THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 15 J.R.]

BETWEEN

O.A. (NIGERIA) AND F.A. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND O.A.)

APPLICANTS

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 20th day of November, 2018

1. The applicants are a mother and child from Nigeria, the mother having been born in 1978. She made the case that she was the victim of threats to kill made by her father's relatives after the father's death in 2000. She claims that her brother was killed as part of this dispute. Nevertheless, she remained in Nigeria for nine years thereafter working in a variety of jobs. She moved to the U.K. on a valid visa in 2009 and never claimed asylum there (see para. 4.2(d) of the tribunal decision). She claimed to be unaware of the asylum process, despite becoming pregnant by a man who was a recognised refugee.

2. She came to Ireland unlawfully in late 2012 and the child was born here on 28th July, 2013. The applicants received deportation orders on 2nd May, 2016, which are still in force, although subject to an undertaking for the purposes of the present application. Following receipt of the deportation orders, the applicants applied for international protection on 24th May, 2016. Those claims were rejected by the International Protection Office on 17th July, 2017. Notices of appeal to the IPAT were delivered on 9th August, 2017 and submissions made on 16th October, 2017, including reliance on UNHCR *Guidelines in International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* of 22nd September, 2009 . On 26th October, 2017 an oral hearing took place before Mr. Conor Gallagher B.L., the tribunal member. Ms. Lisa McHugh B.L. appeared for the applicants. On 22nd November, 2017, the applicants were notified that the tribunal had rejected the appeal.

Procedural history

3. I granted leave in the present proceedings on 15th January, 2018, the primary relief sought being *certiorari* of the tribunal decision. A statement of opposition was filed on 22nd February, 2018. The applicants' submissions were delivered on 21st June, 2018. The respondents' replying submissions are undated but were filed on 26th June, 2018.

4. I have received helpful submissions from Mr. Mark de Blacam S.C. (with Mr. Garry O'Halloran B.L.) for the applicants and from Ms. Sarah K.M. Cooney B.L. for the respondents. Mr. de Blacam has helpfully confirmed that the challenge is limited to grounds 3 and 5 of the statement of grounds insofar as those grounds relate to consideration of the child's interest.

Best interests of the child - Ground 3

5. Ground 3 alleges that "*the Tribunal failed to properly assess the position of the second- named applicant (the minor) as a result of erroneously holding that the best interest principle is confined to procedural matters*". The premise of this ground is incorrect because the tribunal did not hold that the best interest principle is confined to procedural matters. Having said that, the best interest principle is of limited or possibly no relevance to a purely factual finding such as that of past persecution, or the factual as opposed to the methodological element of the assessment of forward-looking risk. Insofar as the principle was relevant, it was considered: see s. 5.3 of the decision which accepts *inter alia* that acts committed against children could be persecution even if the same acts inflicted on adults would not be. Thus the tribunal member took the principle into account. His decision is not correctly represented in the applicants' ground, which in any event has not been made out.

Risk of future harm to the child - ground 5

6. Ground 5 alleges that "*the Tribunal erred in foreclosing on speculation in respect of the possibility of the applicants being exposed to persecution or serious harm in the future on account of their particular circumstances…*". The second sentence of the ground relates to the mother rather than the child, so is not being pursued. The UNHCR guidelines were relied on, in particular generalised passages about many types of human rights violations at para. 13 and socio-economic needs at para. 14. Mr. de Blacam majors on the fact that a child, aged four, is here and the claim that the mother is a vulnerable person. He contends that the child might be a member of a social group, being children in a state of destitution in Nigeria, if returned, and that the child might be separated from the mother, thus giving rise to persecution or serious harm.

7. There are a whole host of independent but converging fundamental problems with the submission made under this heading.

