

THE HIGH COURT**JUDICIAL REVIEW****2008 1372 JR****BETWEEN****B. T.****PLAINTIFF****AND****MINISTER FOR JUSTICE EQUALITY AND LAW REFORM AND MARGARET LEVEY SITTING AS THE REFUGEE APPEALS TRIBUNAL****DEFENDANT****JUDGMENT of Mr. Justice Cooke delivered the 21st day of December 2011**

1. The applicant is 31 year old Nigerian woman who applies for leave to seek a judicial review of an appeal decision of the second named respondent dated 29 October 2008 which affirmed a negative recommendation made on her application for asylum by the Office of the Refugee Applications Commissioner in a Report dated 15th November 2007.

2. She arrived in the State in 2007, with her three year old daughter who was included in the asylum application. The mother gave a somewhat complex account of a life characterised by sexual abuse, rape, beatings and of being forcibly detained. The immediate source of her claim to fear persecution and serious harm in Nigeria was a man called "Tolu" who she said was someone who used come as a customer to her mother's shop. She claims that at the age of 23 she was raped by this man; that she got pregnant; that he tried to force her to have an abortion; but she refused and her daughter was born. Notwithstanding her account of having been raped by Tolu there was continuing contact with him, although his conduct was erratic and violent. She claimed that when her mother opposed the abortion Tolu had her (the mother) arrested upon a false charge of assisting the applicant in running away with his child. The applicant nevertheless agreed to go with him to Port Harcourt and moved in with him in November 2004. She found that he was involved in a secret cult. She claimed that in March 2007, he again tried to rape her and was attacked by him with a knife. On another occasion she said he hit her while she was cooking and hot oil burned her on the arm. He is alleged to have threatened that when the child was three years old he would have the child circumcised. She claimed that she moved with her mother to Lagos, but that Tolu followed her there. A friend of her mother's suggested the move to Minna in Niger state. A family that were friendly with there said they would help her and arranged to get documents for her including tickets and American passports, which enabled them to travel with a woman called Ruth in October 2007, arriving in Dublin on the 26th October.

3. An oral hearing took place before the Tribunal on the 7th October, 2008, at which the applicant was represented by solicitor and counsel. In section 3 of the Tribunal decision, the account given by the applicant as the basis for the asylum claim is set out in some considerable detail over three pages and includes comments on some of her replies under cross examination at the oral hearing.

4. The operative part of the Tribunal decision is characterised by a lengthy, detailed and forthright analysis of the credibility of the applicant's account set out in section 6 of the decision over seven pages. A large number of specific facts and events in the applicant's story are singled out and explicitly discredited. The Tribunal member introduces this analysis with the general assertion: "I do not accept that there is a genuine fear in the mind of the applicant. The entire claim is internally inconsistent and makes little or no sense". This is then substantiated by specific criticisms including the following:-

(a) The Tribunal member cites the account of the rape, pregnancy and the threats and beatings by Tolu over the abortion. She then comments: "Firstly it is reasonable to state that rape victims tend not to contact the perpetrators of the crime whether they become pregnant or not. Mothers of rape victims tend not to advise their daughters to contact the perpetrator either. Men who rape women are generally not interested in whether their victims become pregnant or not . . . nor does it make sense that this victim would the voluntarily go with this individual or that he would be in the least bit interested in taking her for a pregnancy test".

(b) In relation to the account of Tolu having the mother arrested and their pleas with him to get her released the Tribunal member comments: "She gave different versions of this release and how it came about. In interview she said the police saw her when she went with this Tolu to the station to have her mother released. At the hearing she said she did not go to the police, but directly to him as the police would have arrested her if she had gone to them".

(c) In relation to the conduct of Tolu, his erratic behaviour and violence, the Tribunal member comments: "The vacillating behaviour of this individual (if it was occurring in the manner alleged by the applicant and I do not accept that it was occurring at all), sets this person apart as an erratic if not deranged individual . . . That she would be constantly getting in touch with this individual in the light of firstly the rape, but in addition to that, this bizarre behaviour is just not credible".

(d) On her going to Port Harcourt with Tolu and then moving in with him in November 2004, but told that she was to hide if anyone called so that no one would see her, the Tribunal member comments: "The fact that she engaged in any dialogue with the rapist in the first place beggars belief. . . . The fact that he allegedly threatened to take the child (which he originally did not want but then changed his mind) in the context of not wanting anyone to know about her existence makes no sense either".

