

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2007 1044 JR**

**BETWEEN**

**N. J.**

**APPLICANT**

**AND**

**THE REFUGEE APPEALS TRIBUNAL,**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,**

**THE ATTORNEY GENERAL AND IRELAND**

**RESPONDENTS**

**AND**

**HUMAN RIGHTS COMMISSION**

**NOTICE PARTY**

**JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 3rd day of April, 2009.**

1. This is an application for leave to apply for judicial review of the decision of the Refugee Appeals Tribunal (RAT), dated the 3rd July, 2007, to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner (ORAC) that the applicant should not be granted a declaration of refugee status. Mr. Mark de Blacam S.C. with Ms. Maureen Cronin B.L. appeared for the applicant and Ms. Emily Farrell B.L. appeared for the respondents. The hearing took place at the King's Inns, Court No. 1, on the 31st March, 2009.

**Factual Background**

2. The applicant is a national of Nigeria born in 1979. She lived in Benin City until she was eleven years old when she moved with her family to Delta State. Her education seems to have been limited and thereafter she trained and was employed for about eight years as a hairdresser. She is a single mother of a boy born in 1997 who remains in Nigeria. She says that her father acted as a messenger for one of the leaders of the S.S.S. and worked with Asari Dokubo. She says that in November, 2004, several men from her father's organisation visited the family home demanding to see him. She and her mother had been told to say that he was travelling and would be back in four weeks. The men did not believe them and abducted the two women. They were detained separately and the applicant was questioned about her father's whereabouts. The applicant says she was raped every night during that period of detention. One of those men was ashamed of what was happening to the applicant and released her and gave her money to return home. She found the family home was a mess and no one was

there. She sought help from a friend of her father and spent three months living in that man's house. He obtained a passport for her and arranged for her to stay with a friend of his for a further fortnight in Lagos before leaving Nigeria. After she left Ogun village, she had no contact with the men who had threatened her. She says she travelled to Ireland by air to Cork, stopping in one unknown country where she and the agent did not leave the plane. The agent took her through immigration as his wife, showing the passport on her behalf. She and the agent took a bus from Cork to Dublin, where she applied for asylum. She says she does not know where her child is or what happened to her family since she left Ogun village.

3. She applied for asylum and failed before the ORAC. She appealed the decision to the RAT.

4. Some general grounds of appeal were filed but none specifically related to the applicant's claim and none specifically addressed the findings made in the s. 13 report. No documentation was furnished and no country of origin information (COI) was appended. An oral hearing was held and a negative decision issued but that decision was subjected to judicial review proceedings which settled and the applicant's appeal was assigned to another Tribunal Member. It appears that the applicant changed solicitors at that point.

5. Her new legal adviser wrote to the Tribunal enclosing further documentation relevant to her appeal hearing. They included three medico-legal reports from an examining physician and an art psychologist attached to the SPIRASI organisation. They described the applicant in the following terms:- she is a "severely traumatised woman who exhibits all the signs of post traumatic stress disorder"; "the applicant says her father had been murdered and that she suffers from an impaired memory" and her reported poor memory which was "in line with post traumatic stress disorder".

6. These reports indicate that the applicant had disclosed that she had been raped while in detention in Nigeria and that she had been referred to SPIRASI for therapeutic intervention, medical assessment and psychotherapy. The art psychotherapist strongly recommended that the applicant be given the opportunity to reside in the country in order to continue her treatment. The applicant did not tell the ORAC either at interview or in her questionnaire that she had been raped and this was explained in the reports by the applicant being reluctant to either disclose or report these events as she felt deeply ashamed and tried to block out the memories.

7. A report from Dr Siddiqui, an Examining Physician, dated 1st June, 2007, indicated that the applicant had been assessed because the art psychotherapist had expressed concerns about her mental health. It was then noted as follows:-

*"On mental state examination the symptoms and signs were highly consistent with [PTSD] and with further complications like development of impulse control. She was also found to be depressed and had expressed feelings of hopelessness and sees no future for herself. I feel though she is not actively suicidal at present but should this continue on I would have serious concerns about her safety. I believe she has been evaluated by the relevant psychiatric services and is under their care. I would like to point out that she complained of poor memory which is in keeping with [PTSD] in which psychological amnesia is a common phenomenon." ( Court's emphasis added)*

