

**THE HIGH COURT**  
**JUDICIAL REVIEW**

**[2013 No. 50 J.R.]**

**BETWEEN**

**C.N. (NIGERIA)**

**APPLICANT**

**AND**

**THE REFUGEE APPEALS TRIBUNAL**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**THE ATTORNEY GENERAL**

**AND IRELAND**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Eagar delivered on the 17th day of December, 2015**

1. The applicant seeks leave to apply for judicial review of an appeal decision by the Refugee Appeals Tribunal (hereinafter referred to as "the Tribunal") dated the 6th December, 2012 by way of a telescoped hearing.

2. The reliefs sought are:

i. An order of *certiorari* by way of an application for judicial review quashing the decision of the first named respondent to affirm the decision of the Refugee Applications Commissioner and notified the applicant not earlier than the 13th December 2013;

ii. an order of *certiorari* by way of an application for judicial review quashing the decision of the second named respondent to refuse, pursuant to s. 17 (1) of the Refugee Act 1996 (as amended) (hereinafter referred to as "the Act of 1996") to grant refugee status to the applicant.

3. The grounds upon which such relief is sought is:

i. The Tribunal, having determined the applicant's appeal substantially on the basis of adverse credibility findings, erred in law in foreclosing on speculation in respect of the likelihood of the applicant being exposed to future persecution in Nigeria by reason of her status as a person with a history of lesbian activity.

ii. The Tribunal erred in law in making contradictory findings in respect of state protection and in failing to make any assessment of the adequacy in practical terms of the protection perceived to be available.

iii. The Tribunal erred in law in making credibility findings on the basis of the incorrect findings of fact and on conjecture. Further, findings were made in respect of peripheral matters including a total overemphasis on the Applicant's travel, while no clear findings were made in respect of the central homosexuality issue.

iv. The Tribunal erred in law in failing to consider innate findings on the evidence in respect of past persecution.

v. The Tribunal erred in law in failing to have any proper reasonable regard of the country of origin information placed before it.

vi. The Tribunal erred in law in failing to adequately consider the notice of appeal and country reports supportive of the applicant's claim particularly in circumstances where the appeal was determined on the papers only.

vii. The decision of the Tribunal is internally contradictory, lacks coherence, and fails to provide a clear and rational basis for the Minister upon which to make a decision on the applicant's claim.

viii. The finding in respect of internal relocation was wholly unconsidered in the light of the facts or in accordance with the statutory scheme or UNHCR uidelines on internal relocation.

ix. The Tribunal erred in law in failing to have any regard to the UNHCR Guidelines on refugee claims based on sexual orientation and gender identity.

x. The Tribunal erred in law in facing a different standard upon lesbian Applicants as opposed to gay Applicants.

xi. The Tribunal determination that "there is nothing to suggest that this well educated young woman would not be returned to Nigeria with her child in order to set up a new life for herself" is an indication of prejudgement.

xii. The Tribunal erred in law in taking into account matters irrelevant with the determination and failed to take into account relevant considerations.

### **The affidavit of the applicant sworn to verify the facts in the statement of grounds**

4. She says that she is a national of Nigeria and was born on the 7th July, 1982. She states that she has a bisexual orientation and by reason of her lesbian activities she had to flee Nigeria in fear of her life. She said that after some time in Ireland she was informed of the possibility of seeking asylum and she then applied. She arrived in Ireland on the 17th October, 2011 and completed an ASY1 Form on the 12th July, 2012 when she first applied for asylum. She was interviewed by the Refugee Applications Commissioner (hereinafter referred to as "the Commissioner") on the 28th September, 2012 and the decision of the Commissioner pursuant to s. 13 (1) of the Refugee Act 1996 (as amended) (hereinafter referred to as "the Act of 1996") was that the applicant had not established a well-founded fear of persecution as required by s.2 of the Act of 1996 and further, that because of her delay in applying for asylum, the Commissioner also recommended that s. 13 (6) (c) of the Act of 1996 was appropriate to this application which meant that the appeal was by way of a papers-only appeal.

5. As this is a papers-only appeal, this Court will examine the findings of the Commissioner in general.

### **Persecution**

6. The applicant stated that a female friend in school introduced her to same-sex relationships when she was 13 or 14. She stated this relationship lasted for three years and she then had another one year relationship before she finished school. She stated that when she was 27 or 28 her parents and sister started questioning as to why she was always with girls and why she did not have a boyfriend. She stated that she started going out with a boy because of this. She stated that her sister discovered her with a girl in August 2011 and told her family. She stated her family threw her out of the house and threatened to kill her. She stated she went to Lagos to her sister but her sister told her to leave as her parents had told her what she had done.

