

THE HIGH COURT**JUDICIAL REVIEW****[2010 No. 446 J.R.]****[2010 No. 447 J.R.]****BETWEEN****C.O.O AND K.I.O.O. (AN INFANT SUING BY HER MOTHER AND NEXT FRIEND C.O.O.) (NIGERIA)****APPLICANTS****AND****THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND MARGARET LEVY SITTING AS THE REFUGEE APPEALS TRIBUNAL****RESPONDENTS****JUDGMENT of Mr. Justice Robert Eagar delivered on the 7th day of July 2015**

1. This is a telescoped hearing of an application for an order of *certiorari* quashing the decision of the second named Respondent which affirmed the recommendation of the Refugee Applications Commissioner that the Applicants should not be declared refugees.

2. The Applicants are mother and daughter and as the cases were argued together, this Court proposes to deliver one judgment in relation to the judicial review applications. The applications were based largely on what might be termed "procedural due process" and the Court will examine the procedures in the light of the legislation, the Statutory Instruments and European Directives.

3. The grounds on which the relief was sought complained that the second named Respondent having failed to have due regard to its obligations pursuant to the European Communities (Eligibility for Protection) Regulation 2006 and EU Council Directive 2004/83/EC of the 29th April, 2004 (insofar as provisions have not been transposed into domestic law by the said Regulations). Further the Refugee Applications Commissioner failed to have due and proper regard to the provisions of Council Directive 2005/85/EC of the 1st December, 2005 and that the Applicant's claim for a declaration of refugee status had not been lawfully determined by means of a procedure which complies with the minimum standards require to be met by Council Directive 2005/85/EC. In relation to this ground as there was no judicial review challenge to the decision of the Refugee Applications Commissioner the Court will deal with this ground in the context of the decision of the second named Respondent.

4. Further grounds were that no proper regard had been had to the matters set out in the documentation furnished and the decisions were invalid. Further the delay between the hearing of Applicant's appeals and the making of the impugned decisions were such as to render the decisions vulnerable to review.

5. In relation to the substantive issues, the grounds were that the Refugee Applications Tribunal had failed to weigh appropriately the details given by the Applicants and failed to assess the legal requirements as set out as a matter of law to the well-founded fear of persecution No forward looking test was carried out and no proper objective assessment of the Applicants' creditability had been undertaken.

Background

6. The first named Applicant is from Nigeria and the second named Applicant was born in the National Maternity Hospital in Holles Street, Dublin 2, on the 10th September, 2008. The first named Applicant was born in Lagos where she grew up. Her father was killed in 1985. She does not know the whereabouts of her mother and two brothers. She had primary and a little secondary education. Her father was a teacher and served as secretary of the National Union of Teachers ("NUT") in Edo state. There was a misunderstanding in the NUT and he was killed. She was four years of age when it happened. Her uncle told her that they (presumably the NUT) had threatened to wipe out the family. Her mother left and her uncle took her to Lagos. She was there from 1995 to 2000 and her uncle was kidnapped in 2000. Some men with big guns dragged him into a car and took him away.

7. In 2000 her neighbour B. took her in. The police came and told her they would see what they could do but there was nothing to be found and that they would keep looking for him. They said they would call if they turned anything up but there was nothing found. They stopped coming. Sometimes she went and they would say they had no news but that they would keep in touch.

8. Her neighbour was a good woman and when she was 16 she was told she would take her away abroad. After this her neighbour said she should take Italian classes in Nigeria immediately. She then knew it was Italy that was to be her destination. She attended Italian class once a week. She met her baby's father at these Italian classes. He was a friend of M. who worked for her neighbour B. She had sex with her boyfriend J.U. and got pregnant and later in the pregnancy she told him about it. He told her to have an abortion. He later agreed to her keeping the baby. B. often travelled abroad to France or Italy. She didn't know about the pregnancy until she was 7 months pregnant. She told her to have an abortion and left the house as she was in a rush somewhere. So the Applicant quickly picked up some of her things and left the house and went to the putative father's house and told him what B. had said. He told her to stay awhile he told her later that he had spoken with B.'s friend and he said he would look for a place to take her since she was scared.

