THE HIGH COURT

JUDICIAL REVIEW

Record No. 2009 / 468 J.R.

Between:/

A.S., T.S. (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND A.S.) AND L.S. (A MINOR, SUING BY HER MOTHER AND NEXT FRIEND, A.S.) [NIGERIA]

APPLICANTS

-AND-

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

RESPONDENTS

-AND-

HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT OF MS JUSTICE M. CLARK, delivered on the 5th day of June 2013.

1. The applicants, a mother and her two children, are nationals of Nigeria. The mother, Ms A.S., will be referred to as "the applicant". They challenge the decision of the respondent Tribunal dated the 13th March, 2009, refusing their appeal against the negative recommendation of the Refugee Applications Commissioner. By agreement, the application for leave was treated as the application for judicial review by way of a telescoped hearing which took place on the 19th March, 2013. Mr Robert Haughton S.C. and Mr Garry O'Halloran B.L. appeared for the applicants and Ms Catherine Duggan B.L. appeared for the respondents.

2. The Tribunal decision was notified to the applicant by letter dated the 22nd March, 2009, and she claims that it was received on the 30th March, 2009. The applicant requires a two-week extension of time as the proceedings were commenced outside of the time limit established by s. 5 of the Illegal Immigrants (Trafficking) Act 2000. Having heard submissions from the applicant, the Court was prepared to accept that the short delay was adequately explained and extended the time to commence proceedings.

The Impugned Decision
3. The primary negative finding made in the Tribunal decision under challenge was that much of the applicant's evidence at the oral appeal hearing was new evidence and thus her credibility was rejected. The Tribunal went on to find that even though she did not accept that the applicant's allegations were legitimate, it was reasonable to expect her to relocate internally within Nigeria.

The Applicant's Submissions
4. Mr Haughton SC invited the Court to examine whether the information elicited at the appeal hearing was actually new evidence as opposed to a mere expansion of the details of the applicant's claim. He directed the Court's attention to the very short record of the applicant's s. 11 interview which he described as having been conducted in a slipshod manner where the Commissioner's authorised officer directed the applicant to answer the questions directly as posed but no follow-up questions were asked even when required. While it was accepted that every page of the short interview had been signed by the applicant there was a distinction between signing each page and having each page of the interview read back which he asserts did not happen. In the circumstances of the conduct of the s. 11 interview, the finding that most of the information was new could not be said to be grounded on a sufficiently solid basis.

5. Mr Haughton further argued that apart from accepting the applicant's nationality there was no positive finding on her claim. For instance, no finding was made as to whether she was Hausa or as to whether she had been Muslim and was now Christian. The Tribunal did not address the fundamental question of whether on return to Nigeria she would be at risk of persecution for a Convention reason, in light of what is known about her. Reliance is placed on the judgment of Cooke J. in *M.A.M.A. v. The Refugee Appeals Tribunal* [2011] IEHC 147, in which this Court granted leave and in which the Tribunal's decision was quashed as there was no assessment of future risk to the applicant. In the applicant's submission, the same principle applies in this case as no basic findings were made and no forward-looking test was applied.

6. It was further submitted that the internal relocation finding was unlawful on the basis that the Tribunal Member failed to consider the applicant's personal circumstances in relation to her problems with Sharia law, whether the federal courts apply Sharia law on appeal from decisions of Sharia courts, whether the applicant's conversion from Islam to Christianity (which is proscribed under Sharia law) would affect her and whether her daughter who is the product of a mixed religious union would be accepted in Nigerian society.

The Respondents' Submissions
7. The Respondents submit that Tribunal Member's findings on credibility were reasonably based on the inconsistencies in the applicant's evidence at the Tribunal hearing, which was fundamentally different to the evidence given at the s. 11 interview and furthermore the Tribunal Member was dissatisfied with the explanations provided for those differences. Her explanation for the change in her evidence included criticism of the interview process, but no such complaint was made in the extensive Notice of Appeal prepared by her legal representatives. The Tribunal Member was entitled to take the applicant's evidence at the hearing, including her answers, into account.