(e) On the question of Tolu's involvement with the clandestine militant and occult group which met in his house, the Tribunal member comments: "All of this cloak and dagger business is entirely unnecessary when everybody knows everybody else".

5. Clearly, therefore, this Tribunal decision is based squarely and exclusively on the Tribunal member's appraisal of the lack of credibility of the applicant and the implausibility of the facts and events she relied upon in her claim. Significantly in this context, the Tribunal member gives the following assessment of the applicant herself as she appeared at the hearing:-

"This applicant is an intelligent and competent individual and is very articulate at her hearing. Unusually she engaged her interviewer in questions regarding the various organisations in Nigeria for women and displays a certain confidence and assertiveness in so doing. She is not timid or cowed and if she was in the situation she alleged (and I do not accept that she was) she had ample opportunity to escape, on her own evidence, and yet she did not. I do not accept that this story is credible at all and thus I do not accept that there is any risk to her daughter either, based on the applicant's evidence."

6. 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. This Court in its judgment in *I.R. v Refugee Appeals Tribunal* (Unreported, High Court, 24th July, 2009), reviewed many of the existing judgments on this point in the High Court in asylum cases over the last ten years and observed:-

"When subjected to judicial review, a decision on credibility must be read as a whole and the Court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in disregard of the cumulative impression made upon the decision-maker especially where the conclusion takes particular account of the demeanour and reaction of an applicant when testifying in person."

7. In the present application just such a challenge is sought to be made to the findings of lack of credibility made by the Tribunal member and grounds 3, 4, 5, 6 and 9 of the statement of grounds are based upon direct quotations from the relevant parts of the s. 6 analysis of the decision with arguments as to why each finding is mistaken, irrational or otherwise flawed.

8. In arguing the case, counsel for the applicant initially endeavoured to expand the challenge by submitting that in the particular circumstances of the case, the Tribunal member did not in fact have jurisdiction to examine the question of credibility at all or had, in the alternative, breached the principle of fair procedures. This submission was based upon the proposition that the applicant's credibility had been fully accepted in the s. 13 report and that the negative recommendation had been made entirely on the basis of the availability of state protection and internal relocation. It was on that basis that the notice of appeal had been lodged directed exclusively at those two aspects of the report. On that basis it was argued that the Tribunal member had no jurisdiction to re-examine the question of credibility or that, in the alternative, if this was to be done, advance notice should have been given to the applicant if a breach of the principle of fair procedures was to be avoided.

9. The Court considers that this argument is both inadmissible and unfounded. In the first place, none of the 22 grounds pleaded in the statement of grounds is formulated in a way which would cover such an argument. Furthermore, the argument is not addressed in the written legal submissions lodged.

10. Secondly, the Court considers it questionable that the s. 13 Report should be construed as accepting the applicant's credibility in its entirety. In a number of places in the report direct questions of lack of credibility are mentioned. "She claims that despite of over 120 million living in Nigeria that he would still be able to find her. This is not considered credible". (Para.4.2.1), "... it appears from the applicant's testimony that Tolu would have to have been extremely and motivated to find her if it meant there could be no place she could live in safety in Nigeria. However, if that was the case, then it does not appear credible that the applicant would not be sure why Tolu would want her either killed or back living with him so much". (Para. 4.2.2). While it is true, as counsel for the applicant suggests, that these observations are made in connection with questions as to whether the applicant could have evaded her alleged tormentor, the Court reads the report as going further and as indicating a more general questioning of the account as a whole.

11. Thirdly, even if there could be said to be some doubt as to whether credibility in its entirety was being questioned in the report, an allegation of lack of fair procedures on the part of the Tribunal member could not, in the view of the Court, be maintained without some explanation as to what happened at the oral hearing where the applicant was represented by solicitor and counsel. Apart from the few references in the decision itself, this Court has no evidence as to what transpired at the oral hearing. If the argument was valid and either the presenting officer or the Tribunal member had sought to reopen the question of credibility, it would have been open to the legal representatives of the applicant to object upon that ground or, at least, to call for an adjournment in order to prepare to answer it by taking further instructions from the applicant. In support of the argument, reliance was placed upon the judgment of McGovern J. in *M.N. v RAT and Others* (Unreported, High Court, 28th June, 2007). That, however, was a case in which there was no oral hearing and in which the Commissioner had made the Report upon the basis that the applicant feared persecution in Zimbabwe and the Tribunal appeal was, without prior notice, determined upon the basis that the applicant might be repatriated safely to South Africa.

