

THE HIGH COURT
JUDICIAL REVIEW

[2010 No. 422 J.R.]

BETWEEN**H.J.E. [NIGERIA]****APPLICANT****AND****MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM****REFUGEE APPEALS TRIBUNAL****ATTORNEY GENERAL****RESPONDENTS****JUDGMENT of Ms. Justice Stewart delivered on the 27th day of March, 2015**

1. This is a telescoped hearing for judicial review seeking orders of *certiorari* quashing the decision of the Refugee Appeals Tribunal dated 17th February, 2010, and remitting the matter for *de novo* consideration by a different tribunal member.

PRELIMINARY MATTER

2. The applicant, by affidavit sworn on 19th January, 2015, explained the delay in issuing proceedings. The respondents did not take issue with the extension of time necessary to proceed with the case. In light of the explanation provided at paras.2 and 3 of the applicant's affidavit, I was satisfied with the explanation provided by the applicant for the delay and was further satisfied that it constituted good and sufficient grounds for the extension of time. I accordingly extend the time within which to commence these proceedings.

BACKGROUND

3. The applicant is a Nigerian national from Okogbo in Edo state and was born on 21st April, 1970. The applicant stated in his questionnaire, completed as part of the asylum process, that his father was heir apparent to the throne of Okogbo and, as the eldest son he was next in line to that throne. In November 2006, after the death of the king the applicant states that he heard that his life was in danger. Since the applicant's mother was Sierra Leonean, the applicant states that the community did not wish for him to take the throne, instead preferring his half brother, whose mother was Nigerian. He states that his father died on 13th December, 2006.

4. The applicant claims that he was beaten by village people who then took him to the hospital for treatment. The applicant stated at the s.11 interview that he did not report these threats against his life because he "doesn't have the money to do that". (see p.64 of the booklet of pleadings). At the tribunal interview the applicant stated that he did go to the police; that he made a statement; and was informed upon his return to the station that it was a family matter. The applicant then states that he left Okogbo and went to stay in Benin, the capital of Edo state, where he remained for one week before travelling to Kawa in Niger. He states that he remained there from February 2007, until May 2009, working in a restaurant to save money to travel to Canada. His driving licence was issued in Lagos in 2008, and the applicant states that he returned there for a number of days to acquire same. He states that the group from Okogbo attempted to kidnap him in December 2008, in Niger but he was hidden by his employer until he departed for his intended destination of Canada.

5. The applicant arrived in Ireland on the 2nd June, 2009. The applicant states that his intended destination was Canada, via Zurich and Dublin and he paid an agent \$500 for travel. However, he was arrested at Dublin airport for being in possession of a false passport and was taken to Cloverhill prison where he was held for seven weeks. He first claimed to be Sierra Leonean but later stated he was Nigerian. His claim was processed on the basis that he is a Nigerian national.

6. The applicant completed the initial ASY1 form on 2nd July, 2009, and the questionnaire on 6th July, 2009. He attended the Offices of the Refugee Applications Commissioner (ORAC) for the s.11 interview on the 23rd July, 2009, and was issued with a decision from the ORAC dated 29th July, 2009. The commissioner made negative credibility findings in respect of the applicant; made findings in relation to the applicant not having sought state protection; and further made a finding in relation to the feasibility of internal relocation in Nigeria. The commissioner's decision stated that although the applicant's alleged reason for persecution could fall under the Convention ground of nationality, his claim was not well-founded and, therefore, he has not established a nexus between a well-founded fear of persecution and one of the five Convention grounds. The applicant appealed the decision to the Refugee Appeals Tribunal (RAT). The notice of appeal was not exhibited in evidence before this Court and was not contained in the booklet of pleadings, so the precise details of same cannot be referred to in this judgment. The applicant attended an oral hearing at the Offices of the Refugee Appeals Tribunal (RAT) on 12th January, 2010. The applicant was represented by his solicitor at the hearing.

