Neutral Citation: [2014] IEHC 473

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 209 J.R.]

BETWEEN

J. C.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 20th day of August, 2014

1. The applicant is a Nigerian national born in Lagos on 14th October, 1976. She is of Igbo ethnicity and claimed to be a member of the Osu caste, which is routinely subject to discrimination and persecution in Nigeria. She benefited from a first and second level education and obtained a BSc in accounting from the Enugue State University. She had a history of employment in Nigeria.

2. On 17th November, 2001, she married B.N.C. Her daughter, D. A., was included in her refugee application. She was born in Nigeria in 2003.

3. The applicant left Lagos and arrived in Ireland with her daughter and applied for refugee status on 24th November, 2005.

4. The applicant's son, D.D., was born in Ireland on 28th December, 2005. A separate application for asylum was submitted on his behalf by the applicant.

5. Both applications were refused by the Refugee Applications Commissioner and appealed to the Refugee Appeals Tribunal which conducted oral hearings in respect of both on 10th March, 2008. Two separate decisions were delivered by the tribunal member on 27th January, 2009. The decision in respect of the applicant and her daughter is the subject of this judicial review application. The decision in respect of the applicant's son has not been the subject of any legal challenge.

The Claim

6. The applicant claims that her husband's family objected to his marriage to her as a member of the Osu caste. They held traditional beliefs that Osu blood was evil and that the marriage of a family member to an Osu would bring calamity upon it and their lands. Her husband's family investigated her background and discovered that she was an Osu, which led to persecution which forced her to leave Nigeria.

7. The marriage took place despite his family's objections. Most of the family did not attend the wedding. In 2001 she and her husband went to his family's village for Christmas, but were thrown out. In March, 2002 it was said that her husband returned to plead on her behalf and called upon the elders and the family uncles to assist in gaining acceptance by his family of the marriage. This failed. Two of her husband's uncles came to their family home in August, 2002 and threatened them verbally. In September, 2002 they again went to her husband's village to seek acceptance. This was refused. In December, 2002 she became pregnant with her first child. Her husband's brother came to see them in their family home and on seeing that she was pregnant called her evil, cursed her and verbally abused her before leaving. In July, 2003 her husband returned to his family village where he was told that the applicant would bring a curse upon the land if she gave birth. It was alleged that the same two uncles called to their home in December, 2003 and damaged the house. In 2004 she claimed that she was assaulted by these uncles and in July, 2004 her husband's brother came and warned them that he was going to ruin their lives and threatened to kill them.

8. She claimed that family members came five times to her home, broke down the door and attacked her husband, wounding him on one occasion with a knife. The matter was reported to the police, but no action was taken because it was regarded as a family dispute.

9. The applicant stated that she attended Women's Aid Collective (WACOL). Two documents were submitted from WACOL dated 10th March, 2005 and 10th March, 2008. These documents identified WACOL as an organisation which provided free legal aid and advice to the applicant concerning the violence which she was facing at the hands of her in-laws. The report of 10th March, 2005, stated that following her marriage, her in-laws had:-

"…made her life hell and this maltreatment she also receives from the extended family that strongly believe that she has brought a curse into their family. Sadly, they have also extended the degrading and inhuman treatment to her husband who incidentally is their son and brother. When she made this report to us, we initiated reconciliation between the feuding parties and integration of our client into the family. Unfortunately all efforts failed and they were bent on her leaving the family. As it is, she is under threat of violence and possibly loss of her life and that of her husband and children".

The applicant was advised by WACOL to keep away from her in-laws as her life was seriously under threat. The report states that they would have initiated court proceedings on her behalf, but the outcome might not have been positive. It was noted that many women face similar threats and intimidation in many Igbo communities despite the provisions of the Constitution which ban discrimination against the Osu caste. The letter of 10th March, 2008, confirmed that the previous report emanated from the legal department of WACOL.

Section 13(1) Report

10. The applicant and her daughter were refused a recommendation of refugee status by the Refugee Applications Commissioner on

28th March, 2006. In considering whether the applicant had a well founded fear, a conclusion was reached that elements of the applicant's evidence lacked credibility. It was stated:-

> "4.7 The applicant's claim that because she was Osu, her blood was considered evil. She states her husband's family believed that her children would cause destruction in their land. However, according to country of origin information, the Osu status was legally abolished by the Eastern Nigerian Government in 1956 (Tab 1). The applicant stated that she was not aware of difficulties that would arise in marrying her husband (pp. 13, 14). This would appear not to be credible if the applicant was indeed Osu. The applicant would also appear to have third level education and access to the police as evidenced by the certificate presented. It would, therefore, not appear that the applicant had suffered discrimination as a result of an alleged Osu status."