7. She stated she met a man called "T." who let her live with him. She then had a relationship with a girl called "F." who was the daughter of "T."s landlord. She stated this girl's father, who was Muslim, found out and stated that he threatened to take her to the police or to have her stoned. She stated "T." arranged for her to leave Nigeria and she stated she left Nigeria and travelled to Ireland in October 2011. She stated that she met a man called "H." when she arrived here and lived with him until she told him she was bisexual in July 2012. She stated that he is the father of her son. The applicant fears she would be killed by her family or "F."s father if she returns to Nigeria.

8. The Commissioner stated that the applicant's claim would be considered to constitute a severe violation of basic human rights and therefore may be considered as being of a persecutory nature and as such would satisfy the persecution element of the Act of 1996 definition. He said that this is, however, without prejudice to an examination of the well-foundedness of the fear of being persecuted in accordance with s. 2 of the Act of 1996

### **Well-founded fear**

9. The applicant stated she had a relationship with a girl called "F" while living in Lagos. She stated "F" was the daughter of "T.'s" landlord and they lived in the same yard. She stated "the girl was a virgin, it was me that got her dis-virginised [sic.]. The parents found out, the father was screaming that he would have me arrested, that I would rot in jail. He said that he would stone me to death for doing that to his daughter."

10. The applicant stated she fears "F.'s" father in Nigeria. She was asked what she feared he would do to her and she said, "He will kill me. He has already said he will take me to the police. They are Muslim. It is against their religion. If they catch the person they will kill the person."

11. The Commissioner quoted the UK Home Office Country of Origin Information Report on Nigeria dated 6th December 2012 as "Nigeria prohibits homosexual sex for men but not for women". It was put to the applicant that female same-sex relationships were not illegal in Nigerian law, and she was asked how she could have been arrested. She stated "It is illegal. For Muslims it's illegal." It was put to her that she was not Muslim and she stated that she was a Christian. The UK Home Office Country of Origin Information Report on Nigeria, previously referred to, does state that certain states in Northern Nigeria have adopted Sharia law which criminalises same-sex relationships for both men and women. It was put to the applicant that while Sharia Law applies to certain states in Northeast Nigeria, it did not apply in states in Southern Nigeria, such as Lagos. She stated that if she goes back to her parents' house, they could kill her. The Commissioner said it was considered that the applicant had not provided sufficient evidence to indicate that she was at risk of being arrested by the authorities in Nigeria.

12. She stated that it was within a few days that she travelled. Taking the applicant's testimony in relation to the reaction of "F."s father when he discovered her relationship with his daughter the Commissioner said it was difficult to accept that he would not have made some effort to carry out his threats in the days that the applicant remained living in the same yard as him if he was serious about carrying out these threats. The Commissioner also stated that the applicant had remained illegally in Ireland for nine months before claiming asylum, that she had not provided a reasonable explanation for failing to claim asylum as soon as reasonably practicable, and this served to undermine the credibility of the claim. Having regard to the above analysis, it is considered that on the balance of probabilities that there is no reasonable likelihood that the applicant will face the problem she fears if returns to Nigeria and it was considered that the Applicant had not demonstrated a well-founded fear.

### **State protection**

13. In relation to state protection the information in the UK Home Office Country of Origin Information Report on Nigeria indicates that the adequate state protection may not be available to members of the LGBT Community in Nigeria.

### **Internal relocation**

14. The applicant was asked if she would be safe from her family and "F.'s" father if she moved to another part of Nigeria like Benin City, for example. She stated that she could not, that they would have an idea of where she was. They would trace her to that place. It wasn't only her parents, it was her family. The Commissioner noted that Nigeria has an area of over 900,000 km<sup>2</sup> and a population of about 162.4 million. This is based on the CIA World Fact Book. It was put to the applicant that Nigeria is a huge country with a population of 162 million and she was asked how the people she fears would be able to find her in another part of the country. She said they will find her. However the Commissioner considered that she had not provided sufficient evidence to indicate that she would be unable to internally relocate to an area such as Benin City to avoid the threats posed by her family and "F.'s" father and made the recommendation that the Applicant had not established a well-founded of persecution and also the recommendation under s. 13 (6) (c) of the Act of 1996.

15. As this is a papers only appeal the jurisprudence is clear that the standard commensurate with a papers only appeal is one of extreme care and clearly one of the issues which the first named respondent must take into account is any notice of appeal.