8. Ms Duggan submitted that the obligation to assess the objective elements of an applicant's claim only arises where the subjective elements of the claim are accepted. Reliance was placed on the judgment of Peart J. in *Imafu v. The Refugee Appeals Tribunal* [2005] IEHC 416 to support this proposition. The issue was not whether adultery is a crime under Sharia law but whether, as asserted, the

applicant had an affair and suffered the alleged acts of persecution. The Tribunal did not accept that the third applicant was conceived in the circumstances in which the mother claimed and further she was not believed because of the changes in her evidence. If there was no basis for her asserted fear in the past, there was no need to consider fear in the future based on the same facts.

9. In order for these arguments to be assessed in context, it is material to examine the applicant's claim as presented at the different stages of the asylum process.

The Applicant's Claim
10. The applicant's claim as presented to the Refugee Applications Commissioner was that she was a Nigerian of Hausa / Fulani ethnicity who was born in 1977 in northern Nigeria. She had a Muslim father and a Christian mother and was raised a Muslim. She says she was educated up to degree level at university. In October 2001 she married a Muslim man and they moved together to adjoining Bauchi State, also in northern Nigeria, where she worked as a teacher. Their child *T.,* the second applicant, was born in 2004. The following year her husband who she described as a drunk and who was also on anti-depressants simply disappeared. After some time she entered a relationship with a Christian and became pregnant with his child. He taught her the bible and tried to convert her and she was willing to convert to Christianity and raise her children away from Islam which she described as a very violent religion.

11. The applicant told the Commissioner that she was persecuted because of her extra-marital relationship with a Christian man in a predominantly Islamic part of Nigeria where Sharia law prevails. She fled because of fears that the Muslims in her community would take her children from her and she herself would be lashed and would have her hands cut off because according to Sharia law as it is operated in Bauchi State, she was considered an adulterer and her behaviour *haram*. The Muslims of her community disapproved of her pregnancy and wanted her to terminate it. She was harassed by the *Almajiri*[1] who threw stones at her on one occasion. Men had gone to the crèche her son attended and she feared that they had come to take him. She was harassed by Muslims because of her pregnancy which was becoming a crisis in the town. Her Christian boyfriend left town because he was threatened.

12. These events culminated in a plan to attack her in her house on the 15th June, 2007 but her employer who had himself been threatened warned her of the plan. He then paid her for a month and advised her to move out for her safety. She and her son left their town and sought safety with her family in her home State. When no support was forthcoming from her family she eventually sought refuge with an aunt who like her mother had married a Muslim. That aunt assisted her to come to Ireland.

13. She says she arrived in Ireland on the 18th / 19th November, 2007, and applied for asylum. She gave birth to *L.*, the third applicant, on the 21st December, 2007, and attended for her s. 11 interview on the 22nd February, 2008. The interview was brief and her claim failed before the Commissioner on the basis of a lack of a well-founded fear. For example, it was noted that the only physical manifestation of enmity was one occasion of stone throwing which was minor and did not constitute a persecutory event. It was also found that '*it is not evident that she was targeted as a result of her religion but rather as a result of acting outside the tenets of the Moslem faith'*. The threat to her children was found not to be credible.

The Case made at the Appeal Stage
14. On the 26th March, 2008, the applicant's solicitors furnished a detailed Notice of Appeal to the Tribunal which included country of origin information (COI) and supporting documentation on the operation of Sharia law in the northern states of Nigeria, including on the topic of the prohibition of a Muslim converting or changing religion on pain of death. The activities of the *Hisbah* or religious police were emphasised and quotes provided from a Human Rights Watch report and other COI which noted the growing violence in the conflicts between Muslims and Christians. The applicant's own experiences with the police were described, including the fact that when she was seeking her husband she had to pay the police to persuade them to make efforts to find him. When later threatened by the local Muslim community, especially the *Almajiri / Hisbah* who threw stones at her and threatened her with flogging and having her hands cut off, she did not seek police assistance owing to her past experiences when her husband went missing. The women of her community had threatened to have her stripped and flogged as an adulterer. Her conversion to Christianity was confirmed and photographs provided of her daughter's christening in Ireland. The danger to her two children because of her conversion was underlined.

