

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 366 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED) IN THE MATTER OF THE IMMIGRATION ACT 1999 (AS AMENDED) IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED) IN THE MATTER OF THE IMMIGRATION ACT 2003 (AS AMENDED) IN THE MATTER OF THE IMMIGRATION ACT 2004 AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003 SECTION 3(1)

BETWEEN

K.B.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, ATTORNEY GENERAL IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 2nd day of May, 2014

1. This is an application for judicial review in which the relevant relief sought is an order of *certiorari* quashing the decision of the Refugee Appeals Tribunal of 3rd March, 2009, which affirmed the recommendation of the Refugee Applications Commissioner that the applicant not be granted refugee status. The proceedings were initiated by notice of motion dated 3rd April, 2009. The decision was notified to the applicant by letter dated 18th March. The application was not brought within the required 14-day period and an extension of time is required. There are 24 grounds set out the statement of grounds, three of which contain an additional 17 sub-clauses, many of which are irrelevant and too general or imprecise to be capable of giving rise to relief by way of judicial review. Written submissions have assisted in reducing the unnecessary number of grounds and address five issues relevant to the application.

Background

2. The applicant is a Nigerian national born on 31st October, 1990 and is a Muslim. His father died when he was twelve months old and he was cared for and raised by his mother. When he was 15 years old, his mother informed him that his father had been a Chief in the Ogboni Society. His mother advised him that he should not allow the Ogboni Society to initiate him into their cult because it was contrary to the principles of the Muslim religion. The applicant was educated between 1994 and 2006 to second level. He stated that he was employed between February 2006 and August 2008 in Lagos washing cars.

3. The applicant claims to be in fear of the Ogboni Society. In 2005, the applicant's mother was approached, allegedly by a senior member. His father and grandfather had been leading members of the Society and his mother was informed that he too must join and be initiated at the age of 18 years. His mother did not wish him to do so. He was a Muslim and she believed it inappropriate for him to join such a society. The visitor threatened his mother and the applicant, and in particular, his mother's life was threatened if she did not acquiesce in his initiation. The applicant claims that on 5th November, 2005, his mother died mysteriously and was found with blood flowing from her nose and ears in their home when he returned from the local Mosque. He believed that the Ogboni Society was responsible for her death. He has no evidence to support this other than his belief. There was no evidence available to the Tribunal concerning the death of his mother or its cause.

4. Following his mother's death, the applicant moved to northern Nigeria to avoid the Ogboni Society. However, while there, he was found by members of the Society "spiritually". He was threatened that if he did not take his position within the cult, he would be killed.

5. He claims that, subsequently, he was visited "spiritually" by members of the Ogboni two or three times per month. He returned to Lagos to finish his education in February 2006. He obtained part-time employment from 13th February, 2006, until August 2008 in Lagos in a car wash. He claims that he was visited three to five times per annum by members of the Society who wished him to join. He is afraid that the Society members will use their Voodoo and spiritual power to track him and that they would carry out their threat to kill him if he does not join the Society.

6. He has not reported either his suspicions about his mother's death or the threats made to him to the police as he believes that the Society has members within the police force and that they are corrupt.

7. The applicant claimed that a wealthy customer at the car-wash obtained a passport for him and travelled with him on a flight to Spain. He paid €500 for the passport which was not in his name. He presented it to the immigration authorities when entering Spain. He was introduced to the customer's friend who allowed him to stay at his home for a few days and then told him to leave. He attempted to call his former employer. He then found a wallet with an Identification Card. He asked a man where the nearest English-speaking country was. This man told him that he ought to live in Europe and must claim asylum. He helped him to arrange his flight. He arrived in Cork where he was arrested for possession of forged documents.

8. The applicant stated, in the s. 11 interview, that the identification card which he found could be used to travel all over Europe and that he tendered it at the airport. His ticket was stamped and "that was all". He said "I never met Immigration or anything, it was clear they saw it wasn't mine and it's then that the problems started".

9. While one might consider that this story has a number of infirmities, if the applicant's case is to be rejected because of a finding of lack of credibility, it is incumbent upon the decision-maker to give clear reasons for any such finding.

Tribunal Decision

10. The Tribunal Member outlined the facts of the applicant's claim as given in evidence and as appeared from the documentation. The analysis of the claim is somewhat short. The Tribunal Member summarised the evidence given by the applicant as follows. After his mother's death, the applicant went to Kaduna in northern Nigeria where he was discovered by two members of the Ogboni Society whom he did not know. Having remained two to three months in Kaduna, he decided to return to Lagos from which he had originally fled.

