Neutral Citation: [2015] IEHC 739

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 568 J.R]

BETWEEN

B. O. A. (NIGERIA) (A MINOR SUING BY HIS FATHER AND NEXT FRIEND A.A.)

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

REFUGEE APPLICATIONS COMMISSIONER

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 20th day of November, 2015

1. This is telescoped hearing for judicial review seeking certiorari to quash a decision of the Refugee Applications Commissioner (RAC) to apply the provisions of s.13(6)(a) of the Refugee Act 1996 (as amended) to the applicant's claim, dated 15th April, 2010, and notified to the applicant by cover letter dated 21st April, 2010, and an order remitting the matter for reconsideration by the RAC.

BACKGROUND

2. The applicant is a Nigerian national born in this State on 18th September, 2008. His mother and father are Nigerian nationals and asylum applicants. The applicant's father applied for asylum on behalf of the applicant on 3rd March, 2010, when he was seventeen months old. The infant applicant's father completed all documentation and spoke at interview on behalf of the applicant. The interview was held on 8th April, 2010.

3. The applicant's father stated at the s.11 interview that the applicant's claim of persecution emanates from the same source as previously claimed by the rest of the family, and was therefore, not an isolated claim. Some of the relevant sections from the s.11 interview are worth setting out in full hereunder.

> "Q.11: Can you tell me now what exactly you fear will happen to your son if he were to go to Nigeria.
>
> A: If he was to go to Nigeria, he is not going back alone. We will be going back as a family unit. If we go back the threat on the family is still there.
>
> Q.12: What exactly do you fear will happen to your son if he were to go to Nigeria?
>
> A: He could be kidnapped for ransom or to force me to join the cult.
>
> Q.13: Who exactly do you fear would do this to him?
>
> A: The members of Awopa Fraternity.
>
> Q.14: What are the names of these cult members you fear will kidnap him.
>
> A: Any of the members of the Fraternity. You can't say which of them.
>
> Q.15: Why would they kidnap your son?
>
> A: Because they want me to join the cult and I don't want to.
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> Q.16: Other than the fear you have stated for your son with regard to the cult, do you fear anything else for him if he were to go to Nigeria?
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> A: Yes. His father could be killed.
>
> Q.17: Do you fear anything else would happen to your son himself?
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> A: If his father is killed it is not something nice that he lost his father to a cult.
>
> Q.18: Other than the fear of your son being kidnapped, do you fear anything else could happen to happen to him?
>
> A: As I have said his case is not isolated, it has to do with his family.
>
> Q.19: So can I take it that the only fears you have for your son in Nigeria are in relation to the cult and what they might do?
>
> A: Yes. The last one is his mum and his sisters could be mutilated, circumcised."

4. The applicant's father claimed that he was being coerced into joining the Awopa fraternity as a replacement for his grandfather, who had died in October, 2006, and he did not wish to join*, inter alia*, because of their practice of human sacrifice. He and his wife,

the applicant's mother, left Nigeria in February, 2007.

5. An affidavit was sworn by a Higher Executive Officer in the RAC on 2nd July, 2015, to clarify the position of the applicant's family members. He states as follows from para. 11 to para. 16 thereof:

