Muslim of Yoruba ethnicity from Ibadan in Oyo State, born in 1986. She attended primary school for six years and spent one year as an apprentice trader. She had a son born in 2002 with her ex husband but she did not give any details about her first marriage. She left her son with her mother in Ibadan when she came to Ireland. She also named two nieces born in 2003 and 2004 as her dependants though she did not explain their circumstances. She said her (named) current partner was an "alpha" or traditional Muslim scholar and while she was not married to him she moved in with him and his family when she became pregnant with his child.

4. The reasons for the applicant's departure from Nigeria were expressed as follows. Her partner and his family lived at a rehabilitation school / centre run by his father, which was in a big, well-fenced house with lots of cellars in Oojo, Ibadan. Her partner's father was both an alpha and a member of the secret cult which ran the rehabilitation centre. Her partner was not a member of the cult but his brother and some friends were. The applicant's brother was also a Muslim scholar and alpha in the centre. After the applicant moved in to the rehabilitation centre, she discovered that bad deeds occurred there. Suspected drug addicts were taken to there to be cured but many people died mysteriously and were washed and buried in secret. The secret cult sold body parts and human blood to rich people for use in rituals. They also sold the water used to wash corpses, they carried out abortions and they raped women. The applicant lived in a separate apartment and was banned from entering certain parts of the centre but she eventually saw some of the incidents and heard about them from her brother. She said her father-in-law was a Muslim but he was a wicked person who had no fear of God.

5. In January 2008 her partner's father was arrested by the state police and the centre closed down. The incident was reported in daily newspapers. Although she did not support the cult's activities, the applicant was considered an accomplice and was interrogated by the police who had arrested her partner's father. She told them what she knew of the cult's activities at the centre. Members of the cult then decided to seek the release of her jailed father-in-law by carrying out a ritual involving the blood of her unborn child. Her partner told her that they needed the blood of someone very close to his father. Her brother also told her of the cult's plans and he told her all about their activities. He then became ill and died and her partner said this was because he was inflicted with juju for leaking the cult's secrets. Her partner was afraid of the cult members and could not protect her from the proposed sacrifice of his unborn child.

6. The applicant did not report the threat and plan to the police because she was afraid and because most of the case was already with the police. The cult members feared the applicant might divulge their secrets and she feared they might harm her with juju. In February 2008, having been warned by her brother of the intended sacrifice of her unborn baby she went to stay with her mother elsewhere in Ibadan. Her partner also ran away and moved from place to place in Nigeria. He visited her at her mother's house and said the cult members were looking for her so she had to leave. She relocated to her father's town in Ogun State for one month but she believed that some alphas were spying on her and felt they would find her no matter where she went in Nigeria. Her mother and partner paid a man called Mr Collins / Colin to arrange her travel - she did not know how much they paid. She first met the man on the day before she was due to travel and she had no idea what country she was travelling to. She followed someone into Ireland having travelled by plane. She did not know where the plane stopped over and she did not ask because she was not inquisitive. Colin took her documents at the airport. She took a bus and a taxi to the Commissioner's offices. She had no documentation as Colin had

retained everything.

7. The applicant told the Commissioner that she feared she would be killed by members of the secret cult if returned to Nigeria. She also feared they would hurt her son in Nigeria in order to hurt her. She furnished her own birth certificate, a certificate registering her brother's death on 8th February 2008 which stated that he dies after a brief illness lasting two weeks, and a copy newspaper article. She also furnished a police record dated 8th February 2002 relating to the reporting of the death of her brother after a sickness at his residence following the arrest of suspects at the rehabilitation centre.

8. The Commissioner stated that ORAC was unable to verify the authenticity of the documents submitted and made a negative recommendation in relation to the claim. It was found that some elements of her claim lacked credibility. An article entitled *"Police uncover another illegal detention camp"* published by The Punch, a Nigerian online newspaper, dated 24th February 2008 was appended to the s. 13 report, which described the discovery of the rehabilitation centre. It is not clear if this was the copy newspaper article submitted by the applicant or if the article was sourced by the authorised officer. Having regard to the newspaper article, the authorised officer accepted that there was some evidence to support the existence of the named rehabilitation centre but there was no evidence to support the claimed link between the applicant and the man arrested. The Commissioner noted that the applicant had not reported her fears of sought police protection and it was found that she could relocate internally within Nigeria.

