Neutral Citation: [2017] IEHC 115

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 887 J.R.]

BETWEEN

J.M.N. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND N.M.)

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 27th day of February, 2017

1. The applicant for leave to seek judicial review is a five year old child of Zimbabwean origin born in Tralee in December, 2011. The next friend was born in Zimbabwe in 1979. She came to Ireland in July, 2009, and applied for asylum; a claim that was rejected by the Refugee Appeals Tribunal on 19th February, 2011.

2. The mother made an application for asylum on behalf of her child on 1st July, 2014. That claim was also duly rejected by the Refugee Applications Commissioner on 8th October, 2014.

3. A notice of appeal was filed against that rejection by solicitors on behalf of the applicant, and written submissions of counsel were prepared for the tribunal.

4. On 3rd November, 2016, the tribunal issued a decision, dated 1st November, 2016, rejecting the appeal.

5. Mr. Colm O'Dwyer S.C. (with Mr. Ciaran Doherty B.L.) now seeks leave to challenge that tribunal decision.

6. The substantial grounds test applies and I have had regard to the law in that regard as set out in *McNamara v. An Bord Pleanála (No. 1)* [1995] 2 I.L.R.M. 125.

Alleged failure to consider persecution on grounds of being born outside Zimbabwe as the child of asylum seekers

7. The statement of grounds sets out three grounds for the challenge. The first ground is that "*the Tribunal failed to engage in any reasonable and rational analysis of whether the applicant might face prosecution in the form of serious discrimination in Zimbabwe on account of his have (sic) been born and grown up outside the country, in Europe, as the child of asylum seekers and without a Zimbabwean birth certificate*."

8. The tortuous logic of this claim begins with the obvious point that as a person born in Ireland, the applicant does not have a Zimbabwean birth certificate. According to the U.S. State Department country report published in 2016, some persons in Zimbabwe who do not have birth certificates have difficulty accessing public services. Thus it is now submitted that the applicant is at risk of discrimination on this basis in relation to accessing educational services. It is further claimed that the discrimination is so severe as to amount to persecution within the meaning of the Geneva Convention on the Status of Refugees. As can be seen immediately, the punchline ("refugee") derives from a tottering pile of conditional arguments based on minimal evidence and ultimately resting on a remarkably slender premise ("born outside Zimbabwe").

9. Hogan J. in *E.D. v. Refugee Appeals Tribunal* [2011] 3 I.R. 736, a decision heavily relied on by the applicant, was of the view that the denial of basic education in that case amounted to persecution within the meaning of the Refugee Act, 1996. The Supreme Court has recently overturned that decision: *E.D. v. Refugee Appeals Tribunal* [2016] IESC 77 (Unreported, Supreme Court, 21st December, 2016), a decision in which Charleton J. (Denham C.J., O'Donnell and Laffoy JJ. concurring) said that a connection between denial of education and persecution could only be reached "*only in extreme circumstances*" (para. 2), and in which Clarke J. (Denham C.J., O'Donnell and Laffoy JJ. concurring) noted that a context where "*the denial of rights was so fundamental as to meet the threshold"* would arise where for example "*the laws of a particular country might directly prevent persons of a particular ethnicity from obtaining education*" (para. 6.12).

10. The broad submission being advanced on the applicant amounts to something not far short of the proposition that any evidence of any educational problem in the country of origin will amount to a stateable and indeed substantial ground for seeking asylum in Ireland. Such a proposition is almost too absurd to require a response, but not least on separation of powers grounds it would certainly not be appropriate for the courts to engage in such an expansion of established and accepted notions of persecution by means of creative unilateralism of this type. The point being made is well short of being one of substance. The material before the tribunal was far removed from the extreme circumstances envisaged in the Supreme Court decision in *E.D.*

Failure of the applicant to raise this issue

11. Independently of the foregoing, where the key complaint made is a failure by the decision-maker to analyse a particular topic, there must be a certain onus on the applicant to have identified that topic in its dealings with the decision maker. Thus, one cannot put up a particular proposition to the decision-maker, have that rejected, and then seek judicial review on the basis that the decision-maker did not deal with something else.

