Neutral Citation Number: [2009] IEHC 492

THE HIGH COURT
2009 96 JR

BETWEEN

W. M. M.

APPLICANT
AND

REFUGEE APPEALS TRIBUNAL AND MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 11th day of November, 2009

1. The applicant is a native of Nigeria, now twenty-four years of age. She arrived in the State in October, 2006, and claimed asylum. She claimed to have suffered appalling sexual abuse, including rape, from a young age by her father and his associates. She has twice been made pregnant and had abortions arranged for her by her mother, the last in January, 2006. She fears that if returned to Nigeria, she will again suffer the same persecution.

2. In a section 13 report, dated 16th October, 2006, the Commissioner found the personal history she recounted credible, and her graphic account of regular abuse by her father's group of paedophiles was described as "chilling". The report nevertheless recommended that she should not be declared a refugee because, "the applicant stated clearly that the only reason why she left Nigeria was because of domestic and sexual abuse by her father. Although this applicant presented credible testimony, this is not considered to amount to persecution, as defined by the Geneva Convention 1951. It is clear that her motivation for coming to Ireland was for domestic reasons, and therefore there appears to be no section to link with the applicant's claim for asylum".

3. The applicant's appeal to the Refugee Appeals Tribunal was ruled upon in a decision dated 9th December, 2008 (the Contested Decision), which affirmed the negative recommendation of the Commissioner. The applicant now seeks leave to apply for relief by way of judicial review to quash that decision on the basis of something in excess of 25 grounds set out in a proposed statement of grounds.

4. In the Contested Decision, the personal history given by the applicant as the basis for her claim to fear persecution is accepted as credible. The rejection of the claim is based on two conclusions, namely, that State protection against the persecution she fears would be available if necessary, and, secondly, that she could avoid such persecution by relocating internally in Nigeria.

5. In arriving at the former conclusion, the decision quotes extensively from country of origin information on the availability of police protection for victims of sexual abuse, rape and domestic violence in Nigeria. The decision notes that according to this information, while rape is a crime punishable by life imprisonment, it does not extend to marital rape, and that sexual harassment is not outlawed. Further, violence within a family is not treated seriously by the police and few rapes are reported to the police for that reason. The Tribunal Member concludes: -

> "The applicant fears returning to Nigeria as she fears she would not be able to access protection, and she states that her father and his friends may find her. The applicant is now an adult and the issues of child sexual abuse and/or paedophilia no longer relates (sic) to her. While there is a serious problem with domestic violence in Nigeria, rape is punishable by life imprisonment. The applicant is no longer a child, and while there may be social stigma attached to reporting the stated abuse or her fears to the police, and while the applicant may be reluctant to pursue this avenue of redress, such reluctance or stigma does not in itself mean that the State is unwilling or unable to provide protection. While the protection available to the applicant may not be perfect and is less than satisfactory, nevertheless there is a procedure in place that should be availed of before international protection is sought…. Were the applicant to return to Nigeria, it would appear that protection might reasonably be forthcoming were the applicant to seek it and a variety of NGO's and women's organisations could assist her to seek such protection."

6. On the question of internal relocation the decision cites case law to the effect that a claimant is not a refugee if he or she is able to seek safe refuge within the country of origin and the Tribunal Member concludes:-

> "While there may be difficulties for a person to internally relocate in Nigeria, as there would be in any country, it appears from country of origin information that people do relocate within Nigeria. Considering the size and population of Nigeria, the amount of time that has elapsed since the applicant left Nigeria, it is highly unlikely that the applicant's father or her friends would be aware of the applicant's return and would find the applicant in a large populous city, such as Port Harcourt."

7. It is convenient to deal first with the grounds raised against this latter conclusion. In essence, two points are made. First, it is argued that Regulation 7(2) of the European Communities (Eligibility for Protection) Regulations 2006, requires the Tribunal Member as a "protection decision maker" to have regard to general conditions prevailing in the part of the country of origin to which relocation is proposed, and this necessitates identifying a specific locality and carrying out appropriate inquiries to verify that the particular persecution will not be encountered there, and that it is a place to which the claimant can reasonably be expected to move without undue hardship. This was not done in this case.

8. Secondly, the suggestion of Port Harcourt was made for the first time, only in the decision itself. It was never raised with or put to the applicant at the hearing. It is pointed out that this failure, and the absence of investigation into conditions in Port Harcourt, is particularly serious in this

case because Port Harcourt is in the Delta region of Nigeria, a notoriously dangerous area at the moment with widespread conflict, violence and economic disruption. There is, thus, it is submitted, a dual illegality in the failure to comply with the requirements of Regulation 7 and an infringement of the principle of fair procedures.

9. The respondent accepts that Port Harcourt was not mentioned, but submits that identification of a specific location is not required by the regulations; it is enough that possible relocation to another part of the country be raised. Here Port Harcourt is only mentioned by way of example.

10. The Court is not convinced that this is a full answer to the issue thus raised. The Court is satisfied that an arguably substantial ground is made out as to the way in which this conclusion on internal relocation was reached for each of the two reasons put forward, namely, non-compliance with Regulation 7 and infringement of a right to fair procedures by the failure to identify a specific relocation site at the hearing so that it might be commented upon by the applicant.

