

**THE HIGH COURT
JUDICIAL REVIEW**

[2013 No. 674 J.R.]

BETWEEN

S.A.E (NIGERIA)

APPLICANT

AND

BEN GARVEY SITTING AS THE REFUGEE APPEALS TRIBUNAL,

THE OFFICE OF THE REFUGEE APPLICATION COMMISSIONER, THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND ATTORNEY GENERAL

RESPONDENTS

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

1. This is a judgment in a telescoped hearing where the applicant seeks an order of *certiorari* of the decision of the Refugee Appeals Tribunal (hereinafter referred to as "the Tribunal") dated 15th August, 2013.

Background

2. The applicant is a forty-two year old national of Nigeria, who arrived in the State on the 5th January, 2013. He had completed his education to secondary school, having spent twelve years in formal education. He subsequently trained in motor spare parts and set up a business relating to same. His claim was that one of his employees, who he names as A.Y. travelled to Lagos in May 2012 with monies to buy different types of engines and motor parts but did not return. After two days the applicant reported his employee's disappearance to the police who investigated and discovered his body on the Lagos-Ibadan highway. The police informed the applicant that his employee had been killed by armed robbers. The applicant stated upon hearing this news the father of his employee collapsed and died before his family got him to the hospital.

3. The applicant claimed that A.Y.'s family blamed him for both deaths and called him on the telephone two weeks after A.Y.'s father died, threatening to kill him and informing him that they were members of Boko Haram, (an Islamic extremist group based in North Eastern Nigeria). The applicant claimed that members of A.Y.'s family called him on the telephone, morning, afternoon and at night. He reported the threats to the police and says he told them that when they asked for the telephone number used to make the telephone calls that it was "unknown". The police said they would investigate. He did not inform the police of the identity of the callers who said they were members of the A.Y. family as he did not know them personally and they had called him on the unknown number.

4. He left his home in August 2012 and moved around to a number of locations, he claimed he was attacked in Minna by two people who hit him and he had run off. When he moved to Lagos he claims two people were looking at him suspiciously and hovering around him and he ran to a church which he did not leave until he left Nigeria.

5. The applicant claims his travel was arranged by a man to whom the pastor of the church introduced him and this man, Mr. A. arranged for him to come to Ireland. He claims he did not know how his travel was paid for. Mr. A. travelled with him to Ireland and then appears to have left him to his own devices. En-route to Ireland he claims that he did not know the nature of the travel documents which he used to pass through international airports and that Mr. A. kept them all the time, other than when they were passing through the airports. He arrived in the State on the 5th January, 2013.

6. The applicant, having arrived in the State on the 5th January, 2013 did not make an application for asylum until the 23rd May, 2013. The applicant contended that he was unaware of the asylum process. The Refugee Application Commissioner concluded that the applicant had not established a well-founded fear of persecution and the senior officer of the Refugee Application Commissioner recommended that s. 13(6)(c) of the Refugee Act 1996 (as amended) (hereinafter referred to as "the Act of 1996") applied to the application. The net effect of this was that the applicant was confined to an appeal in writing only.

The Tribunal decision

7. The first named respondent in the analysis of the applicants claim summarised the matters which this Court has summarised above.

8. He then quoted from para. 195 of the UNHCR Handbook on Procedures and Criteria for determining refugee status and para. 37 of same.

9. The first named respondent said there were a number of problematic inconsistencies in the applicant's evidence which undermines his credibility and thus questioned the legitimacy of his claim.

a. He claims to have travelled from Nigeria via Turkey to Ireland without paying for the journey or presenting documents to authorities in any of the three international airports he allegedly transited. The first named respondent said it was common knowledge that since "9/11" security at all airports obliged passengers to provide a passport and he quoted a decision of Charlton J. which he does not identify. He then refers to a judgment of Clark J. in *Flora Egharevba v. RAT* [February 2008]. He quotes also from Clarke J. in *Imoh v. RAT* described as 2009 stating:

"Procedures at Dublin Airport are known to all who travel through the area and this is not a matter of conjecture but fact".

10. The first named respondent said that he had considered submissions on this matter and was satisfied that the evidence of his departure from Nigeria and arrival here undermines the applicant's credibility. He then indicated that submissions regarding the late application have been considered. The applicant claims to have arrived on the 5th January, 2013 but according to the tribunal member gave no plausible reason for failing to apply for status until 23rd May, 2013. The Tribunal referred to Law of Refugee Status by Hathaway & Foster (Cambridge University Press, 2014, 2nd Edition):

"If one is truly fleeing persecution and fails to seek international protection as soon as possible such conduct can go to their credibility."