It was noted that suffering the disapproval of a partner's family did not fall under any criteria for determining refugee status. A Nigerian police report recording a complaint made by the applicant on 6th August, 2005, was considered. However, it was noted that the complaint concerned a family dispute and was not, therefore, linked to any of the Convention grounds of persecution. Country of origin information on state protection in Nigeria suggested that reports of threats of violence, including threat to life, maim or harm, are promptly dealt with by the police. It was concluded that it was not evident from the information provided by the applicant that she had suffered persecution for any Convention ground, nor was there any evidence that she was likely to face persecution upon returning to Nigeria.

The Tribunal Decision
11. The Tribunal did not accept that there was a genuine fear of persecution in the mind of the applicant (repeating almost verbatim the findings of the Commissioner) because:-

> "The applicant claims that because she was Osu her blood was considered evil. She states her husband's family believed that her children would cause destruction in their land. However, according to country of origin information, the Osu status was legally abolished by the Eastern Nigerian Government in 1956. (Tab 1) The applicant stated that she was not aware of difficulties that would arise in marrying her husband (pp. 13, 14). This would appear not to be credible if the applicant were indeed Osu. Either this ban on the Osu status was extremely successful and there are now no negative aspects to being Osu (which was not being relied on as being the case as is demonstrated by the country of origin information submitted on her behalf) (p. 84 UN CERD document details that Osu that are still subjected to social exclusion, segregation and mistreatment as well as discrimination in employment and marriage) or she is not an Osu as it is difficult to accept that she would not know that difficulties arise for Osu in marrying non-Osu if she was in fact an Osu. Then having become aware of these difficulties her husband frequently visited his family and brought her to them at Christmas and she allegedly was thrown promptly out of the house."

The Tribunal stated that it was the husband who kept returning to his family notwithstanding their alleged opposition to his marital arrangements and persisted in futile attempts to get them to accept a situation they clearly had no interest in accepting from the outset "if any of this is true". The tribunal member added:-

> "Thus, I do not accept this claim as credible. Firstly, because of her apparent ignorance of the fact that being Osu might cause difficulties in the first place, something an Osu would know, and secondly, that being so, the manner in which they persistently exposed themselves to the erratic behaviour of these people."

12. Furthermore, the Tribunal concluded that "if any of this is credible" the applicant had the opportunity to relocate within Nigeria because of her level of education and the fact that her husband was employed in a bank. It was concluded that relocation in any of the larger cities of Nigeria was an option for the applicant.

The Challenge
13. The relevant relief sought is leave to apply for judicial review by way of *certiorari* of the Tribunal decision. The notice of motion seeking relief issued on 24th February, 2009, outside the fourteen day period required under s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000. A telescoped hearing was conducted whereby if the court granted leave on any of the grounds advanced, the case could be determined on the basis of the evidence and submissions advanced to the court and a notice of intended opposition which would be deemed to be the statement of opposition for the purpose of the hearing. An extension of time was required.

Grounds A and B
14. The applicant submits that the finding by the tribunal member rejecting her claim to be a member of the Osu Caste was irrational or unreasonable. The finding was made on the basis that the applicant stated that she was not aware of the difficulties that would arise as an Osu from marrying into a non-Osu family. The two letters from WACOL were submitted during the appeal process and their authenticity was not challenged. In addition, it is clear that the issue of whether the applicant was Osu never arose in the course of the hearing. In effect, it is claimed that the Tribunal rejected the entirety of the applicant's evidence, including the WACOL letters which were accepted as legitimate later in the decision. It is submitted that no proper weight was given to these letters and that the applicant should have been confronted directly with any challenge to her evidence that she was Osu.

15. I am satisfied that at all stages in the appeal process the question as to whether the applicant was Osu was a live issue. It is clear that the s. 13(1) report which addresses the credibility of the applicant on this issue and found it to be lacking, also stated that it was not credible that the applicant would not have been aware of the likely difficulties for an Osu who married into a non-Osu family. The issue was again addressed in the notice of appeal at para. 2(i). Furthermore, the applicant furnished an explanation that because she and her husband were Christians, she did not understand that his family would have "traditional" beliefs. It is also clear from the questionnaire, the s. 11 interview and the evidence given by the applicant that this hostility was clear to her before the couple were married and was evidenced by the fact that only one cousin from the husband's family and extended family attended the marriage ceremony.