16. The applicant's country of origin information provided were as follows:

a. Pink News (Europe's largest gay news service):

"Nigeria's Same-Gender Marriage Prohibition Bill was proposed in 2011 and has since been amended by the Nigerian Senate to punish those in same-sex union with 14 years' imprisonment and anyone aiding or abetting such unions with 10 years' imprisonment. Parliament said in addition to locals, tourist and aid workers in same-sex marriage or civil partnership are at risk of arrest and prosecution. Those working in embassies but without diplomatic protection will also be subject to persecution. There is a quotation from Michael Cashman, an MEP and Co-President of the European Parliament's inter-group on LGBT rights that:

"Nigeria is already among the world's top oppressors of lesbian, gay, bisexual and transgender people."

b. Vanguard, which repeats the 14 years' jail term for homosexual marriages.

c. Call Nigeria, published on the 9th November 2011 where it states:

"Lesbian, gay, bisexual and transgender (LGBT) persons in Nigeria face legal challenges not experienced by non-LGBT residents. Both male and female same-sex sexual activities is illegal in Nigeria, a largely conservative country of more than 150 million people split between a mainly Muslim north and a largely Christian south."

d. Further country of origin information was provided by Ref World – Amnesty International Annual Report 2012 where the following points were noted:

i. Police operations remained characterised by human rights violations. Hundreds of people were unlawfully killed, often before or during arrests on the street. Others were tortured to death in police detention. Many such unlawful killings may have constituted extrajudicial executions. The police frequently disobeyed court orders. Some relatives were threatened when they sought justice.

ii. Under the heading, "Rights of lesbian, gay, bisexual and transgender people":

"Human rights abuses continued against people suspected of having same-sex relationships or non-conventional gender identity. In December, the Senate approved a bill which would impose a 14-year prison sentence for same-sex marriages. Any person or groups that "witness, abet and aids the solemnization of a same sex marriage or union" or "supports" gay groups, "processions or meetings", would face a 10-year prison sentence. The same sentence would apply to a "public show of same sex amorous relationship"

e. And in an updated UK Border Agency Nigeria Country of Origin Information Report was provided to the first named respondent which detailed the passing of the Same-Sex Marriage Bill, and under the heading "Lesbian and Bisexual Women", the UK Border Agency reports:

"The International Lesbian and Gay Association report, State sponsored Homophobia, A world survey of laws prohibiting same-sex activities by consenting adults, dated 30 May 2012 observed that same-sex relations between men were illegal [in Nigeria]."

f. And there is a quotation from Amnesty International. There is also a quote from Pink News of the 25th November 2011.

### **The decision of the Refugee Appeals Tribunal**

17. The first named respondent said that the applicant's claim that she was bisexual and that her parents discovered this, that she is from a Christian family, that she met a girl at school whom she had a relationship with. The applicant said that this girl threatened her and said if she told anyone that she would kill the applicant. This carried on for three years and when older girl then left school the applicant commenced a relationship with another girl. People started to notice she was always with girls and then she went with a boyfriend to cover up.

18. In August 2011 the applicant's parents found out she was bisexual. The applicant's parents were annoyed and they told all her relations. The applicant's parents threw her out of the house. She packed her things and she went to Lagos to her sister but her sister told her not to come. At this juncture the applicant had met a man called "T". She told him that she had nowhere to stay. He allowed her to stay in his house. The Applicant got into a relationship with the daughter of "T's" landlord, "F." "F.'s" father threatened to kill her and to tell the police. The applicant told "T." everything and then "T." tried to help, called a man called "Y." and gave him money to arrange for the applicant to travel. "Y." gave the applicant a red passport and told them that they were travelling to Italy. The applicant ended up in Dublin Airport and "Y." collected the passport. The applicant and "Y." went to the area in town where Nigerians do business and he left her there. The applicant met a man called "H." and she told him that she had nowhere to go. She moved in with him and started contributing to the house after a while. The applicant got into a relationship with this man and got pregnant. On the 6th July, 2012 the Applicant told "H." about her problems. He got really annoyed. The applicant said he stormed out of the house and she does not know where he is now. She had to leave the house as she could not afford the rent. The applicant then met "N." who let her stay for a few days and this lady told the applicant about asylum.

### **Analysis of the claim**

19. The first named respondent said that the Tribunal had read the country of origin information in relation to the situation of homosexual and LGBT groups in Nigeria and stated that it is clear that there is a lot of discrimination against gay and bisexual people in that country. It was also clear that Islamic states impose serious punishments for getting involved in this type of relationship or activity. The first named respondent then poses the questions: (i) would the applicant be at risk if he were returned to Nigeria; and (ii) did the applicant provide a clear and coherent account of her story? She then deals with identity documents to show that in fact she was from Nigeria. She stated:

"The Applicant has an Irish-born child and they even fail to produce a birth certificate for him."