> "11. I say that the Applicant's father and Next Friend herein, A[…] A[…], his mother, O[…] A[…], and his sibling B[…] A[…] have applied for asylum in the State. [The applicant's sister] was born in Ireland on the 25th April 2007 and she was joined as a dependent (sic) in her mother's application.
>
> 12. I say that the Respondent recommended that the Next Friend, A[…] A[…], should not be declared a refugee by way of Section 13 Report dated 7th March 2007. […] I say that this Recommendation was never challenged by Mr. A[…]
>
> 13. I say that the Respondent recommended that O[…] A[…] and her daughter should not be declared refugees by way of a Section 13 Report dated the 20th June 2007. I say that this Recommendation was challenged by way of judicial review proceedings which were later settled on agreed terms. I say that the Respondent issued a further negative Recommendation dated the 13th February 2008 […]
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> 14. I say that O[…] A[…] and her daughter also challenged the second Recommendation at paragraph 13 herein by way of judicial review and these proceedings were later withdrawn by the applicants on the 14th December 2009.
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> 15. I say that the Refugee Appeals Tribunal affirmed the negative Recommendations at paragraphs 12 and 13 herein by way of decision dated 6th May 2010. I say that these decisions were challenged by way of judicial review proceedings […]. I say that these proceedings were recently compromised on 23rd February 2015 and remitted to the Refugee Appeals Tribunal.
>
> 16. I say that the Respondent has at all material times acted rationally and reasonably and within jurisdiction when determining the Applicant's application and, in particular, was entitled to have regard to the Recommendations at paragraph 12 and 13 herein when examining his claim."

IMPUGNED DECISION

6. The decision dated 15th April, 2010, issued to the applicant by cover letter dated 21st April, 2010, wherein the second named respondent recommended that the applicant should not be declared a refugee. The applicant's case was based upon three findings, namely:

> (i) The applicant's fears, as stated by his father, were deemed not to be well-found. The decision-maker used the applicant's family's RAC s.13 reports in the preparation of her report, because, she stated, the claims were inextricably linked.
>
> (ii) There would be state protection available to the applicant and the applicant could have internally relocated in Nigeria to avoid the perceived danger.
>
> (iii) The claim presented did not have a convention nexus and the situation described was a criminal matter and not a matter that gave rise to the need for international protection.

7. Under the heading, section 13(6) finding', the RAC authorised officer states as follows:

> "The applicant's father claims that the fear he holds for the applicant is based on the fears he has for himself in Nigeria i.e. from the Awopa Fraternity. The applicant's father was refused refugee status by ORAC. The applicant's father has not demonstrated that the applicant has an individual well founded fear of persecution in Nigeria.
>
> Having regard to the above, Section 13(6)(a) of the Refugee Act 1996 (as amended) applies to this application; that the application showed either no basis or a minimal basis for the contention that the applicant is a refugee."

The upshot of this finding is that any appeal to the Refugee Appeals Tribunal would be by way of a papers-only appeal and no oral hearing would be held.

APPLICANT'S SUBMISSIONS

8. Counsel for the applicant Mr. Michael Conlon S.C. appearing with Mr. Paul O'Shea B.L., submitted that the claim was rejected for three reasons: (i) the applicant's father's credibility; (ii) the availability of state protection; and (iii) the absence of a nexus to a convention reason. The applicant argued that findings two and three above could be effectively dealt with by way of a papers-only appeal, but the credibility of the applicant's father could only be tested by way of oral testimony. Here, the applicant relied upon the decisions of Cooke J. in *S.U.N. [South Africa] v. Refugee Applications Commissioner & ors.* [2012] IEHC 338 and that of Barr J. in *U.P. v. Minister for Justice, Equality and Law Reform & ors*. [2014] IEHC 567. Without such an oral hearing, the applicant contended, the applicant would be denied his right to an effective remedy as per the terms of article 39 of Council Directive 2005/85/EC (hereafter referred to as the Procedures Directive).

9. The applicant argued that this case was one of the exceptional circumstances where the court should exercise its discretion in judicially reviewing a first instance decision because the flaw was such that it was so fundamental, it was incapable of being remedied on appeal. The applicant relied on the decision of Hedigan J. in *B.N.N. v. Minister for Justice, Equality and Law Reform & anor.* [2009] 1 I.R. 719 and MacEochaidh J. in *P.D. v. Minister for Justice and Law Reform & ors.* [2015] IEHC 111, maintaining that an error of jurisdiction has occurred that is incapable of being remedied through statutory appeal, that is, the imposition of the s.13(6) finding, resulting in the denial of an oral hearing at appeal where credibility is at issue.