9. A month after that she was taken out of the country. She came with two other women. M was taking them to Italy. She left Nigeria on the 9th of August 2008 and arrived in France on the 10th August 2008. She stayed in a hotel and he said he would take the other girls to Italy. He returned on the 14th August and they went to the airport and got an Air France plane and came to Belfast with B.'s friend. He put her in a taxi and told the man to take her to Dublin, Ireland and that is why she came here. She is afraid of the people who killed her father and kidnapped her uncles and B if she returns.

10. She said she had contact with J.U. since she came to Ireland but with no-one else. She had lived in B.'s house. B. had a stall in front of her house and sold biscuits and jewels in the shop. The first named Applicant worked in the shop when she was about 13 or 14. B. went away a lot. She was away up to six months of the year. When she was away her driver minded the Applicant along with a girl who was selling for her. It was when she was pregnant that B. said she was going to take her abroad so she could have an abortion. At one stage when guards were coming to the house regularly the Applicant decided to ask them what they were doing

there and they said B. was taking them abroad. She knew they were going into prostitution. She said that when she met Johnny it was in her head to get into a relationship with him, to get pregnant and B. would let her be. She said that M. held the passport.

Statutory Framework

11. The Refugee Act 1996 (as amended) (hereinafter referred to as "the Act of 1996") is the statute dealing with the procedures for the investigation of whether an Applicant for refugee status should be deemed a refugee. Section 2 of the Act defines a refugee in accordance with the European Convention relating to the status of Refugees 1951 and the Protocol relating to the status of Refugees 1967. Section 8 of the Act sets out the provisions for an application for declaration that a person is a refugee and section 11 provides for the investigation of the application by the Refugee Applications Commissioner. This includes an interview which is based largely on the application for refugee status questionnaire which includes *inter alia* travel details for the reasons for seeking to be declared a refugee. The provisions of section 11 (A) in relation to burden of proof and section 11 (B) provide that the Commissioner (or the Tribunal) in assessing the credibility abide by these provisions.

12. Section 13 of the Act provides for the recommendations and reports of the Commissioner and section 16 of the Act provides for an appeal against a recommendation of the Commissioner under section 13 of the Act. In most cases there will be an oral hearing but sections 13 (5) and (6) limits some appeals to be determined without an oral hearing. This is not the situation in these cases.

13. Pursuant to section 16 (5) of the Act the Refugees Applications Commissioner furnishes the Tribunal with copies of any reports, documents or representations in writing submitted to the Commissioner under section 11 and section 16 (6) provides that the Tribunal may request the Commissioner to send such further inquiries and to furnish the Tribunal with such further information as the Tribunal considers necessary. Section 16 (11) provides that the Tribunal should enable the Applicant and the Commissioner or authorised officers to be present at the hearing and present their case to the Tribunal in person or through a legal representative or other person. There is no provision in relation to the time from the hearing of the appeal to the making of either affirmation of a recommendation of the Commissioner or the setting aside a recommendation of the Commissioner.

EU Council Directives and Irish Regulations

14. The Directive of the European Union which provides for minimum standards for the qualification and status of third country nationals or stateless persons as refugees whose presence would otherwise need international protection and the content of the protection granted is Council Directive 2004/83/EC. The Irish Regulations giving effect to the Council Directive 2004/83/EC is S.I. No. 518 of 2006 entitled "European Communities (Eligibility for Protection) Regulations 2006". A further Council Directive of the 1st December 2005, Council Directive 2005/85/EC on minimum standards and procedures provide for Member States in respect granting and withdrawing refugee status provides for these minimum standards and reference can be made to this Council Directive.

15. There are other matters which can be argued in judicial review applications including, for example, the UNHCR Handbook which is not obviously binding on the exercise of Act of 1996 but has some persuasive authority.

16. Separate written submissions were presented to the Court in relation to each Applicant and separate submissions were prepared by counsel for the Respondent in relation to each Applicant. I propose to concentrate initially on the issues relating to the first named Applicant.

