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THE HIGH COURT

JUDICIAL REVIEW

2009 393 JR

BETWEEN

Ra. O. E. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND E. E.)

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE REFUGEE APPLICATIONS COMMISSIONER

RESPONDENTS

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JUDGMENT OF MS JUSTICE M. CLARK, delivered on the 16th day of March, 2010

1. The applicants, who are fraternal twin infants, seek leave to apply for judicial review of the decisions of the Refugee Applications Commissioner, dated the 30th March, 2009, to recommend that they should not be granted declarations of refugee status. The applicants will not be entitled to an oral hearing on appeal to the Refugee Appeals Tribunal and in those circumstances they argue that an appeal would be an inadequate remedy for the flaws they identify in the Commissioner's decisions.

2. The hearing took place on the 4th March, 2010. Mr Anthony Lowry B.L. appeared for the applicants and Mr Patrick O'Reilly B.L. for the respondents.

Background

3. The applicants were born in Ireland on the 6th April, 2008 of Nigerian parents. At the time of their birth their parents and two siblings were living in Ireland and awaiting decisions on their asylum claims. Their brother P. was born in Nigeria in 2004 while their sister J. was born in Ireland shortly after her parents and P. arrived in the State in 2006. The mother and father applied individually for asylum and P. was included under the mother's application. The mother claimed to have been kidnapped and held for ransom by MASSOB and that her husband who was a man of means was unable to pay the high ransom. She managed to escape and they fled to Ireland in fear of her kidnappers. J.'s claim was also based on the family's fear of MASSOB. The mother claimed to be from Cross-Rivers State but has not lived there since she married her husband who is from Ogun State. As far as the Court is aware, the status of the husband's case is that he is awaiting a final decision on his asylum appeal before the Refugee Appeals Tribunal.

4. The mother, P. and J. are now failed asylum seekers and were served with deportation orders in January, 2009. In April, 2009 this Court refused an injunction restraining the deportation of the mother and is therefore familiar with the facts of her case.

5. On the 16th February, 2009, when the twins were nine months old, the mother made individual asylum applications on their behalf. A fear of MASSOB played no role in their claims. The claims were based on their mother's fear for them from her husband's family because as twins they would be subjected to spiritual rituals involving feeding them with traditional leaves, throwing them into water and leaving either twin determined to be the evil in the forest to starve.

6. It was claimed that the twins are of Igbo ethnicity and Christians. Their father was stated to be of Yoruba ethnicity. If returned to Nigeria his Yoruba family, who believe that twins are directed by spirits, would insist that they be subjected to traditional rituals in the hope of driving out spirits threatening the twins. The second fear was that both of the twins would face individual circumcision in accordance with Igbo custom. The mother said that if they went to her home town in Cross-Rivers State, both her older daughter J. and her younger daughter, the first applicant, would be subjected to female genital mutilation (FGM) possibly resulting in them bleeding to death or contracting HIV and that a similar fate awaited her son, the second applicant, when he was circumcised. She said the family had no where to go to in Nigeria with the dual threats from her family or that of her husband.

7. When asked if she could relocate away from her home town for example to Lagos, she said she does not know anyone in Lagos and "*You cannot just move somewhere you don't know anybody. Life is hard*." She accepted that she did not know anyone in Ireland before coming here but said that persons fleeing non-state persecution can safely relocate only if they know other people in the place they are travelling to. She said "*It would be difficult to start a life in a strange place, the environment would be different*." She said her husband had told his mother that she had given birth to twins because "*You cannot hide forever. If they came to visit they would see that I have twins.*" She said "*If we were sent back to Nigeria now we would have to go back to either my village or his village and neither is safe for us*." They could not relocate because they have no-where to go.

8. No country of origin information or any other documentary evidence was submitted in support of either application.

The Commissioner's Decisions
9. The Commissioner made negative recommendations in the twin applicants' cases on the 30th March, 2009. At the time they were just over eleven months old. The s. 13 reports, which are essentially identical, summarised their claims and noted the mother's replies at the twins' interview in relation to internal relocation. It was not accepted that she could not relocate simply because she does not know anyone in a different part of Nigeria and it was noted that she travelled all the way to Ireland where she didn't know anybody. It was stated that her reason for not relocating in Nigeria was not credible and it was also found non-credible that she could be located in Lagos by members of her husband's village or Cross-Rivers State considering that the population of Lagos is estimated at over 17 million. In addition it was found non-credible that people from two particular areas in Nigeria would have the interest or the means to search for the twins throughout the whole of Nigeria and it was stated that the testimony lacked any substance. Reference was made to an extract from a U.K. Home Office 'Country Report – Nigeria' (2007) in relation to persecution from non-State agents and internal relocation, which cited extracts from a British-Danish Fact-Finding Mission report. One of those extracts stated that internal relocation to escape any ill treatment from non-state agents was almost always an option although some people may face difficulties with regard to a lack of acceptance by others in the new environment as well as a lack of accommodation and land and it would be easier if the person had family or other ties in the new location.