10. The applicant further argued that the s.13(6) finding was not imposed on the father, and next friend, and his appeal proceeded to the RAT with an oral hearing. Moreover, the applicant pointed out that the tribunal decision in the father's case was settled on the basis that it be quashed and therefore unlawfully decided. The applicant argued that in simply following the decisions in the family's case, the applicant was denied a separate and independent assessment of his claim. The applicant relied on *M.M. v. Minister for Justice and Law Reform & anor*. [2013] 1 I.R. 370, wherein Hogan J. applied *M.M. v. Minister for Justice* (Case C-277/11), that is, in a bifurcated asylum and subsidiary protection system, a decision on subsidiary protection could not be decided based upon the asylum

protection decision where the applicant was precluded from re-opening certain issues.

RESPONDENTS' SUBMISSIONS
11. Counsel for the respondents, Ms. Sinead McGrath, B.L., submitted the applicant's complaint that he did not have an independent assessment of his claim is not substantiated, where his father at all times confirmed that the claim of his minor son mirrored his own. The respondents relied upon *I.N.M. v. Minister for Justice, Equality and Law Reform & anor.* [2009] IEHC 233; *P.I. & ors. v. Minister for Justice and Law Reform & ors*. [2010] IEHC 368; *D.O.O. v. Minister for Justice, Equality and Law Reform & ors*. [2013] IEHC 616; and *O. v. Minister for Justice, Equality and Law Reform & anor.* [2009] IEHC 478.

12. The respondents further argued, and without prejudice to the foregoing, that the RAC did examine whether a separate fear existed on behalf of the child and examined this in light of the applicant's sibling having remained safely in Nigeria for a considerable period after the alleged danger. The respondents contended that the RAC appropriately examined the lack of a convention nexus, the availability of state protection and the feasibility of relocating in Nigeria away from the perceived danger. The respondents submitted that the s.13(6)(a) finding was rational, reasonable and lawful in light of the claim being wholly based on a claim previously put forward by the applicant's father, which was determined not to be well-founded at the first instance.

13. The respondents argued that the crux of the applicant's submissions was that s.13(6)(a) of the Refugee Act 1996 (as amended) was a breach of the Procedures Directive, relying predominately on *S.U.N. (South Africa) (supra).* The respondents submitted as follows: (i) the S.U.N. case is not an authority for the proposition that a s.13(6)(a) finding is a breach of the Procedures Directive; (ii) *S.U.N.* is authority for the proposition that a s.13(6)(e) finding may be a breach of the Procedures Directive in circumstances where personal credibility findings have been made and bearing in mind that there is no logical connection between the removal of the right to an oral hearing and the terms of the subsection itself; (iii) Cooke J. held in the *S.U.N.* case that there may be a logical connection between the removal of an oral hearing and other subsections of s.13(6); and (iv) there is a logical connection between the removal of an oral hearing and the claim having no basis or a minimal basis.

DECISION
14. The question of whether or not the decision is susceptible to judicial review and particularly, whether this is one of those rare instances where the court should exercise its discretion requires an analysis of the particular case put forward by the applicant. The most extensive survey of the case law regarding the instances where the court should exercise discretion was conducted recently by MacEochaidh J. in the case of P.D. (*supra*). At para. 39, the principles gleaned by the judge are set out as follows:

> "1. The High Court is entitled to grant certiorari or other public law remedy in respect of a decision of the Refugee Applications Commissioner where an error as to jurisdiction is identified.
>
> 2. The significance of the error will determine whether the court may exercise its discretion to grant judicial review.
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> 3. Not all errors as to jurisdiction attract judicial review.
>
> 4. The court must carefully consider the nature of the error in deciding whether the interests of justice require the first instance decision to be quashed and taken again rather than the error being the subject of an appeal to the Refugee Appeals Tribunal.
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> 5. The court should bear in mind the extent of the Refugee Appeals Tribunal's capacity to provide a remedy and reverse the error. (The nature of appeals to the RAT has recently been fully described by Charleton J. in the Supreme Court in M.A.R.A (supra))."