The first named Applicant

17. In the analysis of the Applicant's claim, the second named Respondent initially set out what was required for the first named Applicant to qualify for refugee status. I propose to summarise the issues to avoid repetition. The second part of the second named Respondent's report relates to the questions and answers in relation to her alleged fear of the NUT. In fairness to counsel for the Applicant very little reliance was placed on the fear of the NUT. The first named Respondent said it was clear that the Applicant could offer no coherent or rational evidence for her alleged fear of the NUT. Her claim that members of the Nigerian teaching profession harbour homicidal intentions towards her clearly has no basis in reality. Whilst her claim that her father was murdered by criminals at the behest of the NUT is apparently based on the word of the criminals she alleges were arrested for the crime, an insertion allegedly backed up by a newspaper article she submits. She offers no evidence whatsoever for her belief that the NUT had any connection to her uncle's alleged kidnapping five years later. She stated at the hearing that she did not know who kidnapped her uncle.

18. The second named Respondent deals with the Applicant's claim for fearing B. The second named Respondent quotes the Applicant as saying "If I return I will have to go to her (B.'s) place and she will probably traffic me. I have a baby now and there won't be anyone to take care of my baby. If I die there will be no one to look after (her child)."

19. The newspaper article submitted by the Applicant said that her uncle, who is her father's elder brother, is anxious to locate the Applicant and her siblings and the second named Respondent noted that the Applicant had a relative who was eager to be united with her and therefore there would be no need to return to Lagos or B.'s house.

20. The second named Respondent continued that in any event serious credibility issues arise in relation to the Applicant's evidence regarding the madame which cast doubt on the existence of any such person. The Applicant is unable to furnish this woman's full name despite living in her house for eight years. The Applicant had suggested that everyone called B. "madame". The second named Respondent found that the Applicant claimed that she did not know the full name of the woman, was completely lacking in credibility and that this casts doubt upon the veracity of her entire claim. The evidence called into question the actual existence of any such person. In relation to the question of trafficking by B., the second named Respondent said it was neither credible nor logical that she would fail to seek assistance from the police (or women's groups) because if she did this B. would send her away. The Applicant's evidence that she was free to go to Italian lessons and did not flee or go to the police was not credible and is not capable of being believed.

21. The Applicant had submitted a birth certificate and a travel certificate, her date of birth was 28th October 1991 but she was not accepted as a minor by ORAC. The Court notes that in her affidavit she does not identify the date of her birth. The second named Respondent said that the Applicant appeared older than her stated age and appeared to have the maturity of an adult and this in itself undermines the Applicant's credibility. On examination, the birth and travel certificates indicated that the hand writing was the same on both documents, one was issued in October 2004 and the other in 1995. The second named Respondent also found that it was not possible to pass through international airports without touching your own passports and the Applicants claim that she did so is entirely incredible and not capable of being believed.

22. The second named Respondent quoted decisions of this Court and the second named Respondent and then noted that the burden of proof lay on the person making the assertion. The Applicant has the burden of establishing the veracity of his or her allegations and the accuracy of the facts on which his or her claim is based. In relation to the standard of proof the Tribunal must decide whether it is likely that the claim of the Applicant is credible. In reaching this decision, account has to be taken such factors such as the

reasonableness of the facts alleged, the overall consistency and coherence of the Applicant's story, corroborative evidence adduced by the Applicant consisting of generally known facts or a known situation in the country of origin.

23. The second named Respondent then stated alternatively, if this claim is credible, the issue of internal relocation is relevant and quoted Reg. 7 of the European Communities (Eligibility for Protection) Regulations 2006 and in this regard the second named Respondent said that the Applicant claimed she was at risk from non State agents, the NUT and Madame B.. However the Applicant had spent her life unmolested by the NUT despite the fact that they have offices nationwide in Nigeria. While the Applicant claimed she could not relocate in Nigeria because she has nobody to care for her there, she submitted that she had an uncle in Uromi who was anxious to be reunited with her. She is an adult with a child and does not necessarily need anybody to care for her and the second named Respondent stated that it was clear from the 2006 Regulations that internal relocation is a complete answer for her claim for refugee status.

24. Once again, this Court finds that the decision of the Refugee Appeals Tribunal Member to deal with internal relocation having made a decision on issues of lack of credibility is absolutely erroneous. However, the Court is satisfied to sever the decision on internal relocation.