8. An "Update Report" by the Art Psychologist, which was also furnished to the

Tribunal, recorded that the applicant had continued with weekly sessions, her concentration and memory remained poor and many of the symptoms of PTSD continued to be present. She said that the ongoing wait for her appeal had caused her anxiety and stress, which was "*manifested in her being unable to manage daily life at times and resulting in increased suicidal and self harm thoughts. She is in a constant state of fear or confusion.*" The psychotherapist said the applicant was committed to her rehabilitation, had engaged well with the work and was slowly addressing the trauma she experienced before coming to Ireland. As in her earlier report, she strongly recommended that the applicant be given the opportunity to continue with her ongoing work.

9. The applicant's second oral hearing took place on the 7th June, 2007. The Tribunal Member records that the applicant outlined the rapes which occurred and also how she found out that father had been murdered. She was cross examined on issues relating to contact with her home and on the contents of purported death certificates and an affidavit furnished to the Tribunal. She answered questions relating to her education and employment. She explained why she had not disclosed the rapes earlier. It was put to her that now that her father was dead, the danger to her from the people who were seeking him was now over but she responded that she said she doesn't believe that was the case.

10. The Tribunal noted that three SPIRASI reports were submitted and that submissions had made to the effect that the reports strongly recommend that the applicant should be given an opportunity to live in Ireland to continue her counselling / psychotherapy. The Tribunal Member next set out various legal provisions and principles and then turned to analyse the claim.

11. In the "analysis" section the Tribunal Member made no express credibility findings, instead addressing her mind to the option of internal relocation. She first stated that she carefully considered all of the documents submitted by the applicant. She noted that the applicant's father has died since the applicant came to Ireland and that the applicant says she would not like to return to Delta State because her son, siblings and mother have not been seen since the incident occurred. She noted that it was put to the applicant that she could relocate to Lagos as she was a qualified hairdresser with experience and because "*The population of Lagos was vast and there was nothing to suggest that these people would be able to find her there if indeed they would have any reason to look for her there.*" The Tribunal Member found that:-

"While the applicant may have a reluctance to return to Delta given that the alleged events occurred in her home area, no good reasons were proffered as to why Lagos wasn't a viable option and where the alleged threat she believes she faces would, in my view, effectively be neutralised."

12. The Tribunal Member further stated as follows:-

"I find that the risk of serious harm which the applicant claims to fear could be addressed by moving to another part of Nigeria which in effect there would be no risk or in the alternative, were she to believe there is a risk, that effective protection could be accessed."

13. She reiterated, after addressing the general principles applicable to the assessment of state protection, that it was her view that "*the applicant would be able to seek safe refuge within her own country*" and that accordingly, there was no basis for the finding that she is unable or unwilling to avail herself of the protection of her country of origin. She went on to assess whether it would be

unduly harsh for the applicant to relocate and she found that it would not. On that basis she found that the applicant had not discharged the burden of proof and she refused the appeal.

### **The Applicant's Submissions**

14. The applicant's primary complaint in respect of the decision was that the Tribunal Member failed to consider the SPIRASI reports. Mr. de Blacam S.C. accepted that the applicant's claim did not appear to be well-founded at the ORAC stage but he argued that it took on a different complexion in the light of the three SPIRASI reports submitted at the appeal stage which recorded that the applicant had been raped and that her father had been killed. He argued that the Tribunal Member failed to consider the SPIRASI reports and thereby acted in breach of s. 16(6) of the Refugee Act 1996, as amended. He submitted that the SPIRASI reports clearly indicate that there was an issue with the applicant's capacity to give evidence and to remember details of the incidents of which she complains. Reliance was placed on *Khazadi v. The Refugee Appeals Tribunal* (Unreported, High Court, Gilligan J., 19th April, 2007), the judgment of the English Court of Appeal in *Mibanga v. Secretary of State for the Home Department* [2005] EWCA Civ 367 and the decision of Edwards J. at the substantive stage in *D. v. T.S. (Simo) v. The Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 305.

