

THE HIGH COURT

JUDICIAL REVIEW

2008 1023 JR

BETWEEN

F. G. W. AND S. S. (A MINOR SUING BY HER MOTHER NEXT FRIEND F.G. W.)

APPLICANTS

AND

THE REFUGEE APPEALS TRIBUNAL (OLIVE BRENNAN) AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 5th day of May 2011

1. This application for judicial review came before the Court on foot of an order granting leave made by Edwards J. on the 8th October, 2010, in which relief by way of *certiorari* is sought to quash a decision of the respondent Tribunal dated the 31st July, 2008, (the "contested decision"), which recommended that the applicants be not declared to be refugees and affirmed the s. 13 Report of the Refugee Applications Commissioner to the same effect made on the 5th December, 2006.

2. The applicants are mother and daughter respectively and it is one of the material facets of this case that they have different countries of origin. The first named applicant, the mother, was born in Liberia and the second named applicant, her daughter, was born in Ivory Coast on the 16th August, 1993. The mother was first married in Liberia when she was eighteen years old and had a son by her first husband. The husband was killed by rebels in December 1989 during the period of civil war in that country. After a period in a camp with her sister and the son born prior to her husband's death, she decided to make her way to Ivory Coast. While doing so on foot she was attacked and raped by three men. She met a man who helped her, went with him to the Ivory Coast, married him and lived with him for thirteen years. He was, however, a Muslim with two wives and although she lived with him for that length of time and had three children by him, she claims that she had serious difficulties both with him and the other two wives.

3. In March 2006, the mother claims that her husband wanted to have another daughter circumcised (not the second named applicant) which led to a serious altercation in which she claims that she struck one of the other wives with a bottle and may have killed her. She then ran away with the second named applicant to Ajemi and worked there for six months as a prostitute. Then with the help of a customer called Harry Brown, she was able to leave and the two made their way to Ireland.

4. The mother's claim to a fear of persecution is based upon the proposition that if returned to the Ivory Coast her husband might kill her and her daughter and that if she were to be returned to Liberia her fear of persecution is based upon the event of past persecution, namely the rape mentioned above.

5. Leave for the present application was granted by reference to three grounds as follows:

1. The Tribunal failed to consider and/or adequately consider the first named applicant's claim to a well found fear of persecution by reason of risk of being raped in her country of origin, Liberia.
2. In breach of Regulation 5 of the European Communities (Eligibility for Protection) Regulations 2006 (SI No. 518/2006), the Tribunal failed to consider and/or adequately consider the first named applicant's personal circumstances, in the particular context of the previous harm suffered by her by virtue of having been raped and sexually violated, and her present physical and mental condition to the extent that it is being affected or influenced or may in the future be affected or influenced on account of that previous harm.
3. The Tribunal failed to give separate consideration to the claim of the second named applicant by reference to her country of origin, Ivory Coast.

6. Having considered in advance the papers in the case and particularly the s. 13 Report of the ORAC and the contested decision of the Tribunal together with the written legal submissions of the parties, the Court invited the parties to address first, the third of these grounds. Having heard the submissions, the Court indicated that it was driven to the conclusion that it would be necessary to quash the contested decision insofar as it related to the determination of the asylum claim of the daughter. As the Court explained in a brief *ex tempore* ruling, it felt compelled to so conclude, because, in effect, both the s. 13 Report of the Commissioner and the contested decision of the Tribunal are devoid of any explicit conclusion or explanation in relation to the asylum claim of the daughter. In the s. 13 Report the daughter is referred to directly only in the heading "dependent applicant's (sic) covered by this application (if any): Susan S....". In the body of the report she is only referred to by inference where it is said that "the applicant had two other children with this man". The report also says: "the applicant claims her husband wanted their daughter to be circumcised, but she refused and this resulted in a fight". This was in fact reference to another daughter called Becky and not to the second named applicant, but the report refers to the mother escaping and "managed to take her daughter with her" thereby giving the impression that it was the second named applicant who was threatened with circumcision. The operative recommendation to the s. 13 report then says: "I am satisfied that the applicant has failed to establish a well founded fear". The recommendation is not even in the plural.