The Appeal

9. With her Form 1 Notice of Appeal the applicant submitted a second newspaper article, this time from the *Nigerian Tribune* dated 12th March 2008 (*"How our 'Alphas' raped, tortured and turned us into cannibals"*) which again named the rehabilitation centre and referenced the arraignment of the man she named as her father-in-law.

10. In the impugned decision the Tribunal Member Mr David Andrews S.C. stated that he had studied the country of origin information (COI) in depth in the context of the applicant's credibility. He did not find the applicant credible *"more particularly in relation to her demeanour and the evidence she gave"*. He found it "very difficult" to believe that the applicant left Nigeria for the reasons set out in her evidence and if the applicant was to be believed, it would mean the police were not acting in accordance with due process and this was a clear case of the police acting on information given to them in relation to what was occurring in the rehabilitation centre. He stated that the applicant did not seek state protection though she did move to a number of places before travelling to Ireland. The applicant' evidence of how she travelled through immigration points did not relate to the facts as practice in various airports and concluded that she could not have gone through immigration as described. Her travel arrangements and description of her travel were considered "less than credible". The Tribunal Member went on to find that she could have relocated to another part of Nigeria and made some generalised remarks about internal relocation. He had very little doubt that if the police authorities were informed about the applicant's problems, they would have acted and he therefore affirmed the Commissioner's negative recommendation.

11. The applicant initiated proceedings in late March 2009, after the expiry of the 14 days allowed by s. 5(2) (a) of the Illegal Immigrants (Trafficking) Act 2000. She therefore requires an extension of time. Her current solicitor has sworn an affidavit setting out the reasons for the delay which were in the circumstances found reasonable.

12. The proceedings were drafted in 2009 and although the very brief written legal submissions exchanged in early March 2013 sought to rely on different grounds from those drafted, relating to the position of the twins, no application was made to amend the statement of grounds. This issue was raised in the respondents' submissions but again no application was made to the Court. The applicants were therefore only permitted to proceed on the grounds pleaded.

13. Mr de Blacam S.C. on behalf of the applicant argued that the Tribunal Member should be quashed on two grounds, namely (1) the Tribunal Member failed to properly consider the three documents submitted by the applicant and (2) failed to give proper reasons for rejecting those documents. He submitted that the birth certificate, death certificate, police report and newspaper articles were capable of establishing the applicant's identity and her brother's connection with the rehabilitation centre. The *ECs (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006) require a protection decision maker to give consideration to all relevant documents furnished. He cited *Voga v. The Minister* (Unreported, High Court, Ryan J., 3rd October 2010) with which the Court is familiar as it granted leave to seek judicial review. The case was cited by Mr de Blacam as an authority for the need to consider documentation submitted in support of the contention that the applicant is who she claims to be, which it was argued was not done in this case. The second argument was that the decision is perfunctory in nature and based on peripheral findings which do not relate to the applicant's core claim. Mr de Blacam submitted that the Tribunal Member's decision was based on three negative credibility findings relating to (i) demeanour; (ii) failure to seek police assistance and (iii) travel through immigration control. The Tribunal Member's reference to the applicant's demeanour was unreasoned and the Courts have found that reliance on demeanour ought to be a last resort.

14. Ms Brett for the respondents argued that the statement of grounds does not refer to a failure to consider documentary evidence and the respondents were not properly on notice of this proposed new argument which appears to have been made while counsel was on his feet. The applicant does not identify any reason for not raising the issue of the documentary evidence at an earlier stage. Even if an application had been brought at this late stage the fact that a new counsel has taken a different view of the case is an insufficient reason for the statement of grounds to be amended. The respondents relied on *Muresan v. The Refugee Appeals Tribunal* (Unreported, High Court, Finlay Geoghegan J., 8th October 2003). Moreover, looking at the documents it is clear that there is nothing in them which link the applicant to the events outlined in the COI. The only document personal to her is her brother's death certificate which does indicate the cause of death. The relevance of the documents is questionable as the Tribunal Member approached the decision on the basis that the applicant was a person who was in some way connected with the rehabilitation centre. The two newspaper articles and the internet report are unequivocal insofar as they indicates that the police arrested the alpha, released all the inmates and closed down the centre and were doing their job in investigating the allegations made by the people interned/detained there. This was not a case of a person alleging criminal activity and asserting that the police did not investigate. The reverse was the case. In those circumstances, the finding that state protection would have been available if sought is valid and reasoned.