IMPUGNED DECISION

7. By decision dated 17th February, 2010, the RAT issued its decision, affirming the decision of the ORAC not to declare the applicant a refugee. Under the heading 'analysis of the applicant's claim', at p.15 of the RAT decision, the tribunal member sets out a synopsis of the decision that is worth reciting at this juncture:

"This is a case where it is clear from the evidence noted above that the Applicant has no case under terms of a particular social group, but at best an aggrieved heir to the throne in his own individual capacity or has no conceivable claim to any kingship in his country, making the idea that he is a member of a particular social group even more spurious. A list of the breakdown of all of the inconsistencies of the Applicant's case would fill several pages. Those that stand out most are

- (a) The three different persons who he said were sitting on the throne of the tribe at that particular time
- (b) His statement that having beaten him, the tribes people took him to hospital
- (c) His story that the Police at first took on his case, and declined it when he went back to them later, in light of the two denials of having involved them at all."

8. The decision then goes on to conclude:

"Issues of relocation would arise if any reasonable possibility of the Applicant having a well-founded fear existed and would even then militate against an asylum finding. Refusal for failure to seek protection is also dependent on the other facts being accepted and would also work against asylum for him. Failure of a Convention reason is clear and confirms that he cannot be given asylum on these grounds. Credibility or rather the lack of it is a paramount issue for refusing the Applicant. Section 11B (a) is a matter which has been taken into consideration when assessing credibility. The Applicant, posing as a Sierra Leone national, and holding a Portuguese Passport tried to conceal his real identity, and he also did not claim asylum, in short, saying he did think Switzerland has any human rights. The appeal therefore is refused."

APPLICANT'S SUBMISSIONS

9. Counsel for the applicant, Mr. Ian Whelan B.L., submitted that the Refugee Appeals Tribunal did not sufficiently discharge its duty to give reasons for the decision. The tribunal member, in the decision, states that the applicant's claim was unsuccessful due to the fact that the applicant failed to establish a Convention nexus. However, the applicant submitted that the ORAC decision states that the applicant's claim could be considered on the basis of 'nationality', as set out earlier in this judgment. The applicant relied upon the judgment of Cooke J. in *O.A. & D.B. v. Refugee Appeals Tribunal & ors.* [2009] IEHC 501, where at paras. 28-30 it states:

"The issue has been considered by the courts of the United States in cases such as in *Re Toboso - Alfonso* (20 I & N Dec 819); in *Re Acosta* (19 I & N Dec. 211); and *Gatimi v. A.G.* (7th Cir. 20th August, 2009). It has been considered by the Canadian courts in *A.G. of Canada v. Ward* (1993) 103 DLR 1; and by the House of Lords in the United Kingdom in *R. v. Immigration Appeal Tribunal Ex parte Shah* (1999) 2 AC 629; and *Fornah v. Secretary of State for Home Department* (2007) 1 AC 412.

What appears to emerge from such case law is a common thread to the effect that persecution coming within the heading of "particular social group" in the Convention is persecution directed at a person who is a member of a group of persons all of whom share a common characteristic. That common characteristic, which must be other than the risk of persecution itself, distinguishes the group from the rest of society or is perceived by society as being a distinct group. The common characteristic must be unchangeable or innate or so closely linked to identity, conscience or the exercise of a person's human rights that the person should not be required to change it or is incapable of changing it.

The UNHCR has published "Guidelines on International Protection: Membership of a Particular Social Group" with a view to encouraging a common approach to the issue in the application of the Convention. The Guidelines explain the innate or unchangeable nature of the common characteristic as follows:

"This definition includes characteristics which are historical and therefore cannot be changed and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable nor fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognisable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognised as a group which sets them apart."

10. The applicant submitted that the tribunal failed to provide a correct statement of reasons for the alleged inconsistencies in the applicant's case. In this regard, the applicant further submitted that the three reasons averred to in the decision, as quoted above, are not sufficient: Reasons should be clear and capable of being understood. The applicant contended that the conclusion, again as quoted above, are incoherently expressed. The applicant relied upon *R.O. (an infant) v. Minister for Justice Equality and Law Reform* [2012] IEHC 573 where at para.30 MacEochaidh J, set out the following in respect of the adequacy of reasons:

- "(i) Were reasons given or discernible for the credibility findings?
- (ii) If so, were the reasons intelligible in the sense that the reader/addressee could understand why the finding was made?
- (iii) Were the reasons specific, cogent and substantial?
- (iv) Were they based on correct facts?
- (v) Were they rational?"

11. The applicant submitted that the decision in this instance fails the test enunciated above and should therefore be quashed.

12. The applicant submitted that the findings of the tribunal member consist of two factors: (1) a lack of Convention nexus and; (2) a lack of credibility on the part of the applicant. Reference to internal relocation was no more than a passing reference and does not form part of the decision. I accept this submission. The decision will stand or fall based on the matters outlined by counsel.