16. The issue of the applicant's ethnicity on her own case, arose before marriage and was clearly a matter that was certain to give rise to difficulties on the basis of the country of origin information which was considered by the Tribunal, and which in large measure coincides with the experience described by the applicant. It was open to the Tribunal to conclude that the credibility of the applicant on this limited aspect of the evidence was undermined by the prevailing reality of societal discrimination against the Osu, and that, as an Osu with a third level education, she must have anticipated difficulties surrounding her pending marriage. I am also satisfied that this matter was clearly in issue during the course of the appeal having regard to the findings in the s. 13(1) report, the notice of appeal and the evidence adduced at the appeal hearing. Therefore, I am satisfied that on this limited issue the inference drawn was reasonably open to the tribunal member and that consequently the decision should not be quashed on Grounds A and B. However, a more difficult issue arises in respect of the finding concerning the WACOL letters.

Grounds C and D
17. These relate to the finding made by the Tribunal in respect of the applicant's husband's attempts at reconciliation which, it is submitted, is unreasonable. The husband's behaviour in repeatedly returning to his family after initial rejection of his wife before marriage and having been thrown out of the family home at Christmas 2001, and repeatedly thereafter returning to the village seeking acceptance and/or reconciliation with his family and community, was said to lack credibility, because he was repeatedly exposing himself and his wife and ultimately his child to "erratic behaviour by these people". It was clearly implied in the Tribunal decision that as a matter of commonsense, the applicant and her husband would never have persisted in seeking to have contact with his family who were clearly so vehemently and violently disposed towards her, the marriage and their child. The explanation offered namely, that in Nigerian society community and family bonds were very important to the extent that the husband would do all in his power to effect reconciliation was not accepted. In particular, the Tribunal outlined how as part of this process the couple involved WACOL in seeking reconciliation. The Tribunal considered it "amazing" that despite the advice of WACOL the applicant claims that in 2005 the couple persisted in their efforts, resulting in a further violent attack in May, 2005 at their home by members of the family. WACOL had advised the applicant to stay away from the family because of the dangers involved in continuing contact following the failed effort at reconciliation.

18. It is not clear what weight was given to the WACOL letters. If they were authentic, they offered support for the conclusion that the applicant was Osu and had engaged the organisation's services as claimed. The second letter confirmed that position. Moreover, the letters confirmed the reason for the organisation's involvement. Though the Tribunal considered the two letters, they were regarded as undermining the applicant's case. The Tribunal concluded that even if one accepted that the applicant attended WACOL on the basis claimed, and that the organisation engaged in a futile attempt to mediate between the couple and the husband's family, her husband's further engagement with his family subsequent to the advice given and the failure of the applicant to take the advice in March, 2005 undermined her credibility.

19. The evidence given by the applicant was that a further attack was made by members of the family upon the couple at their home in May, 2005. Subsequently, in July 2005, the applicant made a complaint to the Nigerian police which is of a very general nature and does not contain any detail of the numerous assaults said to have occurred over the preceding four years, at least one of which involved the infliction of a knife wound on her husband. Following the making of that complaint on 26th July the applicant went to Lagos in August, and remained there in her friend's home until October. She left her friend's home because people came to that house looking for her.

20. The applicant claims that the Tribunal failed to consider the two letters from WACOL submitted as part of the appeal adequately or at all. In *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 353, Cooke J. at para. 11-9 when considering the general principles applicable to a challenge to a Tribunal decision based on credibility, stated the following in respect of how documents ought to be considered:-

> "Where an adverse finding involves discounting or rejecting documentary evidence or information relied upon in support of a claim and which is *prima facie* relevant to a fact or event pertinent to a material aspect of the credibility issue, the reasons for that rejection should be stated."

21. It is not clear to the court from the decision whether the two letters were regarded as authentic or what weight was attached to them by the decision maker. They were submitted as relevant to the core issue of whether the applicant was Osu, and whether the hostility and violence of her in-laws led the couple to attend WACOL and obtain their services and assistance in seeking a reconciliation and acceptance of the marriage by the family. If the Tribunal determined that the two letters were not capable of being authenticated, it should have said so. If the Tribunal rejected the letters on the basis that they were not authentic, that should have been made clear. If though authentic, the contents of the letters were deemed not to afford support to the applicant's claim to be Osu and the history of the events which she described, that finding should have been made clear and reasons given for it.