15. By way of reply, Mr de Blacam cautioned the Court against reliance on *Muresan* in light of the judgment of Fennelly J. in *Andrew Keegan v. The Garda Siochana Ombudsman* [2012] IESC 29 arguing that the Supreme Court had departed from the strict application of *Muresan*. He submitted that the applicants should not be put to the expense of filing a motion to amend and that the test was the interests of justice.

THE COURT'S ANALYSIS

16. As a preliminary but important matter, the Court finds that the respondents are fully justified in raising their objection that the applicants' attempts to argue the ground relating to failure to properly consider documentary evidence was not expressly flagged in the applicants' sadly generic statement of grounds where none of the grounds could be interpreted as fitting into a challenge to the

treatment of the documents furnished. These proceedings were initiated prior to the amendment of Order 84 by S.I. No. 691 of 2011 but even on the time limits applicable prior to the introduction of the shorter time limits in January 2012, any new ground pleaded would be out of time by many years. The particulars furnished in the statement of grounds are grossly inadequate and fall very far short of putting the respondents on notice of the reasons for challenging the decision. No interpretation of ground (8) – *"The Tribunal … failed to take into account relevant considerations"* or ground (11) *"The decision of the first named Respondent is unreasonable, irrational and flies in the face of commonsense in the light of the circumstances of the case"* could support a challenge to the failure to consider documents relevant to the applicant's identity.

17. The question then arose as to whether the applicants should be permitted to amend their statement of grounds. They have not sought leave to amend, nor have they brought a motion. Whether operating under Order 84 as it applied when these proceedings were initiated or as it applies post-amendment, the substance of the rule remains the same – the Court hearing an application for leave may *"on such terms, if any, as it thinks fit"* allow the statement to be amended whether by specifying different or additional grounds of relief or otherwise. Since 1st January 2012 the Court may now also, *"where it thinks fit"*, require the applicant's statement to be amended by setting out further and better particulars of the grounds on which any relief is sought. A Court is not constrained in granting leave to amend only where a motion to amend is brought by the applicants and it may act of its own motion to direct an amendment. The Court will of course be guided in the exercise of its discretion by the case-law of the Superior Courts and to that end, the summary of the relevant principles set out in the judgment of Fennelly J. in *Andrew Keegan v. The Garda Siochána Ombudsman* [2012] IESC 29 is of invaluable assistance.

18. In *Keegan*, Fennelly J. had regard to previous decisions of the High Court including *Muresan* when considering the circumstances in which the courts should grant leave to amend. He held that these decisions *"cannot be regarded as precluding and undoubtedly were not intended to preclude a court from granting leave to amend grounds, when the interests of justice require that such an order be made"* and *"did not purport to hold that the discovery of new facts was either an essential precondition or that proof of such a discovery was exhaustive of the circumstances in which leave to amend might be granted."* He noted that every case depends on its own facts and circumstances and found that there is no comprehensive and exhaustive judicial statement of the circumstances in which a court may permit an applicant for judicial review to amend the grounds for the relief sought, save that the courts have expressed themselves reluctant to grant such amendment without good reason. He expressed the following conclusions which seems to this Court to be of useful general application:-