10. It was stated that the applicants' mother had failed to establish to a reasonable degree of likelihood that the twins would be subjected to what would qualify as persecution on the basis of membership of a particular social group. A finding was made in each case under s. 13(6)(a) of the Refugee Act 1996 (i.e. that they have shown either no basis or a minimal basis for the contention that they are refugees) which means that the twin applicants will not be entitled to an oral hearing on appeal.

The Applicants' Submissions
11. The applicants argue that a paper-based appeal would not be adequate in circumstances where the Tribunal Member will be required to undertake a complex analysis in relation to the reasonableness of the internal flight alternative. They rely on the judgments of Cooke J. in *P.S. v. The Refugee Appeals Commissioner* [2009] I.E.H.C. 298 (18th June, 2009) and this Court in *J.G.M. (Mhlanga) v. The Refugee Applications Commissioner* [2009] I.E.H.C. 352 (29th July, 2009). It was argued that if a person is to be refused refugee status on the basis of an internal relocation finding, then Regulation 7 of the *European Communities (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006) ("the Protection Regulations") requires the decision-maker to carry out a complex and sophisticated examination of that person's personal circumstances. It was contended that the Tribunal Member would be unable to properly assess whether it would be reasonable for the twins to relocate, without hearing oral evidence. The applicants rely on para. 36 of the UNHCR Guidelines on Internal Relocation (2003) which states:-

> "B. Accelerated or admissibility procedures
>
> 36. Given the complex and substantive nature of the inquiry, the examination of an internal flight or relocation alternative is not appropriate in accelerated procedures, or in deciding on an individual's admissibility to a full status determination procedure."

The Respondents' Submissions
12. The respondents contend that the applicants' submissions amount to a contention that if an applicant fails on credibility then a paper based appeal is insufficient. The respondents reject that contention. The mother was asked very clear questions on internal relocation at the twins' s. 11 interview and she chose to answer in the particular way she did. The Commissioner found that her answers were simply not credible. Her credibility was rejected by reason of the substance of her answers and not by reason of her appearance, demeanour or the manner in which she replied to questions. The issue is whether it would be reasonable to expect the family of the twins to relocate within Nigeria to escape the asserted fear of traditional rituals or circumcision. The Tribunal being a specialist body has the expertise to deal with such matters and this is therefore not a case which requires an oral hearing.

THE COURT'S ASSESSMENT
13. This being a leave application to which s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 applies, the applicants must establish substantial grounds for the contention that the Commissioner's decisions ought to be quashed. As is now well established it is also incumbent upon the applicants, who seek judicial review of the Commissioner's recommendation as an alternative to exercising their statutory right of appeal to the Refugee Appeals Tribunal, to demonstrate a fundamental flaw or illegality in the impugned decisions such that an appeal and more particularly a paper-based appeal to the Tribunal would be an inadequate remedy.

14. The applicants argue that this is such a case and that the Commissioner's decision ought to be quashed because the reasonableness of expecting them to internally relocate within Nigeria was inadequately considered. They also contend that notwithstanding the extreme youth of the applicants and their inability to speak for themselves, a paper-based appeal would be inadequate because, without hearing oral evidence, the Tribunal could not properly assess the reasonableness of internal relocation. No cogent arguments were advanced as to why these issues could not properly be the subject of written submissions in a paper-based appeal or of what could be said by the applicant's mother or father that could not be adequately stated in written submissions. No unfairness was identified as in *Mhlanga* where the applicant would be dealing for the first time on the paper based appeal with a complex issue on which no decision had previously been made. While the applicants relied on *P.S.* and *Mhlanga*, they did not demonstrate how the principles set out in those decisions were applicable to this case. In *Mhlanga certiorari* was granted because the applicant would be forced to deal with an entirely new issue before the Refugee Appeals Tribunal without an opportunity to address the issue in oral evidence and in circumstances where very substantial credibility findings had been made against him by the Commissioner. The Court expressed the following concerns:-

> "The applicant could find himself in the situation of making key arguments for the first time in a paper based appeal where he will have no opportunity to explain changes to the Tribunal Member. It may even be that he could satisfy the Tribunal Member on the legal issue of the non-availability of protection in Mozambique only to be rejected on other credibility issues. In those circumstances, it is certainly possible that where complex issues of nationality and general credibility will have to be addressed on paper, such an appeal would be an inadequate remedy for the error made in the first stage of the investigation. There will be no opportunity for the Tribunal Member to observe the applicant answering questions and no opportunity for the applicant to orally explain any of the discrepancies highlighted in the s. 13 report."