The first named respondent finished by saying:

"The effect cumulatively of the member's observations as to the applicant's credibility is such as to render the unsubstantive thrust of his application incapable of being believed."

The first named respondent decided that he could not afford the applicant the benefit of the doubt. He further stated that in referring to *Imafu v. MJELR* [2005] IEHC 416, dated 9th December, 2005. Peart J. stated:

"in my view the decision in Horvath and of Daniel Pannick QC in Ahmed could not be extended to mean that in every case no matter how unbelievable the applicant is found to be on the 'pure credible' issue, the Tribunal Member must indulge in a pointless exercise namely looking at amounts of country of origin information"

The Tribunal then affirmed the recommendation of the Refugee Appeals Commissioner.

Submissions on behalf of the applicant

11. Michael Lynn S.C. (with Eamonn Dorman B.L.) submitted that the Tribunal had determined that "the effect cumulatively, of the members observation as to the applicants credibility is such as to render the thrust of his application incapable of being believed." He stated that this "cumulative" analysis arrived at in the absence of an oral hearing was based solely on three adverse credibility findings, all of which are challenged in the proceedings and any one of which is sufficient if flawed to require *certiorari* of the contested decision.

12. He stated that the findings are:

1. The applicant's account of travel from Nigeria through Turkey to Ireland was not credible because the applicant claimed not to have produced any identification documents when transiting through airports – this is based on a material error, the applicant stated that he did produce documents.
2. The applicant knew the identity of those who had issued threats to him over the telephone but did not inform the police of their identities – this finding too was made on an mistaken premise, as the applicant stated he did know who the persons were, other than they were from the A.Y. family.
3. The applicant delayed without reasonable cause, in applying for asylum at the earliest opportunity. No adequate reasons were given for the Tribunal's rejection of the applicant's reasons for delay.

13. He submitted that the first named respondent had failed to have regard to principles 4 to 9 in *I.R. v. The Minister for Justice, Equality and Law Reform* [2009] IEHC 353 he stated that these required that the assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, rationally analysed and fairly weighed; that a finding of lack of credibility must be based on correct facts (this Court's emphasis) and the reason drawn from such facts must be cogent and there must be a legitimate connection to the adverse finding; that the reasons must relate to the substantive basis of the claim and not to incidental matters of fact; that an adverse finding based on a single fact will not necessary justify a denial of credibility generally; and where an adverse finding involves discounting or injecting documentary evidence or information which is *prima facie* relevant to a fact or event pertaining to a material aspect of the credibility issue the reasons for that rejection should be stated.

14. He identified the error of the first named respondent in relation to his s. 11 interview in which he explained to the ORAC officer that he got the documents from the agent and after he presented them the agent would collect them from the applicant. Counsel submitted that the adverse credibility finding was not based on correct facts and was not coached.

15. In relation to the second credibility finding in relation to the applicant's engagement with the police, tribunal stated that the applicant "knew who was behind the threats and knew where they lived". However, this was cause of concern to the s. 11 interview where he was asked at question 38:

Question 38: Did you report these threats to the police?

Answer: I went to the police and they asked for the telephone number which these people used, I said the number used was "unknown" they said they would investigate.

Question 39: It appears that you knew the people involved in these threats and where they lived, did you not inform the police of this?

Answer: I did not know them personally, they just called me on an unknown number, they said they were the family of Y and they will kill me.

16. Mr. Lynn submitted that the applicant never claimed that he knew the identity of who was threatening him and where they lived and the adverse finding by the Tribunal was based on an error of fact. With regard to the third and final credibility finding upon which the first named respondent based his decision, he submitted that the Tribunal erred in fact and in law in their determination in that there was no plausible reason for failure to apply for status. He outlined what the applicant had said that when he arrived in Ireland, he met a black family called J. and asked them for help. He then followed them to their home in Newbridge but two weeks before he applied for asylum he had left the J.'s house and had become homeless. He was seen sleeping in bus shelters in Newbridge where he met someone who told him to seek asylum. Mr. Lynn submitted that the Tribunal was obliged at the very least to consider if the explanations amounted to reasonable cause for not claiming asylum immediately upon entry to the State and they found that they did not provide reasons for that adverse finding. To simply state that the applicant "gave no plausible reason" for the delay in applying

for asylum when in fact he had provided reasons was insufficient.

17. Mr. Lynn quoted I.R., he also quoted from *S.K. v. The Refugee Appeals Tribunal & anors.* [2015] IEHC 176 where Faherty J. indicated:

"Overall I am satisfied that the "extreme care" which the consideration of a papers only appeal necessitates (as referred to by Clark J. in *V.M. (Kenya) v. RAT & anors.* [2013] IEHC 24) was not afforded to the applicants' appeal in this case. Thus, the absence of that extreme care, together with the failure of the Tribunal Member to further involve the first named applicant prior to rendering his Decision, convinces this Court that substantial grounds have been made out which warrant the granting of leave in this case and the granting of an order of certiorari."

