

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 404 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED), AND IN THE MATTER OF THE IMMIGRATION ACT 1999, AND IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000, AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003, SECTION 3(1)

BETWEEN

C.C.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on 28th day of October, 2014

1. This is a “telescoped” hearing in which the applicant seeks leave to apply for judicial review for an order of *certiorari* and other reliefs challenging the decision of the first named respondent (“the Tribunal”) to affirm the recommendation of the Refugee Applications Commissioner, made 28th January, 2010, and notified to the applicant by letter dated 5th February. The applicant also challenges the decision of the second named respondent (the Minister) refusing his application for refugee status under s. 17 of the Refugee Act 1996 (as amended). The main grounds originally advanced in the original application related to a challenge by the applicant concerning the suggested incompatibility of provisions of the Refugee Act 1996, with Council Directive 2005/85/EC which, by reason of the decisions of the CJEU in *H.I.D and B.A.* (C-175/11), could no longer be maintained. The more limited ground advanced was based on the alleged failure of the Tribunal to make any clear findings as to whether the applicant’s evidence in respect of his claimed homosexual orientation or history was accepted. The applicant also challenged the decisions on the grounds that the incorrect legal test was applied to the issue of internal relocation considered by the Tribunal. The notice of motion seeking relief is dated 1st April, 2010, outside the period of fourteen days provided for pursuant to s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000. The applicant seeks an extension of time claiming that he has demonstrated good and sufficient reason to the court to do so.

Background

2. The applicant was born on 6th May, 1979, and is a Nigerian national. He claimed to be homosexual and, as a result of persecution, fled Nigeria in fear of his life. He arrived in Ireland on 19th January, 2009, and applied for asylum.

3. In his questionnaire he claimed that he had been repeatedly beaten because of his sexual orientation. He had been discriminated against within his church and was not permitted to enter it anymore. His family turned against him and threatened to have his boyfriend killed. The police treated his complaints with derision and his sexual orientation was treated by his neighbours and friends as an abomination. He has been threatened that he will be killed if he returns to his village. At his s. 11 interview he claimed to have lived in Enugu state from 1997 until 2006. Prior to this he lived in his home village. In 2006 he moved to a different town where he remained until November, 2008. He then lived in Lagos between November, 2008 and January, 2009.

4. In his interview he claimed that he realised he was homosexual when he was 17, which he later corrected to some time in or about 2004, and that he never had a relationship with a woman. He claimed that he engaged in his first gay relationship in Enuga in 2004, and that it lasted for approximately four years. People became aware of it through his partner. During this period he conducted the relationship while living in his home village. When his neighbours discovered the relationship, he was attacked in January, 2006 and ran away. Though he did not need medical attention, he went to the local police who laughed at him. He was barred from his local church. His dates in the course of the s. 11 interview varied and the interviewer drew his attention to the fact that he was very vague about the details of important events and the dates upon which they occurred. He left the village five months after being beaten and travelled to Enuga. He family searched for him. When in Lagos, he contacted his mother and his older sister who informed him that the villagers wished to kill him and were threatening harm to his mother and sister if he did not return.

5. The country of origin information indicated that sexual relationships between gay men were outlawed in Nigeria, but that there had not been any prosecutions. The applicant claimed that the police were arresting gay people if their secret was revealed, but acknowledged that when he reported the assaults committed because of his sexual orientation he was not arrested by the village police. It was suggested to him that gay men in urban areas could operate discretely and if they do so, had no reason to fear mistreatment from non-state agents and that, therefore, he could live discretely as a homosexual in another part of Nigeria.

The Report of the Refugee Applications Commissioner

6. The Commissioner’s s. 13(1) report focused on a number of contradictions in the applicant’s account of his personal history and the events already described. Though there was no express finding made concerning his sexual orientation, the Commissioner considered the issue of relocation and state protection on the basis that he is homosexual. The report stated that he had the option of living a discreet life in another part of Nigeria evidenced by the fact that he had moved from his village. It noted that if he chose to be open about his homosexuality he was likely to suffer discrimination, such as not being allowed to receive communion in his church. However, it was concluded that this did not amount to persecution. As regards state protection, it was noted that while sexual relations between gay men were outlawed in Nigeria and that openly gay men were likely to face societal discrimination and isolation, there had not been any prosecutions. It was also noted that the applicant was not in danger of arrest by police at his local station for partaking in homosexual activities, even though he complained to them that he was being harassed and had been assaulted because of his sexual orientation.

The Tribunal Decision

7. An oral hearing was held by the Tribunal on 22nd September, 2009.

8. In evidence the applicant claimed to have had a girlfriend up to 2004, when he realised that he was gay. However, he claimed in the s. 11 interview that he never had a relationship with a woman. He had given conflicting accounts of when he first realised that he was gay, initially saying that it was when he was 17 and subsequently, stating that it was when he was 23 to 24 years old. The Tribunal concluded that his vagueness on this issue "raises a credibility issue for his claim".

9. The applicant claimed that his sexual orientation was revealed to the people of his village by his partner. However, he continued his relationship with him until 2008, notwithstanding this revelation and this also was said to raise "credibility issues" for the applicant's claim. Thus, though aspects of his gay relationship appeared to be accepted by the Tribunal to the extent that some elements of the adverse credibility decision were based on his failure to break his relationship with a boyfriend who revealed his secret, it is also clearly implied in other sections of the decision that his claimed sexual orientation was not accepted.

10. It is entirely unclear from the decision of the Tribunal whether the Tribunal accepted that the applicant was homosexual. It is essential that a clear determination on this matter be made. It was not.