15. The applicants have not demonstrated that a comparable situation would arise on appeal in this case nor have they distinguished the appeal in this case from the appeal that was available to the applicants in *P.S.* where the applicants contended that the Commissioner selectively relied on country of origin information. Cooke J. held:-

> "This is an issue which can and ought to be dealt with in the first instance by appeal rather than by judicial review. This is so notwithstanding the absence of an oral hearing because it is an issue which turns upon the assessment of written material in the form of country of origin information and is in no way dependant upon the personal testimony, demeanour,

or credibility of the applicant."

16. Rather than demonstrating why that conclusion should not also apply to this case, the applicants sought to argue that a proper investigation of the availability of internal relocation required oral evidence as the UNHCR Guidelines recommend that this is the appropriate method.

17. The applicants' arguments are founded on a fundamental misunderstanding of the Commissioner's decisions and the basic concept of internal relocation, also known as the "internal flight alternative". The Court is satisfied that the applicants have overstated the role of internal relocation and have sought to underplay the finding that the mother's description as to why her twin infants are in need of international protection was implausible and that this in turn led to the s. 13 (6)(a) finding. The impugned decisions were not based on a finding that the applicants could reasonably be expected to stay in a part of Nigeria to escape persecution but primarily and fundamentally because the mother had "*failed to establish to a reasonable degree of likelihood that they would be subjected to what would qualify as persecution on the basis of membership of a particular social group*". The documents which were before the Commissioner and the record of the interviews with the mother convince the Court that such was a likely and not surprising finding.

18. In view of the lack of credibility there was no necessity for an assessment as to the personal circumstances of the applicants and whether it would be reasonable to expect the family to move to a safe part of Nigeria. The issue of relocation arose in the context of a general assessment of the claim when the ORAC officer quite reasonably enquired why, if the mother feared for the safety of her infants in either of their villages of origin, she could not move to a huge and populous city like Lagos. The mother's responses did not commend themselves to the officer who cannot be criticised for finding that the answers were unreasonable in the context of the family having relocated to Ireland. It follows logically that in those circumstances, the question of an in depth analysis of the suitability of a relocation area in Nigeria did not arise. Such an assessment is only required when the Commissioner is satisfied that a well founded fear of persecution in a particular location is established and that relocation is an alternative to seeking protection in another state. In the circumstances, the applicants have not established any error of law or of fact or any breach of fair procedures or constitutional justice which would warrant the grant of leave.

19. The UNHCR Guidelines on Internal Relocation (2003) are concerned with the refusal of refugee status to those who are genuinely in need of protection from persecution. The Guidelines suggest that in the appropriate circumstances, relocation within the home country is a more appropriate answer than international protection. The preamble to the Guidelines demonstrates that the UNHCR is clearly concerned that in some circumstances where persecution is established, it may be unreasonable to expect the person to relocate as safety is not guaranteed or the capacity to survive in the new location may be limited by harsh living conditions. The Guidelines indicate that where a person is fleeing persecution in one part of his country he should not be refused asylum and be expected to relocate, unless an assessment is carried out of his personal circumstances and of the part of the country considered a safe relocation possibility. The primary issue is the safety of the applicant and not whether he can enjoy the same standard of living as in his own part of the country before the persecution occurred. Of relevance to the assessment of such a person's personal circumstances are his age, general health, family situation and relationships, whether he suffers any social or other vulnerabilities; whether there are ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, educational, professional and work background and opportunities. The list is indicative and not exhaustive. There is clearly a degree of unreasonableness in expecting a person to move to another part of his country to escape his persecutors if he would find himself subject to fresh discrimination or even persecution by others because of his lack of ethnic or other cultural ties with the other residents of the *safe relocation*. The Guidelines are not concerned with the generalised approach taken by many credibility assessors when dealing with allegations of non-state persecution where questioning involves moving away from the persecutor. If a person who claims to fear persecution can either seek state protection or can reasonably be expected to move away from the acts of persecution, then he does not require protection in another state. If he either does not seek state protection or provides no reasonable explanation for seeking such protection then his credibility is liable to be impugned. Similarly, if he can relocate but chooses instead to take a flight and come to Ireland, he is unlikely to be considered as a person who genuinely requires protection.

20. It appears that the main issue to be addressed by the Tribunal Member dealing with the applicants' appeal will be to consider whether the fears alleged are real and if so, whether the avoidance of those threats could be achieved by moving to a different area. If the applicants are of the view that they would not be able to live a relatively normal life in another part of Nigeria, that they would face economic destitution or an existence below an adequate level of subsistence, there is nothing to prevent them from putting that claim on affidavit and making efforts to substantiate it by way of documentary evidence. As the matters stand in this application, they have not demonstrated that any prejudice would arise from the absence of an oral hearing or that a paper-based appeal would be inadequate for any other reason.

Conclusion

21. In the light of the foregoing the Court is satisfied that the applicants have not established substantial grounds for the contention that the Commissioners' decisions ought to be quashed and that, even if they have identified any infirmities in the Commissioner's decisions, they have not demonstrated why a paper-based appeal to the Refugee Appeals Tribunal would constitute an inadequate remedy. Leave is refused.