Counsel also cited the decision of Barr J. in *A.M.K. (a minor) v. The Refugee Appeals Tribunal & anors.* [2014] IEHC 380 in which Barr J. commented on a decision of a Tribunal member and stated:

"The decision in this regard is one of a set of reasons giving for making the determination that the applicant's story lacked credibility. The Court cannot no what weight the member of the tribunal attached to each of the reasons giving by him for the finding that the applicant was not credible."

He quoted from *Keagnene v. Minister for Justice, Equality and Law Reform* [2007] IEHC 17 where Herbert J. stated:

"As a Court cannot be aware of what weight the Member of the Refugee Tribunal attach to each of the six reasons given by him for finding that the applicant was not credible or trustworthy and his unsupported testimony was unreliable, the Court must conclude that as far as reasons four, five and six cannot be permitted to stand as reached by the application of unfair procedures, the entire decision must have an necessity to be set aside."

And Barr J. also quoted from Edwards J. in *A. v. Minister for Justice, Equality and Law Reform & anors.* [2010] IEHC 143 to the same reason.

Submissions on behalf of the respondent

18. Ms. Hartnett O'Connor BL, for the respondent submitted that it was not correct for the applicant to assert that finding any one of the credibility findings of a decision maker is flawed is sufficient to require certiorari of the contested decision and quoted from Cooke J in *I.R.* She also submitted that it was only part of the first named respondent's analysis of the applicant's account of his travel rather than the only reason why the Tribunal member doubted the credibility of the applicant's account.

19. In relation to his engagement with the police, she said that the fact that the applicant did not personally know the people calling him was not a barrier to him informing the police that they were self identified members of the family of his employee. She also submitted that it was not factually correct to state, as noted in the applicant's notice of appeal and repeated in the submissions, that the applicant states that he did not know the address of the people making the phone calls (at question 39 of the Section 11 interview) and said that the finding of the Tribunal was made on correct facts. In relation to the delay of the applicant in applying for refugee status she said that the Tribunal clearly considered the explanation and took the view that he did not consider that the applicant had advanced any plausible reason for applying for refugee status in May 2013 having arrived in the State in January, 2013. She also referred to the decision of Peart J in *Imafu* and the more recent decisions of in *R.A. v The Refugee Appeals Tribunal and Others* [2015] IEHC 686 and *GI v The Minister for Justice and Other* [2015] IEHC 682. She submitted that the decision was sustainable on correct facts.

Decision

20. This Court is quite clear that the decision of the first named respondent cannot stand. In finding that he had not presented documents to the authorities when quite clearly in his section 11 interview he described that he got the documents from the agent and that the agent would then collect them from him having passed through the check points in the airport. It appears to me that the first named respondent did not deal with any other issue in relation to his travel apart from the failure to present documents or to pay for the travel.

21. In relation to the applicant's claim to have reported the disappearance of his employee to the police the first named respondent considered his complaint to the police about the threats he had been receiving. He made a finding based an error of fact that the applicant never claimed that he knew the identity of those who were threatening him (other than they were related to Y) or where they lived.

22. In relation to the lack of reasons which the first named respondent considered the applicant had given for the finding of unreasonable delay, this Court finds it strange that the first named respondent would dwell on this issue particularly because the applicant had already suffered in losing his right of an oral appeal based on the Commissioner's assessment of the delay in making an application for asylum.

23. The three findings by the first named defendant in this case are unsustainable and in those circumstances the Court will set aside the decision. It appears to this Court that this is a case that should have been conceded at the outset.

24. Counsel for the respondents has already quoted from *Hathaway and Foster*. However, this Court has found an interesting quote at page 138 of the second edition of this book

"Despite the clear salience of an applicant's own evidence, there is little doubt that a quest to disbelieve negatively affects many assessments of the value of a refugee claimant's evidence."

25. This appears to apply to the first name respondent in this case. As this is a telescoped hearing this Court will grant leave to the applicant and set aside the decision of the first named respondent and this Court makes an order for *certiorari* of the first named respondent's decision and directs that the applicant's appeal be considered by a different member of the Refugee Appeals Tribunal.

Counsel for the applicant Michael Lynn S.C. (with Eamonn Dorman B.L.) instructed by Burns Kelly Corrigan Solicitors

Counsel for the respondents Ann Harnett O'Connor B.L. instructed by the Chief State Solicitor for the respondent.