22. I am satisfied that the two letters were presented as part of the events described by the applicant and were, therefore, evidence of the applicant's history with her in-laws. While the documents were referred to in the decision, I am not satisfied that any adequate regard was given to their potential effect and value vis-à-vis the core claim of the applicant: rather, without dealing with their more obvious context, the letters were only referred to, without explanation, for the ancillary purpose of supporting the conclusion that the husband's subsequent actions in seeking contact with his family were not credible.

23. This does not mean that there are no issues surrounding the two letters. No explanation was furnished as to why a letter was obtained from WACOL in March, 2005 "to whom it may concern" concerning these matters four months before the police complaint was made and seven months before the applicant left Nigeria. This and other matters may require further examination.

24. While I am satisfied that the respondents were entitled to come to a conclusion in relation to the suggested actions of the husband in pursuing a reconciliation in the face of repeated violence from his family, I am not satisfied that the WACOL correspondence was considered at all in determining whether the applicant was an Osu and I, therefore, find the limited reference to the two letters to be unsatisfactory. I am, therefore, satisfied that though Ground C has not been established, the applicant has established a substantial basis upon which to apply for judicial review in respect of Ground D.

Grounds E and F
25. I am satisfied that the Tribunal dealt adequately with the previous decisions submitted for its consideration. I am not satisfied that the delay in delivering the decision offers any ground for relief. The decisions were delivered ten months after the oral hearing in the mother's case which took place on 10th March, 2008. I note that the same tribunal member heard her second child's case on 6th October, 2008. Notes of the oral hearing were available to the court and a full note of the evidence was typed up at the time of the respective hearings for the benefit of the tribunal member. There is no prejudice established by way of misstatement of evidence or otherwise by the applicant related to this alleged delay, and I am not satisfied to grant leave on either of these grounds.

26. There remains the issue of relocation. If the applicant has a well founded fear of persecution based on her membership of the Osu Caste, and if no state protection was available to her, she may be entitled to a declaration of refugee status. However, the issue of relocation would then have to be examined with particular reference to the principles set out in *K.D. (Nigeria) v. Refugee Appeals Tribunal* [2013] IEHC 481. However, as noted by Clark J. there are a large number of decisions which refer to the relocation option notwithstanding a finding that there was no well founded fear of persecution on credibility grounds. In those cases the decision maker is really saying "if what you say is true, which is not accepted, you have given no credible explanation for coming to Ireland instead of moving elsewhere away from the claimed danger". She stated that these "even if" findings are not internal relocation alternative findings requiring adherence to Regulation 7 of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006): rather, they are part of a general examination of whether an applicant has a well founded fear of persecution. She stated:-

> "29. …..If a relocation option finding is made where there is no well-founded fear of persecution, there is obviously no requirement for careful inquiry into a safe location, the availability of state protection or the applicant's personal circumstances. The finding is unnecessary, unhelpful and generally wrongly described as 'internal relocation' and the failure to adhere to Regulation 7 is not a reason for impugning an otherwise lawful assessment of whether there is a well-founded fear of persecution for Convention reasons.
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> 30. Thus an '*even if I am wrong'* finding which goes on to suggest internal relocation is not the equivalent of carefully exploring an antidote to a well-founded fear of persecution for Convention reasons and is often merely a facet of credibility. A reviewing Court must bear in mind that not every case which contains the 'internal relocation' phrase is subject to Regulation 7 principles. When a claim is rejected on credibility grounds and includes the statement that '*even if I am wrong in my assessment of your credibility, there is in any event no good reason why you do not simply move and put a distance between you and the village elders / neighbours / spouse / mother in law'* as the case may be, it is not appropriate to characterise the credibility decision as an internal relocation decision as it is not an exploration of a relocation alternative to refugee status."

27. I am satisfied that the reference to relocation by the tribunal member in this case is an "even if I am wrong" finding. The core of the decision in this case is that the applicant's assertion that she was Osu was not credible. Therefore, I am not satisfied to grant to relief to the applicant on the basis of Ground G.

28. I am satisfied, in granting leave to apply for judicial review in respect of Ground D, to extend the time for the bringing of this application. The applicant is only marginally outside the time limit prescribed and at all material times intended to pursue the challenge. The applicant has established that one of the grounds advanced has merit. I am satisfied in the interests of justice and because good and sufficient reason has been demonstrated, to extend the time for the bringing of this application. I am also satisfied having considered all of the evidence and submissions on the matter that the decision of the Tribunal is fundamentally flawed on Ground D and I will, therefore, grant an order of *certiorari* in respect of the Tribunal decision.