> *"31. Persons are permitted to seek review of administrative decisions which affect them within prescribed times and on grounds in law which they propose and which the courts grant them leave to argue. The object of the system is to strike a fair balance between the certainty and security of administrative decisions and the rights of persons affected by them who wish to contest them.*
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> *32. The strict imposition of time limits is mitigated by the power of the court to permit an application outside the permitted time, provided the court is persuaded that there is good reason for the delay and that no other party is adversely or unfairly prejudiced.*
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> *33. Once an applicant has obtained an order granting leave to apply for judicial review, he is confined to the grounds permitted. He may not argue any additional grounds without leave of the court.*
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> *34. If he applies for an amendment of his grounds within the judicial review time limit, he should, obviously, at least in normal circumstances, have no difficulty obtaining the amendment. If he applies for an amendment outside the time, he will have to justify the application. He will have to explain his delay, just as in the case of a late applicant. The court will expect him to give reasons to explain his failure to include the new proposed ground in his original application.*
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> *35. On the other hand, it is difficult to see why an applicant for an amendment of grounds should have to satisfy a more exacting standard in explaining delay than is imposed on an ordinary late application. He may say that the additional ground is based on material of which he was unaware when he was making his original application. On occasion, the respondent reveals a new ground of argument in its answer to the application … . The applicant may offer a different explanation. There is no reason, in logic, to impose on an applicant a criterion of newly discovered fact to justify an application to amend, when an application for an extension of time is not subject to any equivalent condition. This is not to say that the applicant's knowledge of the facts is irrelevant. In some cases …discovery of new facts may be an explanation for the omission to include a ground. In other cases, the applicant may have been aware at all relevant times of the facts relevant to the new ground and this will weigh in the balance against him, without being necessarily conclusive.*
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> *36. None of this is to take away from the fact that an application for an amendment of his grounds for judicial review must explain his failure to include the proposed new ground in his original application. The cases show that the courts are reluctant to admit new grounds which amount to advancing an entirely new cause of action …, or a challenge to a different decision …. The nature of the decision under attack may also be relevant. If it is one which benefits the public at large or a large section of the public, a challenge may have corresponding disadvantages for a large number of people. This may explain why special and stricter statutory rules have been introduced in cases of public procurement, planning and development and asylum and immigration. The courts will have regard to the public policy considerations which have prompted the adoption of such rules.*
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> *37. Amendment may be more likely to be permitted where… it does not involve a significant enlargement of the applicant's case. To the extent that leave has already been granted, the public interest in the certainty of a decision is already under question. An additional ground may not make any significant difference, particularly if it is based, as in the present case, on a pure matter of law. A court might take a different view, if the new ground were likely to give rise to further exchange of affidavits relating to the facts."*

19. Applying these principles to the facts of the appeal in front of the Supreme Court, Fennelly J. had regard to the arguable nature of the entirely new arguments, the fact that they substantially enlarged the grounds pleaded and the explanation given for not raising the new argument at an earlier stage. He concluded that the delay and the oversight of the appellant's lawyers in raising the new point were *"significantly counterbalanced"* by the failure of the respondent to keep the appellant informed of the relevant issues for several years. In those circumstances, he felt it would be unjust to visit on the appellant the consequences of what his legal representatives frankly admitted to be their own error. He summarised his position as follows: *"The appellant should not, without good reason, be deprived of the right to argue a very significant point of law."*

20. It seems to the Court that the key point which emerges from *Keegan* is that the assessment of whether to grant leave to amend

is inextricably bound up with the assessment of the merits and strength of the newly identified argument and the reasons proffered for the failure to raise the ground at an earlier stage.

21. Going for the moment to the merits of the challenge brought to the impugned decision in the applicant's case. As indicated at the hearing, while the decision in this case may be validly criticised for its form and generally perfunctory nature, the facts being considered by the Tribunal Member and the reasons offered for simply not believing key aspects of the applicant's claim are such that the decision did not require any great discursive reasons for rejecting the claim. Terse though the decision was, the reasons for not accepting the validity of the applicant's claim went beyond the reasons outlined by counsel for the applicant in argument and essentially were that he did not find her credible, more particularly in relation to her demeanour and the evidence she gave. It was difficult to believe she left Nigeria for the reasons given. If her evidence was to be believed, it would mean the police were not acting in accordance with due process and in fact this was a clear case of the police acting on information given to them about what was occurring in the rehabilitation centre. She did not seek state protection. She could not have gone through immigration points in the manner described and that her travel arrangements as described were less than credible.