11. A senior member of the Ogboni Society told him that he could not go anywhere as they had a blood sample from him and could find him anywhere he went. The blood sample had, apparently, been taken from the applicant and given to someone from the society when he was an infant. The applicant claims that he could be found by a "spiritual means". The Tribunal Member concluded:

"The applicant presented as a decent young man, but really to suggest he could return from Kaduna to Nigeria and spend two and a half years, including his schooling, washing cars and not be discovered by the Ogboni is stretching credibility."

That is the only finding in relation to credibility made by the Tribunal Member.

12. Two further elements of the case are addressed by the Tribunal. Firstly, the question of State protection was considered. The Tribunal Member noted that the applicant stated that he had not gone to the police because some police officers are also members of the Ogboni people. He failed to report the death of his mother to the police and also failed to report the threats made to him by Ogboni Society members. Whatever the reality of any of his fears in respect of his mother, his own safety or the fear that police protection was not available to him, no finding was made by the Tribunal in respect of these matters. There is no finding as to whether the Tribunal was satisfied that his mother's death was attributable to the Ogboni Society or whether he had been approached and threatened with adverse consequences by members of the Society if he declined to be initiated. No assessment was made as to whether his reasons for failing to seek State protection were justified on the basis of country of origin information or on the basis of the credibility of any part of story, or whether his failure to seek State protection undermined his credibility or not.

13. The Tribunal also addressed the issue of the applicant's failure to apply for asylum in the first State in which he landed, Spain, where he spent six days before travelling on to Ireland. It noted that the applicant alleged that he knew nothing about asylum and that he was advised to go to an English-speaking country. The Tribunal also noted that the applicant took a number of days to apply for asylum when he arrived here, a considerable time after he was taken into custody at Cork Airport. The applicant did not pay for his journey from Barcelona to Dublin which was paid for by an individual whose name he did not know. In that respect, the Tribunal Member relied upon the judgment of McGovern J. in *K. v Minister for Justice, Equality and Law Reform* [2008] IEHC 9, in which, at paragraphs 13 and 14, the learned judge questioned the credibility of an account given by the applicant in that case as to how he came to travel to Ireland. In *K*, the applicant claimed that while fleeing prison, he met a person who was a friend of his father who then accompanied him through two countries from Africa to Ireland and provided the necessary documentation for the applicant but did not accept any payment for the service. The evidence suggested that it would have cost this person money to assist the applicant as he provided the tickets. It was concluded that on any objective basis, the account was simply not credible. Once again, the Tribunal Member failed to reach any conclusion in relation to this aspect of the case, notwithstanding what appears to be reliance upon the judgment in *K*. It is submitted by the respondents that the court may reasonably infer an adverse credibility finding from the Tribunal's reliance upon this judgment. A judgment of the court is often cited because it provides a statement of legal principle which may be applied *mutatis mutandis* to the facts of the case at hearing. It is not clear what use the Tribunal Member wished to make of this case other than to imply that the applicant's story was not credible. If that view is to be taken, it would appear to apply only to the fact noted that the applicant did not pay for his journey from Barcelona to Dublin but that it was paid for by an individual whose name he did not know. In that respect no distinction is drawn between the fact that the applicant contributed €500 to his passage from Nigeria to Spain whereas the applicant in *K* contributed nothing. It may be that a decision maker would find that such a distinction is of little relevance: however, when the finding on credibility is said to be based implicitly on a High Court decision which is rooted in its own facts, as in *K*, any significant deviation from those facts assumes an importance which ought in this case to have been addressed. In any event, it is not clear to what extent the decision in *K* was relied upon as a matter of legal principle or how it was to be applied to the facts of the applicant's case.

14. The final matter of relevance upon which the Tribunal expresses an opinion is as follows:

"In the opinion of the Tribunal, the applicant could have remained in Lagos in safety, having been there for some two and a half years unharmed washing cars. Further, the applicant could have relocated to another part of Nigeria with ease, in the opinion of the Tribunal, based on the evidence before it."