15. The applicant argued that without an oral hearing he would be denied an effective remedy where the personal credibility of the father was at issue and would require a form of examination that could only be achieved through oral evidence. First, an oral hearing is not necessary to provide an applicant with fair procedures. In a recent judgment of this court, *R.M. v. Minister for Justice, Equality and Law Reform & ors.* [2015] IEHC 441, I set out as follows at para. 27 thereof:

> "I absolutely reject the submission made by the applicant that, as a result of the decision of Cooke J. in S.U.N. (supra), where an applicant is refused a grant of refugee status based upon negative credibility findings then the discretion exercised by the Commissioner to apply s.13 (6) of the Refugee Act 1996 (as amended) is unlawful where the decision is grounded upon credibility. There is no legal basis for this contention and, in fact, it flies in the face of the established authorities. The lawfulness of a papers-only appeal is set out clearly in the decision of McGuinness J. in *V.Z. v. Minister for Justice, Equality and Law Reform & ors*. [2002] 2 IR 135 and Birmingham J.'s decision in *M.O.O.S. v. Refugee Applications Commissioner & anor*. [2008] IEHC 399, and referred to in a recent decision of this Court in *T.C. [Zimbabwe] v. Minister for Justice, Equality and Law Reform & ors.* [2015] IEHC 404."

16. The applicant relied on decisions in *S.U.N. (supra)* and U.P. (*supra*) for the proposition that where a decision is based upon personal credibility then the decision to remove an oral hearing could breach the applicant's right to an effective remedy pursuant to the Procedures Directive. However, in both U.P. and S.U.N. the application of the s.13(6) findings did not have a direct correlation with the applicant's claimed persecution. In the U.P. case the applicant was denied an oral hearing because he had failed to make an application for refugee status as soon as he arrived in the state; and in S.U.N. the applicant's country, South Africa, was a designated safe country of origin. In this case, the RAC authorised officer's decision to apply the s.13(6)(a) finding is entirely related to the claim made by the applicant, namely, "that the application showed either no basis or a minimal basis for the contention that the applicant is a refugee". In the S.U.N. case, Cooke J. stated the following at para. 42:

> "If the present applicant had the nationality of a country which was not designated as a safe country and had based the claim for asylum on exactly the same facts and events, his appeal would entitle him to an oral re-hearing. It might be said that there is some logical connection between the removal of the oral hearing on appeal and some of the other findings covered by s.13 (6). Thus, for example, if an applicant's claim has been based upon false and misleading information there may be some logic and justification for considering that he has forfeited an entitlement to be heard once again. Similarly, a significant delay in making an application for asylum may give rise to the inference that the applicant is not genuinely a refugee and justify a presumption to that effect."

17. Counsel for the applicant stated that an independent assessment of the applicant's claim should have occurred and because, according to the applicant's submissions, that independent assessment did not occur, the s.13(6) finding was imposed. Had the applicant's father's report not been before the authorised officer, then the applicant would have been granted an oral hearing. However, this misses the core of the applicant's claim. It is entirely predicated upon the claim presented by the rest of the family.

Had the child been born before his parent's applications were made, it is likely that he would have been included in one of his parent's claims, as his sister had been. In the *P.I.* case Clark J. set out the following at paras.46-47:

> "The facts of *Oladimeji (J.O.) (a minor) v. The Refugee Applications Commissioner* [2009] I.E.H.C. 478 are very similar to those in this case. An asylum application was made on behalf of a child born after the Commissioner made a negative recommendation in her mother's case. The challenge was to the reliance by the Commissioner on the facts of the mother's claim. Cooke J. refused to quash the decision of the Commissioner in the child's case, noting that if the child had been born earlier, she would have been included with her older sisters as a dependent under her mother's application. He held that the Commissioner was entitled to rely on the findings made in the mother's case and was not required to conduct some sort of pro-forma separate investigation into the child's claim. Cooke J. held as follows:
>
> '10. It must be borne in mind that the function and duty of the Commissioner is to examine the application, to interview the applicant, to carry out any enquires that might be appropriate to verify the claim made and then to report on this to the Minister with the recommendation as to whether the applicant has or has not established the ingredients of refugee status. In circumstances where this three month old child's claim is identical to and dependent upon the claim made by the mother, it is difficult to envisage what further investigation or enquiry might have been carried out into the child's claim, nor has any been illustrated or suggested on her behalf.
>
> 11. Finally, the Court will point out that while asylum applications fall to be examined and determined individually, objectively, and in accordance with law, the asylum process is also to be carried out expeditiously, flexibly, and reasonably. This Court is not required to suspend common sense when asked to review that process. This case is an example of a situation in which the Court ought not to permit formalistic arguments of technical illegality to distract it from the need to apply common sense so as to ensure that the process remains not only lawful but fair, flexible, and expeditious.'
>
> This Court goes further and holds that not only is the main argument in this case excessively technical but on close analysis it is plainly wrong. The Court finds no technical illegality or want of jurisdiction in the treatment of H as a dependent in the family claim. Legislation must not be interpreted in the manner suggested by the applicant to provide for manifestly illogical requirements. Neither the Refugee Act 1996 nor the Asylum Procedures Directive imposes an obligation on the statutory authorities to investigate a claim which has not made or, in the absence of changed circumstances, to reconsider a claim that has already been fully considered. There is no obligation to conduct a separate s. 11 interview or to prepare a separate s. 13 report and recommendation in relation to a dependent infant on whose behalf no independent fear of persecution is asserted. It makes no difference if such a dependent child is born before or after the Commissioner's recommendation on the parent's claim as in either case, the Commissioner's recommendation will also apply to the dependent. Similarly, if the dependent is joined to the parent's Tribunal appeal, the decision on appeal affects the dependent whether the outcome is positive or negative. The Court is satisfied that this interpretation accords with the principle of family unity and that to interpret the Refugee Act 1996 in any other way would be to go beyond any of the key conventions on which the legislation is based."

The claim made by the child was the same claim made by the father. These s.11 interview questions are set out in full above but the father's claim was already investigated in full, and was rejected by the RAC authorised officer. The applicant's father presented the same claim and it would be illogical for the RAC authorised officer not to have access to that material when considering the claim presented by the infant applicant.

18. The applicant claimed that the father's decision at tribunal stage was decided unlawfully evidenced by the quashing of said decision on consent and therefore, should not have been used in the applicant's case. In the s.13 report, at p.11 of the booklet of pleadings, the authorised officer states as follows:

> "The applicant's parent's and sister's asylum applications were refused at first instance and were used by the examiner in the preparation of this report."

The RAC s.13 reports of the father was appealed but has not been quashed by certiorari or on consent. The first s.13 report of the mother and sister was quashed on consent, with their second s.13 report, and negative recommendation, issuing on 13th February, 2008, therefore, two years before the applicant's s.11 interview. In any event, the crux of the applicant's submission centred on the reliance upon the decisions of the other family members in deciding the applicant's case and I do not accept that there is merit to this submission. The case presented by the applicant's father on behalf of his infant son mirrored the case presented by the other family members and therefore, the authorised officer was entitled to take those applications into account when no separate or distinct fears are presented on behalf of an infant applicant.

19. The applicant further sought to rely on the decision of Hogan J. in *M.M. (supra)* for the proposition that a decision-maker could not rely on the reasoning in an earlier decision if it were to preclude the applicant from re-opening certain issue. In my view, the reliance on M.M. (supra) is misconceived. The applicant did have an oral hearing at the first instance and the applicant, through his father, was given the opportunity of re-opening any issues and was given the opportunity to explain how these related to the applicant. I am satisfied that the imposition of the s.13(6) finding, in this instance, was within the jurisdiction of the second named respondent.

20. For the foregoing reasons, I refuse the reliefs sought.