7. The contested decision of the Tribunal on the other hand does mention that the second-named applicant was born in the Ivory Coast and is obviously alert to the fact that it was the other daughter who was threatened with circumcision and not the second named applicant. It also mentions in the summary of the applicant's claim that the mother said she was "also fearful that her husband

will kill her daughter". The most important part of the contested decision under the heading "Analysis of the applicant's claim" contains no actual adjudication in express terms on the claim of the daughter. The substantive analysis carried out is exclusively by reference to the particular claims made by the mother. Given the absence of any consideration of the position of the daughter in the s. 13 Report, the affirmation of the Commissioners negative recommendation in the contested decision cannot be read as furnishing any inferential basis for rejecting the claim.

8. It was strongly argued on behalf of the respondent, however, that this absence of direct reference to and ruling upon the daughter is explained by the fact that no specific claim on her behalf had ever been articulated throughout the asylum process. There is a good deal of force in that argument because, apart from the reference as to the mother's fear that both she and the daughter might be killed if returned to the Ivory Coast, there is no suggestion of any event of past persecution of the daughter in the Ivory Coast. Nor is there any mention of any particular fear of persecution peculiar to the daughter.

9. In the judgment of the Court, however, in the particular circumstances of this case the manner in which the position of the daughter has been dealt with is unsatisfactory and inadequate. It must be borne in mind that the appeal decision of the Tribunal constitutes the second stage determination of the examination of an asylum application and, together with the s. 13 Report, constitutes the basis upon which the Minister will be required to make his decision under 17(1) of the Act of 1996, as to whether to grant or refuse the declaration of refugee status. The daughter in this case will be eighteen years old in a few months time. She has never been to Liberia and may well be a national of the Ivory Coast only. This at least raises the possibility that the daughter might be repatriated as a very young adult to a country other than the one to which her mother may be repatriated. It is true, as was argued on behalf of the respondents, that the issue as to whether the Ivory Coast is a country to which it is currently safe to repatriate anyone is a matter which will fall to be considered in the event of an application for subsidiary protection or the making of a deportation order. Nevertheless in the view of the Court, where there are two applicants for asylum who are dealt with together, it is incumbent upon the Tribunal member to state explicitly, if however briefly, why the claim of each applicant is rejected. It may be that the Tribunal member was of the view that no separate claim on behalf of the daughter had been advanced, but it is not sufficient that it should be left to the Minister to so infer in the absence of any express statement to that effect in either the s. 13 Report or the appeal decision. It was for this reason that the Court indicated its intention to quash the contested decision so far as it applied to the claim of the daughter.

10. The claims raised as regards the position of the mother are essentially directed at her claim to fear persecution if returned to Liberia and upon the proposition that the Tribunal member has failed to consider as required by Regulation 5(2) above, whether there are compelling reasons arising out of the previous persecution (the rapes incident,) for concluding that the mother is eligible for international protection. It is not disputed that insofar as the contested decision addresses a fear of persecution by reference to the mother's experiences in Liberia, its primary conclusion is based upon the assessment that the period of conflict and violence which was at the origin of her difficulties including the death of her first husband and her separation from her son, is now over and Liberia has returned to a state of some stability in which the UNHCR has begun to promote voluntary repatriation of refugees. Having regard to the fact that the mother is in contact with her sister and the pastor with whom her sister lives in Liberia, it is concluded that she will not be in need of protection there. The contested decision does not wholly ignore the possibility of a claim based on past persecution and Regulation 5(2). There is an inferential reference to it as a "facility" where the Tribunal member says:-

"Counsel for the applicant has indicated to the Tribunal that while the Convention is forward looking there is facility whereby the applicant can be granted refugee status on the basis of past persecution. While I have great sympathy for the plight of the applicant, that which befell her resulted from domestic violence and abuse. Notwithstanding the applicant's claim that she was fearful for the safety of her second daughter, she in effect left and abandoned this daughter to her fate. Given the customs regarding circumcision it is highly unlikely and unbelievable that one daughter would be chosen for such a procedure and not the other daughter in the same family, notwithstanding the applicant's claims of lack of interest on the part of her husband in their first daughter Susan who is with the applicant here in Ireland."

11. The Tribunal member is there dealing the claim of a feared persecution if returned to Ivory Coast rather than Liberia. No equivalent observation is made in respect of the claim based upon repatriation to Liberia. The issue arises, accordingly, as to whether there is therefore a material failure to deal with that aspect of the claim.