The Appeal Hearing
15. The Court has the benefit of a handwritten note of the hearing and the details of the evidence extensively outlined in the Tribunal decision, both of which indicate that the applicant gave evidence of being stoned by the *Almajiri*, of being forced to drink a concoction to terminate her pregnancy, of being stripped and flogged by women from the Muslim Women's Association, of having a butcher refuse to serve her and that her headmaster had advised her that her husband had returned and was actively seeking her. She also gave details of her flight from Bauchi State to her father's compound where she was called a whore and told to leave and of her flight to various places where her pregnancy with a Christian was treated as utterly unacceptable. She said that at one point she stayed in Lagos with her aunt, but when her uncle learned at the mosque that her photograph was being distributed and she was being referred to as an adulteress with a Christian man, he told her to leave. Eventually, with the help of her aunt who was formerly a Christian she came to Ireland.

16. She was asked why, notwithstanding her evidence about her affair and conversion, her daughter's birth certificate names her Muslim husband as the baby's father and why the child was registered with his surname. She responded that she would explain her reasons to her daughter when she grew up.

17. She claimed that returning to Nigeria was not a viable option as she now knew that her husband had returned and was looking for her. This information came to her from the headmaster at her former school. She provided his telephone number so that this information could be verified by the Tribunal. She had previously told the authorised officer at her s. 11 interview that she had no time to attend to becoming a Christian due to the difficulties she had in adjusting to the cold and because she was pregnant. A year later at the hearing she submitted photographs of her daughter's christening and a letter from the Christian community where she is living indicating that she is a member of the congregation. She stated that her children would not be safe from fundamentalists who were present throughout Nigeria and that they did not speak either Yoruba or Igbo if they were to seek out Christian areas.

The Court's Analysis
18. In the ordinary course of challenges to credibility findings, the applicant faces an uphill battle as the reviewing court is generally slow to disturb such findings unless it is established that they are based on errors of law or fact or are manifestly unreasonable. The advantage a decision maker has over the reviewing court in seeing, hearing and engaging with the applicant is difficult to overstate and must always be borne in mind by the reviewing judge. In this case, there is no doubt that the appeal failed because the Tribunal Member was unimpressed and ultimately unconvinced by the applicant's presentation of so much new and inconsistent oral evidence and for this reason the applicant's credibility in relation to the events of her pregnancy was rejected. While undoubtedly some of this evidence was elicited by appropriate questioning by her legal representative at the hearing and some of the additional evidence may

be attributed to her inability to provide expansive answers to the Commissioner's authorised officer, it is clear that her evidence went beyond what could be attributed to a defective interview. Of note, her evidence went beyond what was asserted on her behalf in her Notice of Appeal following consultation with her legal advisers. An examination of the evidence shows that the persecution claimed progressed from general harassment and one occasion of stone-throwing by the *Almajiri*, to focused involvement of and threats from the Muslim Women's Association to being actually stripped and flogged by them. It is objectively difficult to understand why if a woman had been exposed to such barbarity she did not report this event at the first opportunity when she sought asylum. Equally, it is not unreasonable to expect that she might have reported being ordered out of her aunt's house because her photograph was disseminated in mosques throughout Nigeria. A decision maker is entitled to query the omission of such events in the questionnaire, s. 11 interview or the appeal submissions and the applicant cannot justifiably complain when her own actions of progressive embellishments have created many of her problems in relation to the assessment of her credibility of past persecution. This aspect of the applicant's challenge must fail.

19. The lawfulness of the Tribunal decision does not however stop at the legitimate rejection of the applicant's claim of past persecution. The applicant may very well have embellished or even invented parts of her ill-treatment while pregnant but the core claim – where the fundamentals have remained constant – that she feared for her safety and that of her children if returned to Nigeria because she converted from Islam to Christianity and she feared Muslim reaction to that state of affairs, remained to be assessed.