This conclusion must be viewed in the context of an error of fact in the summary of facts in the earlier part of the decision. The applicant complained that he had been threatened on a number of occasions while working at the car wash over a period of two and a half years by members of the Ogboni Society. Furthermore, in the s. 11 interview, the applicant claimed that he had been visited three to five times per annum over that period by members of the Society at the car wash. His claim was that he had been discovered and threatened. It is true to say that the applicant remained "unharmed" in Lagos, nevertheless, his claim was that he was threatened with death if he did not become a member of the Society and that his mother's death had been caused by members of the Society. No conclusion was reached in relation to these matters. Instead, a simple statement was made that he could have remained in Lagos in safety because he had not been harmed over the previous two and a half years. This did not address his core claim.

15. The Tribunal then considered the issue of relocation or internal flight as an alternative for the applicant. It concluded that he could have relocated to another part of Nigeria with ease based on the evidence available to the Tribunal. Though the Tribunal sets out a number of legal principles in respect of the relocation issue, it fails to offer any reason for the conclusion reached. The court notes that the Tribunal stated that it would stretch credulity to believe that he could remain washing cars in Lagos for two and a half years and not be discovered by the Ogboni when, as already stated, he had clearly indicated that he had been discovered by members of the Society, approached and threatened on a number of occasions.

The Challenge

16. The many grounds relied upon were reduced to five issues, namely:

- (a) Failure to make a decision on the core aspect of the applicant's claim;
- (b) a reliance upon vague findings;
- (c) errors of fact;

(d) State protection, and

(e) issues relating to internal relocation.

17. The court is satisfied that in the short analysis of the case by the respondent, he failed to make findings in respect of the applicant's account of past events of persecution, his perception of those events and the factual basis upon which he claimed to have a well founded fear. It is completely unclear what aspects, if any, of the claim were accepted by the first named respondent. Though there is a detailed narrative of the events alleged by the applicant, the only facts considered and thought to be "stretching credibility" related to the facts that the applicant had been found in Kaduna and spent two and a half years without being discovered while working and going to school in Lagos. The latter finding is based on an error of fact as it suggests that the applicant claimed that he was not discovered during that period when his claim was based on the fact that he had been discovered.

18. The applicant was entitled to have his claim of a well-founded fear of persecution analysed on the basis of whether he subjectively held that fear and whether it was objectively justifiable pursuant to s. 2 of the Refugee Act 1996 (as amended).

19. An important feature of such an analysis is whether the applicant sought State protection, and if he sought it, whether it was available to him. On the other hand, if the applicant failed to seek State protection, it was incumbent upon the Tribunal to assess whether the reason offered for his failure or unwillingness to seek it was reasonable. The reason is stated in the decision but there is no analysis of whether it was justified or reasonable.

20. Insofar as it is suggested that a number of the findings made by the Tribunal are vague and non-specific, the court is satisfied that the decision is unclear as to what elements of the applicant's story were determined to be true or lacking credibility. Consideration of the issue of internal relocation, while assisted in many cases by the availability of country of origin information must also take account of the circumstances or events outlined by the applicant that are deemed credible. In this instance, it is not at all clear what element, if any, of the applicant's case was considered to be credible so that a proper assessment could then be made of whether it was possible for him to relocate in Nigeria. The applicant's account was that he was traced and followed by members of the Ogoni Society when he moved to Kaduna in northern Nigeria and when he returned to Lagos. If the account that he was approached by individuals on numerous occasions who had traced or followed him was deemed to be credible and an inference could be drawn that he might be traced in any part of Nigeria, as he contended (leaving aside the rather fanciful notion that it could be done by spiritual means), such a finding might also give rise to a finding that he had a fear of persecution in respect of which he could not seek State protection. If his claim about the police were also to be considered to be correct then the issue of relocation would perhaps be more problematic.

21. A number of submissions made by counsel for the respondents seek to explain what are said to be a number of findings that are clearly implicit in the decision of the Tribunal or which seek to explain the decision as rational and reasonable by reference to the evidence (including country of origin information) and to some of the more peculiar features of the applicant's testimony. I am satisfied that to adopt some of these submissions would be to expand the basis of the decision as expressed by the Tribunal and to speculate as to the underlying reasons for the decision. There may well be reasonable grounds upon which the same result might have been delivered but it is not for the court to re-write the decision. The reasons for the decision must be made clear by the Tribunal in fairness to the applicant and in order for this Court to exercise jurisdiction by way of judicial review. The decision is unclear and somewhat cryptic in its statement of credibility findings and fails to address core elements of the applicant's claim.

22. I am, therefore, satisfied that the applicant has established that this decision is fundamentally flawed for the reasons set out above. The court will quash the decision and remit the matter for hearing by a different Tribunal Member.