Neutral Citation: [2014] IEHC 162

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 1286 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

BETWEEN

R. O. Y.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered the 6th day of March, 2014

1. This is an application seeking leave to apply by way of judicial review for an order of *certiorari* in respect of the decision of the first named respondent, the Refugee Appeals Tribunal (hereinafter "the RAT"), dated 20th November, 2009, and notified to the applicant by letter dated 30th November, 2009, affirming the recommendation of the Refugee Applications Commissioner (hereinafter "the RAC") that the applicant be refused refugee status pursuant to s. 16(2)(a) of the Refugee Act 1996 (as amended).

Background

2. The applicant, a Nigerian national, was born in Ilorin, Nigeria on 23rd June, 1980. She is of Yoruba ethnicity and professes the Muslim faith. She met her partner, Mr. K. O. in November, 2003 in Ilorin. Ilorin is mainly inhabited by Muslim Yoruba people and has a population of over 800,000. The applicant's partner was a pagan at this time, but converted to Islam at the applicant's request. According to the applicant, when her partner's parents discovered his conversion they reacted angrily and threatened her; they felt that their son had forsaken his beliefs and the customs of his ancestors and they held the applicant responsible.

3. The applicant's partner's father, a wealthy and influential man, and leader in the Ogboni Society, subsequently became very ill. An oracle (a traditional priest) was consulted and he indicated that in order for her partner's father to recover, it would be necessary to sacrifice a child from the family. The applicant, who was the only pregnancy in the family at this time, was subsequently kidnapped and detained by three men working for her partner's father. They informed her that her unborn baby was to be sacrificed to secure her partner's father's recovery. When asked how the men would carry out this task, the applicant explained that they would either wait for the baby to be born, or "call the child out from her womb". Fortunately, this operation was not carried out and on 24th August, 2005, after ten days in detention, the applicant was rescued by her partner, who had learnt of her whereabouts from a family member.

4. On 25th August, 2005, the applicant left Nigeria for Ireland. Her passage was arranged by her partner with the assistance of an agent of African origin, named John. The agent took the applicant by air from Lagos to a second airport which the applicant thought was in Europe. The applicant arrived in Ireland on 26th August, 2005, and applied for asylum on 9th September, 2005. On 11th September, 2005, she gave birth to a baby daughter in the State.

5. The RAC recommended that the applicant not be declared a refugee and she was so informed by letter dated 24th October, 2005. The applicant was furnished with a report pursuant to s. 13(1) of the Refugee Act 1996 (as amended). The applicant appealed the RAC recommendation to the RAT by notice of appeal dated 2nd November, 2005. An oral hearing occurred on 4th November, 2009, and the RAT's decision to affirm the RAC's recommendation was notified to the applicant by letter dated 30th November, 2009.

Issues Concerning the RAT Decision

6. The applicant's main claim was that she was in fear of her partner's father, who was a wealthy and influential man. She claimed that he was a leading member of the Ogboni Society in Nigeria. The applicant's main complaint, in relation to the RAT decision, is that in the course of that decision the Tribunal member relied on certain country of origin information which was not made available to the applicant. The Tribunal member's decision to dismiss the applicant's appeal, and to affirm the RAC's recommendation to refuse the applicant refugee status, was based predominantly on information about the Ogboni Society sourced by the Tribunal member himself from the UNHCR Refworld online database. In particular, the Tribunal member relied on three unspecified reports by the Immigration and Refugee Board (IRB) of Canada, and also on the report of a 2004 joint British/Danish fact-finding mission to Nigeria, in support of his finding that "the applicant's fear that her father-in-law would, as an Ogboni member, pose a threat to her is not well founded". The applicant claims that the documentation which forms the basis of this opinion reached by the Tribunal member was never shown to her and that she was not given an opportunity to comment upon it or to lead other evidence in respect of the content of the documentation.

7. Section 16(8) of the Refugee Act 1996 (as amended) provides as follows:

> *"The Tribunal shall furnish the applicant concerned and his or her solicitor (if known) and the High Commissioner whenever so requested by him or her with copies of any reports, observations, or representations in writing or any other document, furnished to the Tribunal by the Commissioner copies of which have not been previously furnished to the applicant or, as the case may be, the High Commissioner pursuant to section 11(6) and an indication in writing of the nature and source of any other information relating to the appeal which has come to the notice of the Tribunal in the course of an appeal under this section."*

8. In *Biti v. Ryan* [2005] IEHC 13, Finlay Geoghegan J considered the obligation to provide copies of documentation to the applicant.

