

THE HIGH COURT**JUDICIAL REVIEW****[2011 No 456 J.R.]****BETWEEN****U.O.A. [Nigeria]****APPLICANT****AND****REFUGEE APPEALS TRIBUNAL****RESPONDENT****AND****MINISTER FOR JUSTICE AND EQUALITY****NOTICE PARTY****JUDGMENT of Ms. Justice Stewart delivered on the 19th day of March, 2015****PRELIMINARY ISSUES**

1. At the outset of the hearing counsel for the applicant submitted an affidavit of the next friend of the applicant to ground an application for a certificate granting leave to the applicant to proceed in his own name as the applicant had now reached the age of majority. Leave was granted and the telescoped hearing proceeded on the basis of the applicant taking the case in his own name.

2. The application was outside the 14 days permissible to initiate judicial review proceedings of the decision of the Refugee Appeals Tribunal. The applicant provided the reasons for the delay as follows: an application was made to the Minister by letter dated 26th October, 2010, requesting the Minister to exercise his discretion to grant the applicant a declaration of refugee status, notwithstanding the negative decision of the Refugee Appeals Tribunal made against the applicant. The applicant submitted that the statutory scheme under s.17 of the Refugee Act 1996 (as amended) is such that if an applicant is refused a grant of refugee status by the Office of the Refugee Applications Commissioner (ORAC) and the Refugee Appeals Tribunal (RAT), the Minister has a discretion to grant such a status, notwithstanding the negative findings of the ORAC and RAT. The applicant's legal representatives operated on the basis that the applicant had an entitlement to seek the Minister to review his case and consider granting him legal status. It was subsequently decided by the High Court in the case of *O.S. & anor. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 291 that the Minister has no obligation to consider such an application.

3. By letter dated 2nd November, 2010, the applicant's legal representations wrote to the Minister and the RAT stating that in light of the application seeking the Minister to exercise his discretion in this case, judicial review proceedings would not be initiated by the applicant at that time. The letter further went on to state that it would be unreasonable for the Minister or the RAT to raise objections to the necessary extension of time at a later date. By letter dated 8th November, 2010, the Minister acknowledged receipt of the letter. No further correspondence was received from the Minister in regard to the extension of time. By letter dated 3rd November, 2010, the RAT stated that the tribunal was *functus officio* in the matter.

4. In this regard the respondent states that the applicant is obliged to bring proceedings in a timely manner. The decision had issued and the time to challenge that decision had passed. The respondent asserts that the applicant is obliged to challenge the decision in the timeframe set down in the statutory framework.

5. The applicant's legal representatives had sent two letters to the Minister, the first of which did not receive any response. The applicant had asked for a response to the issue regarding the potential objection to an extension of time. There was a view at the time that the Minister had such a discretion and it was not unreasonable for the applicant legal representatives to hold such a view. Clarification was needed of this issue by way of a High Court decision and this was provided in the *O.S* case (*supra*). By letter dated 20th May, 2011, the Minister stated that he is not obliged to take account of subsequent representations made on behalf of the applicant after the tribunal decision, and stated that the Minister found no reason to overturn that decision.

6. In the circumstances, I am satisfied that good and sufficient reasons have been set out by the applicant such as to warrant an order to extend the time for the bringing of the judicial review leave application in this case and I so extend the time.

BACKGROUND FACTS

7. The applicant was born on 6th August, 1994, in Nigeria. The applicant's mother, a Muslim, married the applicant's father, a Christian, in 1992. The applicant's mother applied for asylum on 14th March, 2000, in Ireland and his father on 15th May, 2000, also in Ireland. Both applications were refused by the ORAC and the RAT.

8. The applicant was a minor at the time of the s.11 interview and was represented by his father at the interviews and at the oral hearing. The applicant stated (via his father) that he, his brother and sister were in their house when their parents were attending church. He stated that the house was burnt by a group of Muslims, the applicant's siblings both died and the applicant suffered burns as a result. The applicant stated that if he is returned to Nigeria he would face persecution because he is the son of a mixed religious marriage and would suffer discrimination because of his disabilities. The applicant has been diagnosed with intellectual and learning difficulties, microcephaly and expressive and receptive language difficulties.