11. It is also necessary to consider the ground proposed to be raised against the other limb of the Contested Decision. Because the Contested Decision is based on two independent conclusions, as indicated above, no purpose would be served in granting leave in respect of the internal relocation issue unless the illegality of the second conclusion is also demonstrated. In this regard, the issue is perhaps less straightforward.

12. As indicated above, and as the applicant acknowledges in the written submissions, the Contested Decision contains a largely correct and pertinent exposé of the legal principles and criteria applicable to the assessment of the availability to an asylum seeker of State protection in the country of origin. The complaint made is that the Tribunal Member here failed to apply those principles and criteria adequately or at all. It is submitted that the decision effectively discounts the applicants fear on the basis that it related only to the paedophile abuse she received from her father and his associates as a child and that as she is now no longer a child. It is pointed out that the most recent abuse she suffered was in 2005, when she was nineteen years of age.

13. It is argued, more particularly, that the passage quoted from the decision above as to there being a system in place which should be availed of before international protection is sought, demonstrates a misunderstanding of the law on the part of the Tribunal Member and thus an application of a wrong test. It is submitted that it is irrational to accept, on the one hand, the effect of the country of origin information as confirming that there is scant protection for rape victims from the criminal justice system in Nigeria, while, on the other, concluding that there is "a procedure in place" from which "protection might reasonably be forthcoming".

14. Before addressing the main thrust of this ground, it is useful to dispose of a number of incidental aspects raised in submissions. It is argued, for example, that the decision errs in finding the protection would be available from NGO's and women's organisations. Such aid, it is argued, is not State protection for the purpose of assessing refugee status.

15. This argument misconstrues the decision. The Tribunal Member does not fall into that error. It is clear that she is approaching the issue on the basis that even if intervention by the police and State authorities is imperfect and reluctant, there are NGO's and other voluntary organisations with experience and resources whose purpose it is to help women in this difficulty, and who are able to intercede to force the authorities to act if necessary.

16. Secondly, a complaint is raised as to an alleged failure to consider previous decisions relied upon by the applicant and a failure to give any explanation as to why the applicant should be differentially treated.

17. No substantial ground has been made out on this account. Quite apart from the fact that no specific previous decision has been identified in the course of the hearing or in the written submissions, and no actual difference of treatment has been pointed to in argument, it is clear that a Tribunal decision, as such, will not be unlawful by reference only to a discrepancy when compared with previous decisions in similar cases. Where availability of State protection is in issue, it is the particular circumstance of the individual applicant that determines the issue. That is illustrated in the present case by the emphasis placed on the uselessness of the applicant complaining to the police because of the influence of her father and his associates in the community in question.

18. Although one might have some hesitation in saying that this decision's assessment of the availability of State protection for this applicant was obviously questionable, it seems appropriate, in the particular circumstances of the case, to approach the grant of leave in respect of this ground on the following basis.

19. First, it is of significance that both the Commissioner and the Tribunal Member have accepted as credible ,and even as "chilling", the account the applicant gave of prolonged gross sexual abuse over a period of years. Secondly, as already indicated, there is a substantial issue raised as to whether the conclusion on the availability of internal relocation is sustainable. If it is not, then it may be necessary to approach the validity of the conclusion on State protection on the basis that the applicant will return to the area in which her father and his associates operate, if she is deported.

20. Thirdly, it is not possible to tell from the decision to what extent the Tribunal Member's conclusion on State protection was possibly influenced by the fact that it might be sought and availed of outside the area of the apparent influence of her father and his associates.

21. Fourthly, in those circumstances, it may well be necessary to take a different view of the reality of the applicant's risk of being exposed to rape or abuse by her father and his associates, even as an adult, and of the reality of the danger she might not have access to State protection from the authorities in her home area, given the apparent reticence and ineffectiveness of the authorities to intervene in family matters and their apparent susceptibility to corrupt pressure at the behest of those of influence in the community.

22. For these reasons there is, in the Court's view, adequate substance in the reasons raised against the second conclusion also, which justifies granting leave in this case.

23. However the grounds canvassed in the statement of grounds are far too numerous to permit a judicial review hearing to be focussed efficiently upon the essential illegalities that are alleged. The order of the Court will therefore grant leave to apply for the reliefs in the statement of grounds at section 4, paras. B, D, E, and F. (Those sought at A. and C. are unnecessary). Leave will be granted for those reliefs on two grounds to be stated as follows:-

> 1. In concluding that the applicant was not a refugee because her claimed risk of persecution could be avoided by internal relocation in Nigeria, the Tribunal erred in law and in complying with the requirements of Regulation 7 of the European Communities (Eligibility for Protection) Regulations 2006, and with the duty to adhere to fair procedures by:
>
> > (1) Failing to identify a part of the country as a site for relocation and to conduct the necessary enquiries to verify whether it was a place where the applicant could be reasonably expected to stay without fear of being persecuted or real risk of suffering serious harm;
>
> (2) Identifying Port Harcourt for that purpose only after the appeal hearing without such inquires and without affording the applicant an opportunity of commenting thereon.
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> 2. In concluding that the applicant ought not to be declared a refugee because State protection might reasonably be forthcoming to her on return to Nigeria, if required, the Tribunal erred in law and applied a wrong legal test in that regard and failed to apply correctly regulation 5(2) of the said Regulations, having regard to the applicant's personal history and to the effect of the country of origin information as to the ineffectiveness of State protection for victims of rape and sexual abuse.