She stated:

> *"I have also concluded that the applicant has not made out grounds that there was any breach of fair procedures by the first named respondent in relying upon country of origin information which only became available after the date of the oral hearing. For the reasons set out above it appears to me that the first named respondent was entitled to do so provided he complied with fair procedures. Where, in an appeal an oral hearing has been held and the member of the Tribunal subsequently either carries out further investigations or obtains new evidence or information, fair procedures may require that such information is made available to the applicant and that he and/or his advisors are given an opportunity of making submissions either in writing or possibly in certain instances orally thereon or adducing further evidence if they so require. Well known general principles in relation to fair procedures would appear to so require and in addition s. 16(8) of the Act of 1996 expressly obliges a member of a Tribunal to furnish reports, observations or representations in writing or any other document to the applicant and his or her solicitor and also 'an indication in writing of the nature and source of any other information relating to the appeal which has come to the notice of the Tribunal in the course of an appeal under this section'."*

9. In *Biti*, the learned judge held that the applicant had not been denied fair procedures where her solicitors had been given copies of the country of origin information under consideration and submissions had been invited from them in relation to the documentation. A similar decision was reached by Birmingham J in *A.T.T. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 503. In that case, the judge held that there had been a technical non-compliance with s. 16(8) of the Refugee Act 1996, in that the information communicated to the applicant and his solicitor regarding country of origin documents was not furnished in writing. The information in question was up to date information accessed by the respondent from a highly respected source. The respondent advised the applicant of the nature of the information and the applicant submitted further documentation to support his appeal. The court held that, in the circumstances, there was no substantial unfairness to the applicant. A contrary view was taken by Cooke J in *L.M. v. Refugee Appeals Tribunal* [2010] IEHC 132. At paras. 13-14 of his judgment, the learned judge held:

> *"In the judgment of the Court therefore, if the Tribunal member had intended, towards the end of November 2008, to rely upon information that had come to him which led to the conclusion that the position in Zimbabwe had, as he puts it, 'dramatically changed' which removed the risk of persecution, this was a situation in which the Tribunal member had a clear duty to put those matters and the information upon which it was based, to the applicant for comment and rebuttal, and possibly even to reopen the hearing for the purpose of enabling that matter to be dealt with by reference to this up to date situation in Zimbabwe in the Autumn of 2008.*
>
> *Accordingly, the Court is satisfied that there has been an infringement of the obligation of section 16(8), which was material in this case, but more fundamentally, that there has been a failure of fair procedures in reaching a conclusion as to dramatic change which discounts the evidence that was before the Tribunal as a basis of the applicant's claim to asylum. For that reason the decision is clearly unsound."*

10. In *O.O.C. v. Minister for Justice, Equality and Law Reform* [2013] IEHC 278, the RAT had found that a solicitor's letter was forged. This conclusion had been reached using undisclosed country of origin information. With respect to this finding, McDermott J held:

> *"This is a most serious allegation. The court is satisfied that the Tribunal should have furnished the applicant with a copy of this information, indicated to the applicant in writing that there was a serious issue in relation to the authenticity of the letter and given the applicant an opportunity to address any allegation or suggestion that it was forged. At the very least, the country of origin information and the issue should have been raised directly with the applicant at the oral hearing. Therefore, the court is satisfied that the determination of the Tribunal was for that reason fundamentally flawed and contrary to the principle of audi alteram partem."*

11. The case law thus establishes that in order to render a RAT decision unsound the breach of s. 16(8) must relate to a material fact rather than to a superfluous or peripheral issue. In addition, as long as the material is put to the applicant for his comment thereon, the fact that it is not put in writing will not automatically mean that the decision has to be quashed.

Conclusions

12. In this case, the RAT relied upon country of origin information about the Ogboni society which was not put to the applicant. This documentation was significant and related to a central part of the applicant's case which the RAT had to determine. Having regard to the case law noted above, I am satisfied that in relying on such information, the Tribunal member acted in breach of s. 16(8) and also breached fair procedures. The applicant should have been given an opportunity to make submissions on the documentation relied upon by the Tribunal. As this was not done, the applicant is entitled to an order of *certiorari* in respect of the decision of the RAT dated 20th November, 2009.

13. The RAT made passing reference to the possibility of the applicant being able to avail of internal protection in Nigeria. It is not clear whether the RAT was considering internal protection or internal relocation to Lagos. However, the RAT did not give the matter further consideration due to its finding on the fear of persecution. The RAT concluded:

> *"However, as I have already indicated, as her fear of the Ogboni is not well founded, the issue of internal relocation is not something for any further consideration."*

14. As this issue was clearly influenced by the Tribunal's findings on the central question, which in turn was predicated on country of origin information which was not put to the applicant, it is necessary to order certiorari of the RAT decision in this regard as well.

Extension of Time

15. The applicant's application for judicial review may have been very slightly out of time by one day. In the context of these proceedings as a whole, and bearing in mind the length of time that it has taken to bring the matter to a hearing, I am satisfied that it is fair and reasonable to extend the time for bringing these proceedings up to and including the date on which the proceedings were actually commenced.

16. For the reasons stated herein, I will quash the order of the RAT dated 20th November, 2009, and direct that the matter be resubmitted to the RAT for determination by a different Tribunal member.