11. The Tribunal also determined that the applicant had the option of living in another part of Nigeria and noted that no harm came to him when he stayed in Lagos. It was noted that the applicant was not in danger of being arrested by police at his local station because of his homosexual activities even though he had complained of assault and harassment. The existence and application of discriminatory laws against homosexuality was referred to by the Tribunal and though it appears to have been accepted that he attended at his local police station to complain about his homosexual activities, the only comment on that aspect of his case is that he was not arrested. There is no discussion of whether state protection was available to him in respect of the assaults, harassment and threats made to him.

12. The issue of relocation is given very little consideration. It was noted that a British Home Office Report stated that internal relocation to escape any ill-treatment from non-state agents was almost always an option. The applicant complained that he could not be safe anywhere in Nigeria as he had no legal rights and the church would discriminate against him. Another United Kingdom Home Office Report stated that while sexual relations were outlawed between gay men in Nigeria and openly gay men were likely to face societal discrimination and isolation, there had not been any cases prosecuted under the law against homosexuals. No conclusion is reached in relation to how he might relocate, locations to which he might reasonably be expected to relocate or how he may, if it is accepted that he is homosexual, live his life in the future as a homosexual in Nigeria, or whichever part of it to which he might relocate.

13. There is extensive discussion in the decision of his mode of travel and his story about arriving in Ireland which is also said to undermine his credibility, but it is entirely unclear whether or how this issue was said to affect his credibility on his central claim that he is homosexual. If the Tribunal accepted that the applicant was a homosexual as claimed, the question arises as to whether the Tribunal ought then to have applied the principles set out by the Supreme Court of the United Kingdom in *H.J. (Iran) v. S.S.H.D.* [2012] UKSC 31, which were considered and approved in *M.A. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 842, and considered by this Court in *S.Q. v. The Minister for Justice, Equality and Law Reform* [2013] IEHC 94 and by MacEochaidh J. in *E.P.A. v. Refugee Appeals Tribunal* [2013] IEHC 85 and *Adams v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Cooke J., 17th December, 2009). A number of issues would then have to be considered by the Tribunal if the principles set out by Lords Hope and Rodger in *H.J. (Iran)* were to be properly applied. Lord Hope set out a staged test to be applied to such cases at para. 35 as follows:-

(a) The first stage is to consider whether the applicant is indeed gay:

(b) The next stage is to examine a group of questions which are directed to what his situation would be on return. "The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does. Those others will include everyone with whom he will have come in contact, in private as well as in public. The way he conducts himself may vary from one situation to another, with varying degrees of risk. But he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. If he fears persecution as a result and that fear is well-founded, he will be entitled to asylum however unreasonable his refusal to resort to concealment may be. The question what is reasonably tolerable has no part in this inquiry:

(c) The fact that the applicant will not be able to do in the country of his nationality everything that he wants to do openly in the country whose protection he seeks is not the test. It is wrong to approach the issue on the basis that the purpose of the Convention is to guarantee to an applicant who is gay that he can live as freely and openly as a gay person as he would be able to do if he were not returned. The focus throughout must be on what will happen in the country of origin:

(d) The next stage if it is determined that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. If this is simply in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, the claim for asylum must be rejected. "But if the reason why he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well-founded". (See also Lord Rodger at paras. 61 and 82)

14. The court is satisfied that a finding that the applicant is credible in his claim that he is a homosexual must be followed by an assessment which is in accordance with the approach set out in *H.J. (Iran)*, by taking into account whether the applicant lived openly as a gay man or intends to in the future, or felt obliged to live "discreetly" by reason of the violence and threats of others and the failure of the state to offer any state protection to the gay community and/or to encourage discrimination against him on the basis of the criminalisation of sexual relations between men. These are important issues which require to be addressed once a clear finding as to the sexual orientation of the applicant is made. Unfortunately, a clear finding on that central issue was not made in this case.

15. If an adverse credibility finding is made in respect of the applicant's claim to be homosexual, then the other aspects of the test laid down by Lords Hope and Rodger do not arise (as in *O.E. v. Refugee Appeals Tribunal* [2011] IEHC 149).

16. The court is satisfied, therefore, that the Tribunal failed to make a finding on the core element of the applicant's claim and the evidence in respect of his sexual orientation and is, therefore, satisfied that the applicant has established a substantial ground upon which to grant leave to apply for judicial review. In the circumstances, having regard to the relatively short period of approximately

two months that passed and the fact that the applicant's solicitor was not in a position due to pressure of work to grant an appointment to the applicant until 23rd March, 2010, and the fact that the court is satisfied that the applicant has established a substantial ground, the court is satisfied that good and sufficient reason has been demonstrated to grant an extension of time and that it is in the interests of justice to do so in accordance with the principles set out in *G.K. v. The Minister for Justice* [2002] 2 I.R. 418 and *C.S. v. The Minister for Justice, Equality and Law Reform & Ors* [2005] 1 I.R. 343.

17. It is not necessary to consider the remaining ground in respect of relocation by which the applicant sought to challenge the decision because of the failure of the Tribunal to apply the approach set out in *H.J. (Iran)* to the issue of relocation.

18. I am, therefore, satisfied that the orders made by the Tribunal and the Minister should be quashed and the matter remitted for further hearing before a different tribunal member.

19. The court is not satisfied that the further evidence adduced by the respondents concerning the fathering by the applicant of a child following a very short lived acquaintance with the child's mother which occurred many years after the events which are at the core of this application, should be regarded as a sufficient basis upon which the court might exercise its discretion to refuse the application of *certiorari* because of lack of candour. This aspect of the case may, of course, be the subject of further evidence at any rehearing. The court also notes that as a result of the child's birth the applicant has applied for permission to remain in the state under the *Zambrano* line of authority and awaits a determination on that issue.