20. The applicant's story had two parts. The first was an almost biblical but a not unusual story and related to her extra-marital affair and pregnancy while the second related to her fear of persecution as a Muslim who converted to Christianity and who might be pursued by fundamentalists because of her prohibited action. A cynical reader might well ask how or why a well-educated woman[2] of Islamic background would court trouble by engaging in a relationship with a Christian man in the very town where she had lived with her Muslim husband and where Sharia law operates, and then compound her problems by remaining there teaching children in a Muslim school while her pregnancy was apparent. That cynicism could only be justified or removed by a thorough open minded investigation of the claim and by establishing why such an unlikely event might have occurred, whether it occurred at all or whether there were explanations for any of the unusual features in the story.

21. The unusually short s. 11 interview after the usual preliminaries runs only to five pages. The impression given is of a disinterested inquirer, perhaps fatigued by the tedium of the much repeated claim of adultery and consequent pregnancy, a fear of Sharia and an alleged conversion to Christianity. In the s. 13 report the Commissioner seemed to accept that the applicant was Muslim. He made no finding on attitudes relating to the boyfriend's Christianity or her interest in his Christian faith as he found that religion played no part in the claim which he rejected and found that whatever was meted out to the applicant by societal disapproval was because her behaviour deviated from the tenets of her Muslim faith. In other words, he did not accept that the applicant was shunned and threatened because she had a relationship with a Christian man or because she showed an inclination to change her religion but rather because of her adultery. He did not accept the credibility of her stated fear that her son would be taken from her. He did not assess any future risk.

22. While this judicial review is confined to the findings of the Tribunal decision it is opportune to mention that the s. 11 interview is the one opportunity in the asylum assessment procedure where the primary decision maker can, with an open mind, investigate with the applicant without adversarial elements, the facts presented and can assess the likely truth of those facts in the context of current and objective COI. That is not to say that a comprehensive and unbiased investigation could not lead to negative credibility findings for perfectly legitimate reasons. However, until and if that stage is reached, an applicant is at a minimum entitled to fully make her case to an investigator who is prepared to ask the right questions and by probing and listening permit the applicant to enlarge on aspects of the claim which require expansion. A story which at first glance may seem utterly unlikely may on probing become sustainable.

23. Returning to the particulars of this claim: There is no dispute that Sharia law proscribes all extra-marital relationships and that those tried before Sharia courts may be sentenced to lashing or stoning to death. Similarly, giving up the Islamic faith for another religion is absolutely forbidden and is a grave offence. Given what is known and confirmed by COI on societal norms in northern Nigeria where the religion of the Hausa / Fulani is Islam, the story told by the applicant could in its widest sense be true. Equally, it is a story frequently told raising requirements for some minimal level of corroboration especially where no documents capable of supporting the case made were submitted. While the first part of the claim was found not credible the applicant was not asked the sort of questions to assess whether any part of her story relating to her (then intended) conversion and her asserted fear of persecution on this basis was true.

24. Although the assessment of whether a person is a refugee involves a forward looking test, the applicant's fears for her future in Nigeria were not considered. The reality is that once the applicant had delivered her child, her pregnancy was over and whatever the of her treatment by members of her community in Bauchi State or who is the father of the child born in this State, the only relevant issue in relation to a future risk was whether her fears as a Hausa woman with two children who had changed her religion were well founded. While past persecution is a good indication of a risk of future persecution, the rejection of her narrative of persecution because she was pregnant does not necessarily relieve a protection maker of the obligation to apply a forward looking test of prospective risk. See for example the cases of *M.A.M.A. v. Refugee Appeals Tribunal* [2011] IEHC 147, *Karanakaran v. Secretary of State for the Home Department* [2000] 3 All E.R. 449 and *Minister for Immigration and Multicultural Affairs .v Rajalingam* [1999] F.C.A. 719. It is also useful to consider *Da Silveira v. RAT* [2004] I.E.H.C. 436, where Peart J. stated:-