RESPONDENTS' SUBMISSIONS

13. Counsel for the respondents, Mr. Anthony Moore B.L., submitted that the applicant does not fall into a particular social group. The respondents argued that he is defined by the alleged persecution and this has consistently been held not to constitute a social group for the purposes of refugee protection. The respondents maintained that the adverse credibility findings made against the applicant were substantial. The tribunal member sets out three of these findings in the decision and the respondents submitted that these

adverse credibility inferences were open to the tribunal based on the evidence before it. In this regard, the respondents relied upon the Supreme Court decision in *Baby O. & anor v. Minister for Justice, Equality and Law Reform & ors.* [2002] IESC 44, wherein it was held that an applicant is not entitled to ask a court to set aside such inferences unless the court can be satisfied that no reasonable decision making body could draw such inferences.

14. Furthermore, judicial review does not entail a reassessment of the applicant's credibility and the respondents argued that this is what the applicant is asking this court to undertake; they referred in *Imafu v. Minister for Justice, Equality and Law Reform & ors.* [2005] IEHC 182. The respondents argue that the finding on internal relocation was lawfully made in line with the judgment of, *inter alia*, Birmingham J. in *Bamidele (G.O.B.) v. Minister for Justice Equality and Law Reform* [2008] IEHC 229.

DECISION

15. When one looks at the determination of the tribunal member, which is the subject matter of these proceedings and in respect of which the applicant is seeking an order of *certiorari*, the decision can be found in part 6 thereof under the heading 'analysis of the applicant's claim'. It is worth setting out again and states as follows:

"This is a case where it is clear from the evidence noted above that the Applicant has no case under terms of a particular social group, but at best an aggrieved heir to the throne in his own individual capacity or has no conceivable claim to any kingship in his country, making the idea that he is a member of a particular social group even more spurious. A list of the breakdown of all of the inconsistencies of the Applicant's case would fill several pages. Those that stand out most are

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(c) His story that the Police at first took on his case, and declined it when he went back to them later, in light of the two denials of having involved them at all."

16. At first glance the analysis section appears quite terse. On the other hand, the tribunal member does refer to the recital of evidence which had been noted earlier in the decision. In s.3 of the tribunal member's decision under the heading 'the applicant's claim' the tribunal member goes into considerable detail setting out the evidence which the applicant had put before the tribunal. The tribunal member highlights the inconsistencies in the applicant's stories. At p.2 of the report the tribunal member states:

"It must be stated here that the story has been different in the telling, as between his questionnaire, his interview and this Hearing, and even within the space of the two hours of the Hearing, it changed in certain respects. In evidence the applicant said that his father had been king of the tribe and he worked for him in the palace, going on messages and attending to the rules and regulations of the palace. He had been told by his father that he was to be king in succession to him when he would die. There were three ceremonies conducted in the tribe's shrine in Okogbo and the upshot was that he was deemed to be by the elders to have been rejected. He described a proposed ritual killing of a goat but said this was cancelled when the native doctor ordered that his inauguration should not take place. He said there was (*sic*) also two other similar attempts to resolve the matter at the shrine. On the last of these, instead of being crowned king of Okogbo, he got a beating which necessitated his hospitalization for three days. He produced a photograph with his face in profile, on which a small abrasion or cut can be observed at the side of his jaw.

The Applicant said he had been taken to hospital by the same people who had beaten him. There were seven in number, and when he got out of hospital he went to Benin to his mother's house, one and a half hours drive from Okogbo in the same state. He gave his departure for Niger as one week after returning to Benin. He had both in his questionnaire and his interview said that he had never complained to the Police about either his fears or about the beating, saying in interview that he didn't have the money. Now he told the Tribunal that he went twice to the local Police, had made a statement on the first visit and had gone back and had been informed that they would not get involved, as it was a family matter. His own legal representative asked him to explain the different responses and he blamed it on his lack of education.