12. Fourthly, and in any event, it is well settled that the appeal before the Tribunal is a second stage re-examination at the request of the applicant of the asylum application. This Court has dealt with the point on a number of occasions. In *O.A. v. RAT* [2009] I.E.H.C. 296, the Court held: "The appeal takes the form of rehearing in which the applicant is entitled to challenge the content of the report; to contest any findings it purports to make; to adduce new evidence including new country of origin information in rebuttal, and to require that a fresh assessment as to credibility of his claim is made where credibility has been put in issue in the report". In *T.T.A. v. Refugee Applications Commissioner* [2009] I.E.H.C 215, the Court described the asylum process as having two stages:-

"Made up of an investigative stage before the Commissioner at first instance, followed by a second stage, an appeal review in which the Tribunal can either affirm or set aside the report and recommendation. In so doing, the Tribunal is fully entitled to substitute its own appraisal of the facts and evidence, including of any new evidence adduced by the applicant, and also of the credibility of the applicant himself in giving testimony when he appears in a case which has an oral hearing."

Later in the same judgment the Court referred to the procedure on appeal in these terms:

"The full scope of that appeal and the latitude for the substitution of an appraisal which is the full opposite to that reached by the Commissioner in the report, is not in any sense restricted or impaired by the fact that the appeal's starting point and the procedural framework for the appeal is the Commissioner's report to which the Appeal Tribunal is required to have regard. Nor is it diminished or circumscribed by the change from an investigative forum to quasi adversarial procedure in which the Commissioner is represented before the Tribunal in order, as it were, to stand over the

report. The Commissioner acts as a type of *legitimus contradictor* who provides the adversarial element which permits the Tribunal to test and tease out the issues, but this in no way inhibits the Tribunal in reaching a conclusion that the Commissioner has made mistakes; that he has relied on wrong or inadequate evidence; that he has misunderstood the applicant, or in deciding in the light of entirely new evidence submitted by the applicant that conclusions which might have been tenable before the Commissioner should, on balance, no longer be allowed, and that a new view of the case should be taken."

13. In the judgment of the Court these are particularly important considerations where the appeal includes an oral hearing. The Tribunal member has an opportunity of assessing the fundamental basis of the claim to a fear of persecution by reference to the answers given by an applicant in person. Even where an appeal may be directed at issues of internal relocation or state protection, an applicant may seek to explain away observations in the report in a manner which gives rise to doubts in the mind of the Tribunal member as to the plausibility of the facts or events out of which the need for such forms of protection were first thought to arise. Subject only to possible circumstance attracting the application of the principles of fair procedures, there is no impediment in law or in the scheme of the asylum process under the 1996 Act, which precludes the Tribunal member reassessing the credibility of the asylum claim.

14. In the judgment of the Court this case is a quintessential example of such a situation. The findings very clearly made and cogently expressed in the Tribunal decision were clearly open to the Tribunal member. As such they are findings on credibility with which this Court cannot interfere. In the judgment of the Court the attempts made to dissect and analyse the specific instances of implausibility identified by the Tribunal member do not give rise to any substantial ground for questioning the overall assessment made in the decision.

15. Thus, for example, the criticism point mentioned at paragraph 4 (b) above – the reference to different versions of the account of her mother's release – is dependent upon treating as ambiguous an answer given by the applicant to a question recorded at page 11 of the s. 11 interview and then suggesting she was trying to convey something different. In fact the answer in question is reasonably clear and different from the later version in that she said: "*When we went back to Lagos and begged Tolu to tell the police to release her, as Tolu was the only one who could tell them to release her, and we went to the police station and they saw me, that I was pregnant, that Tolu had told them the wrong story, that he had told them he had a child, didn't matter to them, they still did what he wanted.*"

16. The other points identified by the Tribunal member are in the view of the Court instances of the application by the Tribunal member of common sense to different aspects of the story told and as such within the competence of the decision maker in making an overall appraisal of the veracity and reliability of the claim made.

17. The application is refused.