> *"The task of the Tribunal is not simply to be satisfied that there is a well-founded fear of persecution arising from the past, but also that, owing to such well-founded fear for a Convention reason (the applicant) is outside the country of nationality, and is unable or owing to such fear is unwilling to avail himself of the protection of that country. In other words, that if returned to that country he would be likely to suffer persecution in the future. It is therefore not sufficient for the adjudicator to be satisfied or not as the case may be about particular facts and details relating to past persecution. A lack of credibility on the part of the applicant in relation to some, but not all, past events, cannot foreclose or obviate the necessity to consider whether, if returned, it is likely that the applicant would suffer Convention persecution."*

25. The same issue which arises in this case was examined in depth by Cooke J. in M.A.M.A. when he reviewed all the above recited authorities and concluded that,

> *"18. […]one of the crucial elements in the definition of "refugee" as stated in s. 2 of the Act of 1996 based upon Article 1A of the Geneva Convention, is that the asylum seeker "is outside the country of his or her nationality" owing to a well founded fear of persecution for one of the Convention reasons. The assessment of the fear claimed thus involves identifying a country of origin. Accordingly, if the finding on credibility goes so far as to reject a claim that the asylum*

seeker has a particular nationality or ethnicity or that he [or she comes from a particular region or place in which the source of the claimed persecution is said to exist, there may be no obligation upon the decision-maker to engage in "reasonable speculation" as to the risk of repatriation in the case. On the other hand, if the decision-maker concludes that the asylum seeker is opportunistically seeking to place himself in the context of verifiable events in a particular place but decides that while such events did occur, the asylum seeker was not involved in them, the risk of future persecution may still require to be examined if there are elements (the language spoken or obvious familiarity with the locality for example,) which establish a connection with that place. Thus, opportunistic lying about participation in events involving previous persecution will not necessarily foreclose or obviate the need to consider the risk of future persecution provided there are some elements which furnish a basis for making that assessment."

The decision in M.A.M.A. was returned to the same Tribunal Member for determination of the Applicant's country of origin and whether because of that fact he would face a future risk of persecution if returned.

26. It is remarkable that in this case no examination of the second part of the applicant's claim was conducted by the Commissioner or the Tribunal. In contrast with the Commissioner who asked few questions, the Tribunal Member allowed the applicant to respond fully to her counsel, the Presenting Officer and to her own questions. There was a far ranging appeal hearing where the applicant described in enhanced detail her treatment as a woman pregnant to a Christian but where she also described her fear as a Hausa living away from Sharia law whose conversion to Christianity would be recognised by other Muslims who would react negatively and that she would have no protection as '*Muslims were everywhere...the chief of police in Lagos was Muslim…*'. There is no reference to any assessment of the risk of persecution arising from her claimed conversion and the Court is therefore unclear as to whether the applicant's claim was fully understood. While the rejection of credibility relating to her account of past persecution may have been based on legally sound reasons, the Court simply does not know whether the Tribunal formed any view on whether the applicant had ever been a Muslim or was married to a Muslim or had converted to Christianity. The decision concentrated on the applicant's adultery and pregnancy rather than on what the applicant's situation would be if returned to Nigeria as a single Hausa woman with two young Christian children. It is not known if it was accepted that the applicant is Hausa/Fulani although reference was made at the hearing to her mode of dress which identifies her as being from North Nigeria. In the circumstances. where there is a real likelihood that the applicant is in fact Hausa and therefore likely to have been Muslim, the identification of her region of origin and her religion is an important part of the assessment of any future risk.

27. While it was accepted that the applicant is Nigerian and is well educated with work experience and could therefore readily relocate, the key issues of whether she was in fact Hausa (who are generally Muslim) and whether she had become Christian while in Ireland were not addressed. Her claim that she faces future risk and cannot safely relocate has not been fully or properly assessed. The failure of the decision maker to conduct an assessment of future risk in this case has meant that half of the core claim remains unaddressed. Therefore, the Court will grant an order of certiorari quashing the Tribunal's decision and will remit the claim to the Tribunal for fresh consideration by a different Tribunal Member.

1. The Almajiri are children who attend Islamic school and who often end up begging on the street as 'street children'.

2. The applicant gave evidence that she has a BSc in zoology