15. Counsel argued that it was incumbent on the Tribunal Member, upon reading the SPIRASI reports, to question to what extent the applicant's evidence in her ASY-1, questionnaire, Section 11 interview and grounds of appeal could be relied upon. He submitted that the Tribunal Member should have questioned the applicant so as to determine her capacity to give evidence. While he accepted that applicants are obliged to co-operate with the decision-makers and that they are active participants in the process he argued that the applicant in this case may not by reason of her mental state have been in a position to put her best foot forward.

### **The Respondents' Submissions**

16. Ms. Farrell B.L., counsel for the respondents, pointed out that although questions are being raised in these proceedings about the applicant's capacity to give evidence, the affidavit grounding this application is sworn by the applicant. She argued that the applicant was represented by her current solicitors at the oral hearing and that they could have made the submission at that stage that the applicant was incapable of giving reliable evidence if this is what they believed. As no such submissions were made it is not appropriate to make such submissions at this stage. She also submitted that the applicant's solicitors could, without difficulty, have provided a psychiatric report dealing with the applicant's capacity to give evidence prior to the hearing as there was a long interval between the review of the first appeal and the second but they did not do so. In addition, she pointed out that the primary SPIRASI report was dated June, 2006 and could have been submitted to the Tribunal at any stage during the year between that date and the date of the second oral hearing. Reliance was placed on *U.I. v. The Refugee Appeals Tribunal* [2008] I.E.H.C. 345, where Edwards J. held that:-

"Finally, I attach little importance to the fact that the Tribunal member did not specifically refer to the medical report submitted by the applicant. This medical report established only that the applicant had been exposed to some psychological stressor or trauma. It provides no objective evidence as to the nature of the stressor or of the trauma in question. There is only the history given by the applicant which the Tribunal had in any event. It was not necessary to have regard to the consistency of his account as he was been given the benefit of the doubt on subjective credibility."

17. Counsel for the respondents further argued that even if it were accepted that the applicant was raped repeatedly, this would not necessarily mean she was a refugee and in that regard, she relied on the decision of this Court in *Anishehuk v. The Refugee Appeal Tribunal* (Unreported, High Court, Clark J., 31st March, 2009). Counsel argued that the option of internal relocation was found in relation to the applicant and also that state protection would be available to the applicant. She urged the Court to consider that the applicant's mental state has no impact on those findings. Reliance was placed on *Camara v. The Refugee Tribunal* (Unreported, High Court, Kelly J., 26th January, 2000).

#### **THE COURT'S ASSESSMENT**

18. As this is an application to which section 5(2) of the Illegal Immigrants (Trafficking) Act 2000 applies, the applicant must show substantial grounds for the contention that the decision ought to be quashed. As is now well established, this means that grounds must be shown that are reasonable, arguable and weighty, as opposed to trivial or tenuous.

19. It seems to me that this is not a case where the Tribunal Member failed to take account of the medical reports when assessing the applicant's credibility, as was the case in *Khazadi* and in *Mibanga* referred to previously. The Tribunal Member instead made no adverse credibility findings. The allegations of rape were not rejected. The main argument made and which must be addressed is whether the content of the SPIRASI reports should have alerted the Tribunal Member to question the quality of the evidence already given to the ORAC and to question the applicant's capacity to give reliable evidence to the appeal. The remaining argument was that the Tribunal Member should have indicated that she read the reports and rejected their content for given reasons.

20. As previously mentioned the applicant's credibility does not appear to have been seriously impugned although there were doubts relating to some of the peripheral evidence. The Tribunal Member seems to have approached the case on the basis that, accepting everything that the applicant says is true the risk of persecution that she claims to have feared has now passed with the death of her father. The applicant's claim is that she was abducted, questioned and unfortunately raped as a method of interrogation to find her father. The Tribunal Member's approach was that as the father was now dead, the fear of further criminal acts directed towards the applicant had passed. The Tribunal Member then went on to say that in any event, the applicant as a hairdresser could relocate for instance to Lagos.