This is an unusual request in a papers-only appeal and the Tribunal could have sought a copy of the birth certificate. She continues to say:

"An absence of documentary evidence in relation to one's identity is central to a claim like this."

20. She then finds, having regard to the applicant's claim, that she remained in "T.'s" yard for two days after "F.'s" father found out about her. The first named respondent said:

"It was difficult to understand how she would be able to remain in "T.'s" yard for two more days without losing her life. The Applicant's story did not add up in this respect."

21. The next finding was that the applicant that because "T." organised her travel and paid for the Applicant's trip to Europe it was not credible. The second named Respondent said that because "Y." arranged a red passport for her, and was never intercepted by the authorities at that stage, the first named respondent said that the applicant's failure to seek help earlier in the circumstances was not credible in that she would have known about the asylum process.

22. The applicant claimed to be afraid of her family first and foremost but she did not have any problem with them while she was in Lagos.

23. The applicant refers to her fears in relation to "F.'s" father. It was put to her that "F.'s" father lived in the same yard as her and it was difficult to understand why he did not cause problems for her before she left Nigeria and the applicant said:

"It was just two days and he didn't know I was still in the yard as T. hid me."

24. The first named respondent said that the applicant's evidence in this respect utterly undermined her claim. On the one hand she claimed that this man would kill her at any cost yet on the other hand she claims to have remained in the same yard as him for two days after she found out about the affair without suffering any adverse consequences. She stated that the entirety of the applicant's account of a fear of persecution was blighted by the evidential problems which have arisen. The applicant claims to fear her family and "F.'s" father. She admitted that she successfully relocated from her family to Lagos without them tracing her. She claimed that "F.'s" father threatened to stone her after she heard about the affair yet she remained in the same yard with him for two days. The applicant's lack of documentation coupled with the details regarding her travel and passports suggest that the Tribunal does not have the entire story. Of course as this was a papers-only appeal the Tribunal did not have any basis on which to say that it did not have the entire story. It was open to the first named respondent to seek further information but the first named Respondent did not do so.

25. In relation to the objective country of origin information, the Tribunal states that she has read all of the information in relation to same-sex relationships in Nigeria and has read the Bill which opposes same-sex marriage. It is only a Bill at present and is not law. Furthermore she notes while the twelve northern States outlaw homosexuality it is interesting to note that the "Sharia Penal Code does not apply to non-Muslims." She states there was nothing to suggest that this well-educated young woman could not be returned to Nigeria with her child in order to set up a new life for herself and she affirmed the recommendation of the Commissioner.

#### **Submissions on behalf of the applicant**

26. Mr. Gary O'Halloran B.L. made submissions on behalf of the applicant. He stated that the standard commensurate with a papers only appeal was one of extreme care and in his written submissions he cited the cases which established this. He submitted that the decision of the Tribunal indicated that the first named respondent had not considered the evidence and had not taken sufficient notice of the notice of appeal or the country reports. Instead the Tribunal has made a series of credibility findings which were made for the first time and which were not made by the Commissioner. He suggested that the credibility findings did not go to the core issue.

27. He also pointed to the Tribunal finding that the applicant had not made a claim that she was being persecuted by the State "I note that the Applicant has not made a claim that she was being persecuted by the State. She only claimed persecution by non-state agents and in the circumstances, this claim has been dealt with above."

28. Counsel reviewed the ASY1 form and analysed the section 13 report of the Commissioner, he outlined what he submitted was the relevant country of origin information in relation to lesbians and the law in Nigeria in relation to gay men and lesbian women.

#### **Submissions by counsel for the Respondent.**

29. Ms. Denise Brett S.C. submitted that this was a classic case of credibility with the principles relevant to the manner in which evidence going to credibility be treated in asylum application were established by Cooke J. in *I.R. v. MJELR* [2009] IEHC 353 and adopted in many numerous decisions. The applicant rejected the applications and added that these principles must be read in the context of the onus being on the applicant to demonstrate to the Tribunal that she had a genuine fear of persecution for a Convention reason and that this fear is objectively justified or reasonable and therefore well founded.