22. With regard specifically to the documentation produced by the applicant, it is very well established that the extent to which a decision-maker is required to expressly consider, weigh and evaluate a document furnished to him / her in support of a claim depends on the nature of the document itself. Common sense must prevail. If a document has the potential to corroborate an aspect of the claim then it merits a reason why it is not afforded weight. Clearly, if a document is no more than a sum of its content and does not have any probative value, it is unnecessary for a Tribunal Member to outline the weight attached to the document in the decision. In this case the documents at issue are (i) the applicant's birth certificate; (ii) her brother's death certificate, (iii) two newspaper articles relating to the arrest of the man she named as her father-in-law and (iv) a police report relating to her brother's death. Her birth certificate was not exhibited in the proceedings but it seems to the Court that it could do nothing more than corroborate her claimed name, date of birth and nationality. It cannot link her to the man arrested for ill-treating inmates at a rehabilitation centre and it does not advance her narrative of cult members wanting to sacrifice her unborn child to secure that man's release from jail. The remaining documents similarly if accepted as genuine are wholly lacking in any probative value. They cannot link her to the rehabilitation centre or the man arrested nor do they connect her to any person in that centre. They do not place her as a witness interviewed by the police. They do not connect her to her partner or him to the rehabilitation centre.

23. In addition the contents of the documents are internally inconsistent. The "Punch" internet article relied upon by the ORAC is dated Sunday 24th February 2008 and is considerably more measured in terms than the rather lurid descriptions contained in the other newspaper articles. It states that the rehabilitation game was uncovered and its manager was arrested "on Friday", i.e. Friday 22nd February 2008. The applicant's brother's death certificate states his date of death as 8th February 2008, his cause of death as "brief illness" and states the duration of illness as two weeks. The purported police report dated 8th February 2008 says *"he was sick for a period of some weeks in his house at Oloore's residence during the time of arresting suspects at the above mentioned residence"*. The death certificate and police report accord generally with each other but they do not tally with the Punch article. None of the documents identify the applicant or her partner and while the newspaper articles outline allegations of many crimes committed at the named centre in quite sensational terms, they do not link those crimes to any cult. The newspaper extracts do no more than describe the discovery of misguided and particularly cruel treatment of people with addiction and mental health problems. Nothing in any document placed the applicant or her then unborn children anywhere near the arrested operators of the so called rehabilitation centre.

24. Given the nature of the documents furnished, the Court takes the view that there was no duty on the Tribunal Member to expressly outline their content or to explain why he did not attribute weight to them.

25. While the Court permitted the argument on the failure to consider documents to be heard without prejudice to the respondents, it became clear that the argument had no weight and could not be considered as establishing substantial grounds for impugning the lawfulness of the appeal decision or of being of such force that in the interests of justice the amendment of grounds should have been permitted. Similarly, there is no substance to the argument relating to the failure to establish the identity of the applicant. The argument is not assisted by reliance on *Voga* as that case had particular and unusual facts. The applicant claimed to be the wife of a deposed Fon in Cameroon who had been murdered. Establishing her identity was key to assessing her credibility as the incident involving the murder of the Fon was established. She submitted documents which, if verified, were capable of corroborating her connection with the murdered Fon. In this case the applicant's personal identity was not disputed, the event of the arrest of a man in charge of a rehabilitation centre was not disputed and the Tribunal Member even accepted that the applicant was at the centre. The Tribunal Member found it simply not credible that a person who was aware that an active police investigation was taking place and knew that key players had been arrested and detained and had herself been interviewed by the police would not report the additional threat to her and her unborn child.

26. In sum, while the decision is notable for its brevity, it cannot on the specific facts of the claim be described as unfair, unlawful, irrational or unreasonable. The credibility findings were well-founded and connected with the applicant's claim. The finding on state protection was reasonable in light of the applicant's own evidence and the documents furnished by her, which indicate that the police acted to arrest and arraign those responsible for crimes against "inmates" at the rehabilitation centre. As the applicants have not established substantial grounds for the contention that the decision ought to be quashed, they do not require leave to amend their statement of grounds. The application does not succeed.