Submissions by counsel for the Applicant

25. Counsel for the Applicant set out the provisions of s. 5(1) of the S.I. 518 of 2006 in relation to the matters to be taken into account by a protection decision-maker for the purpose of making a protection decision. Section 5(1) provides as follows:-

"5 (1). The following matters shall be taken into account by a protection decision-maker for the purposes of making a protection decision:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the protection Applicant including information on whether he or she has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the protection Applicant including factors such as background, gender and age, so as to assess whether on the basis of the Applicant's personal circumstances, the acts to which the Applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the protection Applicant's activities since leaving his or her country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for protection as a refugee or a person eligible for subsidiary protection, so as to assess whether these activities will expose the Applicant to persecution or serious harm if returned to that country;

(e) whether the Applicant could reasonably be expected to avail himself of the protection of another country where he or she could assert citizenship."

26. Counsel on behalf of the adult Applicant submitted that the aforementioned minimum standards were not adhered to in the decision-making process. However counsel for the Applicant failed to point out any relevant up to date country of origin information which was particularly relevant in relation to the Applicant's claim. He claimed that the matters raised explicitly in the Applicant's notice of appeal were not addressed in the decision, in that the Applicant's individual circumstances were not properly reconsidered. Counsel however failed again to point out which individual circumstances were not properly considered.

27. Counsel further argued that the claim was not assessed objectively and again suggested that an objective analysis necessitated *inter alia* consultation of up to date and relevant country of origin information. Again no particularly relevant Country of Origin Information was pointed to which would assist the Applicant's claim.

28. There was no objective assessment of whether the Applicant's story in whole or in part could have happened. However this Court is satisfied that the second named Respondent did deal in detail with whether the Applicant's story could have happened. The issue of delay is also raised by counsel for the Respondent but again as this Court as pointed out, there are no time limits provided in the legislation.

29. Counsel for the Applicant referred to the decision of Kelly J. in *Camara v. The Minister for Justice Equality and Law Reform* (Unreported, High Court, 26th June 2000), which was decided prior to the 2006 Regulations, and which quotes from Goodwin-Gill, *The Refugee in International Law* (Oxford University Press, 3rd Edition, 2007). In particular this Court notes the following passage of the judgment of Kelly J.:-

"Inconsistencies must be assessed as material or immaterial. Material inconsistencies go to the heart of the claim, and concern, for example, the key experiences that are the cause of flight and fear. Being crucial to acceptance of the story, Applicants ought in principle to be invited to explain contradictions and clarify confusions".

This court is satisfied that the second named Respondent posed that question and decided that it was not credible.

29. Counsel for the Applicant also referred to the indication of internal relocation alternative and this Court has indicated that it will sever the decision on internal relocation from the decision of the Tribunal.

30. The final ground raised by the counsel for the Applicant was that almost all the issues raised by the Applicant's advisors in the notice of appeal were ignored. However no concrete examples of this were indicated to the Court and the second named Respondent indicated that in making a finding that the Tribunal had considered all relevant documentation in connection with the appeal including the notice of appeal, the country of origin information, the Applicant's asylum questionnaire and the replies given in response by or on behalf of the Commissioner on the report made pursuant to section 13 of the Act of 1996. In the absence of examples it appears to this Court that this ground cannot be sustained. I am satisfied that I do not need to deal with the legal submissions on behalf of the Respondents in relation to the adult Applicant.

The minor Applicant

31. The minor Applicant was born in Ireland in 2008 and her fear of persecution is the same as that of the adult Applicant. Obviously before the Minister for Justice and Equality (hereinafter referred to as "the Minister") makes any decisions with regard to deportation

the fact that the minor Applicant is 7 years of age and has lived all her life in Ireland is a factor which the Minister must consider in making such a determination. The decision in relation to the infant Applicant is that of the mother's and that has already been dealt with by this Court. As the Applicant's mother had failed to produce a coherent or plausible narrative it is clear that as the mother's claim is not deemed credible the same applies to this claim. In the section 11 interview, Q27 states:-

Q. "Are you happy that you have given all the details need to be considered in the child's case"

A. " Yes"

32. It appears to this Court that the issues in relation to the infant Applicant will be matters which will be the subject of scrutiny in relation to an application for subsidiary protection.

33. This Court is satisfied that the decisions of the second named Respondent in relation to both applicants were reasonable and in accordance with law.

34. For these reasons this Court refuses the applications for certiorari in respect of both the adult Applicant and the infant Applicant.

Paul O'Shea B.L., instructed by Burns Kelly Corrigan Solicitors

Eilish Brennan B.L., instructed by the Chief State Solicitor