12. While the commissioner appeared to consider that the issue to be considered was membership of a social group, and took into account access to education (see paras. 3.2 and 3.4 of the s. 13 report), this claim was rejected on the merits by the commissioner, and there was absolutely nothing in the notice of appeal taking issue with that rejection in any specific way. The notice of appeal to the tribunal is so generic as to be virtually fatal to any claim that the applicant might seek to make to the court as to the outcome of the procedure triggered by it. Indeed the boilerplate nature of that document is illustrated by the fact that it refers to persecution in "*Nigeria*" as opposed to Zimbabwe. (See "*Submission 4: It is submitted that it would be extremely unsafe to return the Appellant to Nigeria…").*

13. The notice of appeal was then followed by written submissions on behalf of the applicant which were quite explicit as to the basis

of the case. Paragraph 4 of the written submissions stated "*the appellant fears persecution from the government and non state actors associated with ZANU-PF on the basis of perceived political opinion*". There is absolutely nothing in that claim taking issue with the rejection of the notion that the applicant was entitled to asylum on the basis of membership of a particular social group.

14. Supplemental written submissions were delivered on 4th October, 2016. Insofar as those expand the case made, the relevant provision is para. 3 in which it is said "*it is respectfully submitted that the appellant's claim is not based totally on his mother's fears and requires to be considered in the context of the appellant's particular circumstances, i.e. as a child who is born in Ireland, has never been to Zimbabwe and does not possess a Zimbabwean passport or birth certificate*". That is not a claim of asylum on a different basis to that made in the previous submissions. It is a statement as to matters to be considered in assessing the claim previously made, which was a claim on the basis of persecution based on perceived political opinion.

15. Nowhere in the papers before the tribunal is there any attempt to define the claim as being one based on membership of a particular social group, namely Zimbabweans born outside of Ireland, and the associated persecution being the denial of education to such persons.

16. The tribunal decision deals with the claim actually made. There are no substantial grounds to seek judicial review of the decision on the basis of a different claim. No Geneva Convention nexus supporting the current claim was set out to the tribunal. Mr. O'Dwyer's attempt to define the social group for the purposes of the Convention nexus being Zimbabweans born out of Zimbabwe is pure post hoc concoction. Had that case been made to the tribunal in any sort of organised manner it is to be presumed that the tribunal would have dealt with it.

17. There is no obligation on a decision-maker to address a "core claim" if an application is being rejected on other grounds (see issues addressed in *P.D. v. Minister for Justice and Equality* [2015] IEHC 111; *R.A. v. Refugee Appeals Tribunal* [2015] IEHC 686; *I.E. v. Minister for Justice and Equality* [2016] IEHC 85, authorities not fully taken cognisance of in the applicant's original submissions necessitating an application to file amended written submissions). But in this case the tribunal *did* address the core claim – the one actually made by the applicant to that body. He is now trying to make a significantly different case to the court.

18. The tribunal was aware, of course, of the lack of a birth certificate (see para. 3.5), but did not address that as the key issue because that was not the way in which the applicant's claim was presented. Mr. O'Dwyer in written submissions, in support of this application, described the issue of persecution in the form of serious discrimination on account of having been born and grown up outside the country in Europe as the child of asylum seekers and without a Zimbabwean birth certificate as being the "*central or core issue of the case*" which involves post hoc reconstruction of the basis of the claim as actually put, which was as stated above "*on the basis of perceived political opinion".*

19. In circumstances where the applicant did not make an issue of it, there was no obligation on the tribunal to engage in the sort of analysis that the applicant now complains about. For the applicant to put up a claim on a particular basis to the tribunal, have it rejected, and then complain to the court that a different basis was the central or core issue which the tribunal allegedly wrongly failed to address, is to engage in a heads-I-win, tails-you-lose form of gaslighting of the tribunal. No substantial grounds arise, or can arise, for such a spurious procedure. No decision could survive judicial review if such a process were permissible.

20. In any event, the claim is so far removed from the concerns of the Geneva Convention, and is supported by such minimal evidence, that there are no substantial grounds for contending that it was such as would have required the tribunal to consider it of its own motion.

Remaining grounds

21. The other two grounds of the application are that the tribunal engaged in selective use of country of origin information and failed to weigh fairly and adequately country of origin information in respect of the risk of discrimination. As the applicant has failed to make out substantial grounds for the proposition that the tribunal should have dealt with persecution on the basis of educational discrimination by reference to membership of a social group, these issues, which are based on that proposition being established, simply do not arise. Moreover, use of the country of origin information, and the weight to be attached to it, are classically matters for the decision-maker and no substantial grounds would have arisen in any event.

Order.

22. For the foregoing reasons I will order:

(i). that the application for leave to seek judicial review be dismissed;

(ii). that the matter be listed for any consequential application for leave to appeal, which if made, should be on notice to the respondent; and

(iii). that the applicant serve the CSSO with a copy of this judgment in any event.