The applicant described how he stayed in Kawa in Niger, not leaving until May 2009, including a chance meeting with a man from Okogbo and the attempt to kidnap him by the Okogbo faction in December 2008. He gave the Tribunal an account of from December 2008 until May 2009 he was kept out of sight by his boss in case those men would return. He said his boss introduced him to a man who provided him with a Portuguese passport and airline tickets to Canada via Zurich and Dublin, which he paid for through his own resources. He got through Zurich but in Dublin his passport was checked and he was not allowed to travel on to Canada. He was taken to Cloverhill Prison and was held there for 7 weeks. He finally said his mother took the children to Ghana because she does not know what is in his uncle's mind in relation to them."

17. The tribunal member at p.4 of the report then sets out the cross-examination of the applicant which took place at the tribunal hearing and states as follows:

"He said his partner's name is Lovethe and they lived together in the Palace of Okogbo with his father. His father died on 13th December 2006, the same day his youngest child was born. Ms. Walsh put it to the Applicant that he had given three different stories. He had said in Asylum 1 that his father worked for the king and that he filled out a job application to be made king. He responded that the official who wrote this out had miss-quoted (*sic*) his English and had not written down what he had actually said. He had not yet said that he had filled out any job application or said that his mother was from Sierra Leone. Ms. Walsh put it to the Applicant that he had written at Question 21 in his questionnaire that his grandfather was king of the tribe, but that his father had died before him, causing him the problem. She asked him why he wrote that. He said it was a mistake. She said "so your father was king". He replied "yes". She then quoted him the answer he gave at page 6 of his interview notes in which he said "my uncle was king". He then told her that this was a mistake. She asked him "whose mistake" and he said "I have to say mine", but he added "I never said my uncle was king". He was asked who had now taken over as king of the tribe and he said his youngest brother. I interjected to ask the Applicant if either he or his brother is qualified to be king and how it should be resolved. He said the Oba of Benin has a duty to resolve it. I said that in Nigeria there is a chieftaincy investigation court to deal with these issues and he denied that it would be used in his village. Ms. Walsh asked him if he had gone back any more to Nigeria. He said he had not. Ms. Walsh pointed out to him that his driving licence was issued in Lagos in 2008, and he had to admit that he went back there for a couple of days to get it."

18. In judicial review applications of asylum matters before the courts, it is regularly pointed out that when reviewing decisions of

Refugee Appeals Tribunal that the decisions must be read as a whole. It seems to me that this is an appropriately apt comment to make in this case. In my view on reading the entire decision of the tribunal member, and not just the 'analysis' section, that it is patently clear that the applicant's story was not believed and that the reasons for not believing him were recited in the part three of the decision.

19. It is well established that in a judicial review, the court does not embark, nor does it have any entitlement to embark, on a reassessment of credibility and substitute the court's views in respect of credibility for that of the decision-maker. In *Imafu v. Refugee Appeals Tribunal* [2005] IEHC 416 Peart J. said:

"This Court must not fall into the trap of substituting its own view on credibility for that of the Tribunal Member. The latter, just as a trial judge is at trial rather than the appellate court, in the best position to assess credibility based on the observation and demeanour of the applicant when she gives her evidence. These are essential tools in the assessment of credibility, and it is always essential to remember that what appears as the spoken word in a transcript or in a summary of evidence contained in any written decision cannot possibly convey the necessary elements for the assessment of credibility. That is what a Court will be reluctant to interfere in a credibility finding by an inferior tribunal, other than for the reason that the process by which the assessment of credibility has been made is legally flawed."

This sentiment was echoed by Feeney J. in *Benzuzi v. Refugee Appeals Tribunal & ors.* [2007] IEHC 2 where he stated as follows:

"The adverse findings of credibility do not run counter to generally known facts and are not inconsistent with the country of origin information and are based upon a determination by the person who had the benefit of assessing the demeanour of the Applicant that his account in certain regards was neither coherent nor plausible. For this court to impose a different view or finding in relation to credibility would be for the court to fall into the trap identified by Mr. Justice Peart in *Imafu...*"

20. In the case of *Totobor (B.T.) v. Refugee Appeals Tribunal & anor.* [2011] IEHC 484 Cooke J. said at para. 6 thereof:

"It goes without saying that such assessments of credibility are the exclusive function of the decision makers in the asylum process. An application for judicial review is not an appeal. It is no function of the High Court in judicial review to reassess credibility or substitute its own evaluation of the plausibility of events."

21. I am satisfied that on reading the decision as a whole, it is clear the basis upon which the tribunal member arrived at his decision. In light of the above I am satisfied that there is no basis for interfering with the findings made by the tribunal member and I refuse leave.