12. In the judgment of the Court there has been no such failure. It is true that in the notice of appeal one of the grounds raised related to the claim to fear persecution by reference to the applicant's experience in Liberia: "The first named applicant fears persecution by reason of her membership of a particular social group comprising women and/or women in Liberia subject to sexual assault and rape and/or the threat of same and/or against which the State fails to provide protection. The first named applicant is the victim of rape."

13. It must be borne in mind that what Regulation 5(2) provides is that evidence of previous persecution or serious harm is to be regarded as a "serious indication" – not as conclusive proof – of an applicant's well founded fear of persecution or a real risk of suffering serious harm unless there are good reasons to consider that such a persecution or serious harm will not be repeated.

14. The applicant's claim to a fear of persecution in respect of Liberia was based upon what she had experienced during the period of civil war in that country prior to 1991. This included the killing of her husband in December 1989, but also what befell her when she fled on foot to the Ivory Coast. That claim, including the part of it based upon the incident of rape, has been addressed in the contested decision in that the Tribunal member comes to a clear conclusion that it no longer has a well founded basis because of the changes that have taken place in that country together with the fact that the first named applicant is in touch with her sister and her husband and that voluntary repatriation of Liberian refugees is being encouraged by the UNHCR. The decision can only be read in that regard as concluding that after such a lapse of time and in view of the changes that have taken place in that country, the first named applicant no longer faces any real risk of a repetition of any of those events.

15. Regulation 5(2) nevertheless contains what has been referred to as the "counter exception" namely: "but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection". (*M.S.T v. Minister for Justice, Equality and Law Reform* [2009] I.E.H.C. 529). In other words, even if there are reasons for believing that some previous event of persecution or serious harm will not be repeated in the event of repatriation, such an event by itself may warrant a determination that international protection is necessary provided there are compelling reasons arising from the event for so concluding.

16. In the judgment of the Court no such "compelling reason" has been put forward either upon this application or, more importantly, to the Tribunal member during the appeal as to why this counter exception should apply here. As the Tribunal member points out, the first named applicant escaped Liberia and, notwithstanding the difficulties she encountered, she remarried and lived for thirteen years

in the Ivory Coast. This strongly suggests she succeeded in putting the experiences behind her. A medical report from the Centre for the Care of Survivors of Torture (SPIRASI) was put in evidence. This records her description of the rape incident but does not, in the view of the Court, offer any conclusion in relation to the first named applicant's current health which could be said to form the basis for a "compelling reason" as to why her experience in Liberia at the time now warrants a determination that she is in need of international protection. The first named applicant's mental state is assessed: "Ms. W. is bright and alert, although she became agitated and distressed when discussing the traumatic events of her past such as the beating that she witnessed her husband sustaining, her own sexual assault and the repeated beatings by her second husband and his two other wives. Her mood is normal and she has no evidence of any psychotic symptoms".

17. The conclusion to the report is that her current experience of "considerable psychosomatic symptoms" is consistent with the history she gave of her experiences. These are, however, the experiences in both Liberia and Ivory Coast.

"Ms. W. gives a clear and consistent history of the physical and sexual assaults she experienced while living in her native country, Liberia, during the ongoing war there. On physical examination, she has scars which are consistent with the injuries that she reports sustaining. On mental health assessment, she continues to experience symptoms which are related to the traumatic experiences that she sustained and these were exacerbated by her ongoing separation from three of her four children. She will need ongoing psychological therapy to help her deal with these symptoms."

This does not identify any continuing consequence of the rape and assault which might be described as a compelling reason which the rape has given rise to.

18. The Court accordingly concludes that having regard to all of the factors taken into account by the Tribunal member in the contested decision, the applicant's claim to fear persecution if returned to Liberia has been properly considered. No case has been made for any "compelling reason" as to why the rape incident alone should constitute a basis for determining at this remove that the applicant is eligible for international protection.

19. For these reasons, the application so far as concerns the first named applicant has not been sustained and judicial review of the contested decision to that extent will be refused. There will, however, be an order of the Court quashing the decision to the extent only that it relates to the asylum application of the second named applicant as indicated above.