9. The applicant arrived in Ireland on 2nd October, 2000. His parents were already present in Ireland and had applied for asylum on their own behalf. An asylum application was submitted on behalf of the applicant on the 14th March, 2000, and was considered as part of his mother's asylum application. The applicant's father initiated judicial review proceedings on behalf of the minor applicant and

on foot of those proceedings by letter dated 7th June, 2007, the ORAC agreed to undertake an independent investigation of the applicant's claim. On 11th July, 2007, the applicant completed a questionnaire and was interviewed on 16th July, 2007, in accordance with s.11 of the Refugee Act 1996 (as amended). A report pursuant to s.13 of the Act issued in respect of the applicant and was dated 16th August, 2007. The s.13 report recommended that the applicant should not be declared a refugee for reasons of credibility and a lack of a Convention nexus. The applicant appealed to the RAT and the appeal hearing took place on 10th May, 2010.

IMPUGNED DECISION

10. By decision dated 6th September, 2010, and cover letter dated 11th October, 2010, the RAT affirmed the recommendation of ORAC not to declare the applicant a refugee. The tribunal accepted that the applicant could potentially face discrimination in Nigeria because of his disabilities however the tribunal found that this did not amount to persecution in the Convention sense. The tribunal member also pointed to country of origin information and highlighted that the state authorities provide protection for individuals who face discrimination as a result of their disability.

11. The tribunal member also stated that the applicant's claim of persecution in Nigeria stemming from being a child of a mixed marriage between a Muslim and a Christian was inextricably linked to his parent's asylum claim. Because these claims and their associated stories were found to be lacking in credibility, the applicant's claim in this regard could not be substantiated.

APPLICANT SUBMISSIONS

12. Counsel for the applicant, Mr. David Leonard B.L., submitted that the respondent erred in law and failed to act in accordance with natural and constitutional justice by failing to assess the discrimination against disabled persons in Nigeria which amounts to persecution, such that the applicant as a disabled person should qualify for refugee status. The applicant argued that the discrimination is such that it gives rise to a situation of persecution.

13. Further, counsel for the applicant submitted that insofar as the tribunal conducted an evaluation of the country of origin information that was before it to see whether there was state protection of persons facing persecution because of a disability, the tribunal fundamentally erred in fact and failed to take into account relevant information and arbitrarily preferred certain country of origin information over conflicting information. There was a failure to take into account the previous decision of the tribunal and a failure to explain why it was reaching a different decision from that reached in that other decision regarding a situation for disabled persons from Nigeria.

14. The applicant, in this regard, submitted country of origin information from the United Nations Committee on the Rights of the Child, considerations from NGOs, dated 13th April, 2005, particularly pointing to the section regarding persons with disabilities as set out in p. 6 in the additional affidavit handed into Court which states, *inter alia*, that:

"There were no laws that prohibit discrimination against persons with physical and mental disabilities in employment, education, access to healthcare or the provision of other state services. There were no laws requiring physical accessibility for persons with disabilities. Children and women with disabilities faced social stigma, exploitation, and discrimination and were often regarded as a source of shame by their own families. Children with disabilities, who could not contribute to family income were seen as a liability, and in some cases were severely neglected. Significant numbers of indigent persons with disabilities beg on the streets. Literacy rates among various categories of persons with disabilities were significantly lower than among the general population, for both men and women. The federal government ran vocational training centres in Abuja to provide training to indigent persons with disabilities. The individual states also provide facilities to assist the blind and physically incapacitated individuals to become self-supporting and persons with disabilities established a growing number of self-help NGOs"

15. The applicant states that the tribunal member did not have due regard to his country of origin information and had preferential regard for conflicting country of origin information. The applicant relies on *D.V.T.S. v. Minister for Justice, Equality and Law Reform & anor.* [2007] IEHC 305 where, the applicant asserted, the decision was invalidated because the tribunal failed to have due regard to conflicting country of origin information submitted by an applicant.

16. The applicant further contended that a previous decision of the tribunal should be followed in the case at hand. The tribunal decision in another case was submitted and the applicant contended that it was essentially the same as the applicant's claim in this case and should therefore have been followed by the tribunal member. The applicant relies on the decision of *P.P.A. v. Refugee Appeals Tribunal & anor.* [2006] IESC 53 where the Supreme Court held that constitutional justice requires reasonable consistency of decisions based on the same objective facts. The applicant further relies on the leave application decision of Clarke J. in *L.C.L. v. Refugee Appeals Tribunal & anor.* [2009] IEHC 26 where it was stated that if the tribunal were to disregard previous decisions then the respondent should distinguish between those previous tribunal decisions.

17. The applicant asserts that the tribunal erred when finding that although the applicant would suffer discrimination, he could rely on state protection. The applicant stated that it is an error in law to find that when persons in Nigeria face discrimination this would not give rise to the level of persecution which would engage the Convention. Here the applicant pointed to the UNHCR Handbook at paras.54-55 thereof where it states:

"(c) Discrimination

Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.

Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element"

18. The applicant submitted that the tribunal materially erred in fact in placing reliance on a proposed bill entitled 'Discrimination against Persons with Disabilities (Prohibition) Bill 2009', as an indication that there was state protection against discrimination in Nigeria. The bill relied on by the tribunal was exhibited at p.224 of the booklet furnished to the Court. The applicant submitted that the bill was not passed by the senate and another substantially diluted bill was passed, which the applicant contends, does not

provide the same level of protection for persons facing discrimination in Nigeria.

19. The applicant further submitted that the tribunal erred in law in stating that protection akin to state protection was available from NGOs. As a matter of law, NGO protection is not in and of itself sufficient. The protection available must be a form of state protection.

RESPONDENT SUBMISSIONS

20. Counsel for the respondent, Ms Kilda Mooney B.L., submitted that a critical issue in this case is that the decision should be read as a whole. The respondent submitted that the tribunal member accepted that the applicant has a disability. However, the facts of the case, counsel submitted, are entirely different from the previous tribunal decision that the applicant sought to rely on. The facts of the other tribunal decision are completely distinguishable from those of the applicant's case. The respondent submitted that the country of origin information which the applicant seeks to rely on shows that serious physical disabilities are the source of discrimination in Nigeria. Nothing in that information shows that person with learning and language difficulties, as is the case with the applicant, suffers the same degree of discrimination. From reading the tribunal decision and the country of origin information put forward by the applicant, it is clear that just because discrimination exists, it does not mean it reaches the level of persecution that would give rise to the need for international protection.

21. A lot of emphasis was placed by the applicant on the two different bills contained in the country of origin information. However, in my view what is relevant to the tribunal member, and the decision to be made, is that legislation was passed which prohibits discrimination against persons with disabilities in Nigeria.

22. The respondent submitted that the applicant's case was based on the fact that the same level of services would not be available were he to be returned to Nigeria. This, the respondent argued, cannot give rise to a grant of refugee status. In this regard, the respondent relies on the judgment of Cooke J. in the case of *M.E.O. [Nigeria] v. Minister for Justice, Equality and Law Reform* [2012] IEHC 394, where it was held that a disparity in healthcare services cannot give rise to a protection claim save in very exceptional circumstances. Further, counsel for the respondent relies on the judgment of P.J. & ors v. *Minister for Justice, Equality and Law Reform* [2011] IEHC 433 where Hogan J. states at para. 42 thereof that substandard or a disparity in the standards of care available in an applicant's home country would not give rise to judicial intervention.

23. The respondent submitted that the tribunal member referred to the prohibition against persons with disabilities bill in her decision and the tribunal member did not refer to a specific bill being passed, and even the applicant's country of origin information states that a bill was passed. Therefore, the respondent argued, that the applicant has not shown that any error of fact exists in the tribunal decision in this regard. The respondent submitted that in regard to the applicant's submission that NGOs could not provide protection in place of state protection, this is misreading of the decision. The respondent directs the Court to p. 19 of the decision and submitted that this is not what the tribunal had stated. The tribunal member was referring to discrimination, where the applicant could receive support from various NGOs operating in Nigeria that assist people with disabilities and not that NGOs provide protection from persecution. Further, the UNHCR Handbook that the applicant referred to is again only valid where persecution has been found to exist, which the respondent argued has not been found to exist in this case.

FINDINGS

24. In my view the tribunal member properly and adequately assessed the applicant's claim and evaluated the country of origin information before it. I accept the respondent's submission that the previous tribunal decision which was referred to the tribunal member and which, it is contended, the tribunal member should have followed differed from the facts of the present case and can be distinguished on that basis. The mere fact of discrimination or the potential for discrimination in the applicant's country of origin does not give rise to the need for international protection unless that discrimination is at the level that amounts to persecution of the applicant. It seems to me that the tribunal member, looking at the applicant's case as a whole, accepted that the applicant had a disability. The applicant's case seems to be based on the premise that because discrimination exists in Nigeria that the applicant was discriminated against. Even if this were so the applicant must satisfy the tribunal member that he was subject to persecution or is likely to be subject to persecution if returned to his country of origin. The tribunal member asked the applicant's father in relation to this matter and the response consisted of a complaint that the standard of treatment which the applicant avails of here would not be available at a same level and/or an appropriate level in Nigeria. The tribunal member properly differentiated between discrimination and discrimination which amounts to persecution and it seems to me that the decision of the tribunal member was rational and reasoned and there is no basis for this Court to intervene in that decision.

25. For the reasons set out above I will therefore refuse leave.