21. I have carefully considered the three SPIRASI reports in order to assess whether their contents disclose a person whose psychological condition is such that her evidence in the past and before the Tribunal Member should be discounted as unreliable and not doing justice to her case. The reports before the Tribunal certainly indicate a distressed and fragile young lady displaying symptoms of post traumatic stress disorder and who may use dissociation as a way of evading memories of traumatic experiences suffered in the past. The reports are unequivocal in describing that she has been traumatised in the past and are highly suggestive of rape being at the root of the upset. I cannot accept, nor is it anywhere in those reports suggested, that the applicant cannot on the basis of this trauma give reliable evidence. While she subjectively suggests memory loss, the summary of her evidence demonstrates that at the oral hearing she discussed her experiences in Nigeria and fully disclosed that she was repeatedly raped while detained in 2004 and she considerably enlarged upon the story that she told at the ORAC stage. In the circumstances, it is very difficult to

see how it could have been incumbent on the Tribunal Member to make any inquiries as to the applicant's capacity to give evidence or to make any further findings in that regard.

22. When setting out what had occurred at the oral hearing the Tribunal Member recorded that:-

*"On her behalf it was submitted that the SPIRASI report strongly recommends that she be given an opportunity to live in Ireland to continue her counselling physiotherapy."*

This reference to the contents of two of the reports cannot be a stronger indicator that the reports were read. The Tribunal Member also refers to the higher probability of accessing psychological treatment if the applicant were to relocate to a large city like Lagos. The reference are made in context and in the body of the report and not as an aside after credibility findings had already been made as was the subject of adverse findings in *Khazadi* and in *Mibanga*.

23. From the information available to the Court, it appears that no submissions were made at the hearing by or on behalf of the applicant to the effect that the SPIRASI reports indicate that she was unable or incapable of giving reliable evidence, nor were any such submissions made in the letters furnishing the SPIRASI reports prior to the oral hearing. The Examining Physician's report indicates that the applicant had been examined by "the relevant psychiatric authorities" but no report was furnished from those authorities. If it was intended for the Tribunal Member to question in advance of the hearing whether the applicant was capable of giving reliable evidence, the Tribunal Member should have been furnished with such medical evidence and the hearing adjourned. Instead the applicant went ahead with the hearing and now seeks to impugn the findings on the basis of a strained interpretation of the content of the actual medical reports furnished. As is now very well established, applicants are not passive participants in the asylum process and are obliged to put their case fully at the appropriate time. It is not appropriate to find fault in the process when it was well within the capacity of the applicant and her legal representatives to make their case on psychiatric fragility, if they could, at the hearing.

24. I do not wish to suggest that the reports on an ordinary reading make any suggestion that this applicant was incapable of doing justice to her case on the appeal. It is not the case and never has been that a person suffering from PTSD cannot give evidence or narrate what happened to them. It is not the case that a person who suffers the loneliness and stresses of an exile cannot give reliable evidence and it was not even hinted at in the one medical report from an experienced SPIRASI physician that this applicant's ability to recount why she seeks refugee status is impaired. It is also clear that the Tribunal Member did consider the contents of the SPIRASI reports; she expressly referred to them on two occasions. The fact remains that there was no dispute as to their contents in the statutory assessment by the Tribunal Member as to whether the applicant was past fleeing persecution, whether she would be faced with a risk of persecution on her return to Delta State and whether she could relocate.

25. The Tribunal Member's decision was carefully considered and that there was a clear basis in the evidence that was before her on which she could have reached that decision she did. No negative credibility findings were made. Instead, it was assumed that the applicant had a subjective fear of persecution but as the option of internal relocation was open to her, it could not be said that she was unwilling or unable to avail herself of the protection of the Nigerian State. This was a

reasonable and rational finding as the applicant's evidence at her s. 11 interview was that when she returned to her home and found that her siblings and son were missing, she stayed in a village thirty minutes away for a period of three months and spent a further fortnight in Lagos before coming to Ireland. During that time, she had no contact at all with the men who had maltreated her. Her reason for not going to another part of Nigeria was that she had no relative or other person to go to. She said that it was not her idea to leave Lagos or Nigeria but rather, she left because the man she was staying with in Lagos with said he was arranging for her to leave the country and he did not explain why it wouldn't be safe for her to remain in Lagos. It simply cannot be said that relocation was not an option in all the circumstances of this particular case nor can it be inferred that the reports from SPIRASI were not considered. The appeal decision makes it clear that they were considered and even accepted but in the circumstances, where the main reason for refusing refugee status was that the applicant could not be said to be unwilling or unable to avail herself of the protection of Nigeria, they had little real relevance.

### **Conclusion**

26. In the light of the foregoing, I am *not* satisfied that substantial grounds have been shown and accordingly, I must refuse leave.