30. Ms. Brett also submitted that credibility assessment comprised two elements one subjective and the other objective. The applicant in *I.R. Cooke J.* stated

*"There are two facets to the issue of credibility, one subjective and the other objective. An applicant must first show that he or she has a genuine fear of persecution for a Convention reason. The second element involves assessing whether that subjective fear is objectively justified or reasonable and thus well founded."*

31. Ms. Brett also suggested that whilst the applicant claims to be bisexual the only evidence that could be relied on in this regard was that she was following her arrival in Ireland the applicant had been befriended by a man called "H." and was accommodated by him until the 6th of July; 2012. The relationship ended, according to the applicant, when she informed him of her bisexuality. At that time she was pregnant by him and a boy was born on the 2nd of August, 2012.

#### **Description**

32. This Court accepts the submission by counsel for the applicant that the standard commensurate to a papers only appeal is one of extreme care.

33. This Court is also well acquainted with the judgment of Cooke J. in *I.R.*

34. Prior to laying out the ten principals which Cooke J. set out in that case stated, at para. 3:

*"It is because in such cases the judgment of the primary decision-maker must frequently depend on the personal appraisal of an applicant, that it is not the function of the High Court in judicial review to reassess credibility and to substitute its own view for that of the decision-maker. Its role is confined when a finding of lack of credibility is attacked, to ensuring that the process by which that conclusion has been reached is legally sound and not vitiated by any material error of law."*

35. The first named respondent set out at the forefront of the decision that the first named respondent had read the country of origin information in relation to the situation of homosexuals and LGBT groups in Nigeria and says that it is clear that there is a lot of discrimination against gay and bisexual people in that country. It is also clear that Islamic states (in Nigeria) impose serious punishments for getting involved in this type of relationship or activity

36. This Court notes that much of the country of origin information related to same-sex marriages and there is not as much information available to the Tribunal in relation to lesbian relationships.

37. The first finding of credibility relates to the account given by the applicant of being thrown out of her parents' house having been refused accommodation by her sister, the applicant met a perfect stranger called "T." on the same day and this man said she could stay with him. The applicant did not say why this man took her in and there is no clear evidence as to why he would do. This seems a reasonable finding by the first named respondent.

38. The second credibility finding related to a relationship with "F." who was the daughter of "T.'s" landlord. Her parents, who were Muslims, found out and they got very angry. They said they would stone her to death. The applicant remained in Nigeria for two days in T.'s yard after this event. The first named respondent said that it was difficult to understand how she would be able to remain in "T.'s" yard for two more days without actually losing her life as a result and the first named respondent stated that the applicant's story did not add up. Again this appears to this Court to be reasonable and does not seem in the words of Cooke J. to be "vitiating by any material error of law".

39. The third credibility finding is that the applicant stated that "T." organised her travel and while this Court takes the view that the circumstances of travel are largely peripheral, the point made by the first named respondent was that "T." was a perfect stranger and was prepared to pay for the applicant's trip to Europe and she found that evidence not credible.

40. The next finding of lack of credibility was that the person who arranged a red passport for her which did not belong to her and the applicant passed through airports in Nigeria, Turkey and Ireland with a red passport (almost certainly in this Court's view and EU passport) which was not her own and she was never intercepted by the authorities at any stage. The applicant's evidence in this respect is simply a stretch too far. This Court takes the view that circumstances of travel are peripheral and that the reality, well known to the Tribunal members, is that the person who was arranging the travel produces the passport which is generally an EU passport which avoids difficulties at airports and retrieves the passport from the applicant on arrival in Dublin. And this Court takes the view that the applicant's evidence in this regard was fair.

41. However the next credibility finding of the first named respondent was that the applicant, having arrived in Dublin City Centre in October, where she met another perfect stranger, a man who agreed to let her stay with him. She lived with this man. She got pregnant by him. The first named respondent found that setting herself up with a total stranger within hours of arriving beggared belief. Again it seems to this Court that that is a reasonable finding of the first named respondent. The next finding of lack of credibility related to the applicant remaining in Ireland for nine months before she sought protection from the authorities. She has already suffered the lack of an oral hearing and in those circumstances feels that it is unnecessary for the Tribunal to make findings in this regard in circumstances where the Tribunal is not in a position to hear any appeal against a recommendation against s. 13 (6) of the Act of 1996.

42. Counsel for the applicant stated that the finding of the Tribunal that the applicant claimed to be afraid of her family first and foremost and of "F.'s" father and the Tribunal found that she only claimed persecution by non-state agents in the context of the objective country of origin information. Counsel for the applicant stated that the applicant clearly had in fact claimed persecution by the state in view of the laws which existed in Nigeria. However the finding of the first named respondent in this regard must be coloured by the circumstances of her luck in identifying a number of men who were in a position to assist her.

#### **Decision**

43. For the above reasons this Court will refuse leave and as this is a telescoped hearing dismiss the application for an order of *certiorari*.