> (i). Not for the first time I observe that the language of foreclosing on speculation is inappropriate (see *K.M. (Pakistan) v. International Protection Appeals Tribunal* [2018] IEHC 510 [2018] 7 JIC 1005 (Unreported, High Court, 10th July, 2018), para. 19). It is not for the tribunal to speculate, and indeed if it did so, no doubt this would be presented as a ground for judicial review. For good measure, not only is speculation a form of strained terminology here but so also is foreclosure, smacking as it does of the law of real property.
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> (ii). The UNHCR guidelines regarding child applicants are general and wide-ranging across the human rights field. They are not confined to matters specific to the jurisdiction of the IPAT and they are certainly not the law of the State. There is no obligation to narratively refer to any such guidelines. They were considered in the sense that the tribunal says all material presented was considered and that has not been displaced*: G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401 *per* Hardiman J. I have already dealt with the point in multiple cases, particularly in *S.A. (Ghana and South Africa) v. IPAT* [2018] IEHC 97 [2018] 2 JIC 0104 (Unreported, High Court, 1st February, 2018). There is generally no obligation to engage in narrative discussion of an applicant's points, including UNHCR guidelines, in an administrative decision, including a tribunal decision.

(iii). The fundamental problem for the first-named applicant was that her core story was generally rejected. Indeed, there is no challenge being pursued to that rejection as far as she is concerned. Paragraph 4.3 of the decision rejects the concept that the applicant was subjected to threats by her extended family and holds that she was not subject to past persecution or serious harm for a Convention reason.

(iv). The fact that someone is extremely poor or is going to be destitute (even if that were the case here) is not a basis for international protection. Otherwise one might as well abolish the borders of the State or of any developed country.

(v). Mr. de Blacam claimed that the mother was extremely vulnerable and at risk and describes these as part of the "*facts*" of the case. Such a submission confuses claim with fact. The applicants have been through a process and the tribunal has made findings, having had the opportunity to see and hear the first-named applicant. The tribunal did not find the applicant's claims were to be accepted - quite the reverse. The tribunal rejected the vulnerability argument in that at para. 5.5 it rejected the submission that being a single mother or single woman involved a recognised Convention nexus as a basis for persecution in Nigeria. He accepted that the first-named applicant's situation might be difficult but that was not a basis for international protection. The fundamental point made by Mr. de Blacam under this heading was expressly rejected by the tribunal member, holding "*there is no basis to suggest that they would be separated or that she would be killed. It would be entirely speculative to consider that a reasonable possibility. The last paragraph of p. 6 of the submission makes a case based on vulnerability and hardship and that the minor child would be deprived of his rights. However, there is no actor of persecution when the matter concerns general economic and societal issues causing hardship. The case made is outside the realm of International Protection"* (para. 5.3), citing *Tchoukhrova v. Gonzales* 404 F. 3d 1181 (9th Circuit, 2005) per Reinhardt J.

(vi). As regards the allegation now made for the first time to the court that the child should be regarded as a member of a social group of destitute children in Nigeria, no ground was identified in the questionnaire. The case now being made is accepted by Mr. de Blacam as not having been made to the tribunal. His response, of course, is the reflexive one of the "shared duty" and the claim that the tribunal had an obligation to identify in effect all possible social groups of which the child could have been a member. To launch an argument of that kind in court, never having identified the alleged group to the decision-maker, is simply gaslighting the tribunal: see *Jahangir v. Minister for Justice and Equality* [2018] IEHC 37 [2018] 2 JIC 0102 (Unreported, High Court, 1st February, 2018). Systems and institutions have to be made to work, and an obligation on a decision –maker to independently identify all possible social groups that an applicant might subsequently think of, having first dispensed with the services of counsel who appeared at the tribunal and then engaged new junior counsel and leading counsel to think of new points, is simply a completely unworkable test for judicial review and without any basis in law.

(vii). The claim is made that the mother's evidence tended to support the point now being made, but as I have noted the mother's evidence was largely rejected. The risk of separation from the mother was expressly rejected. As regards destitution, the tribunal member noted that the mother managed for nine years in Nigeria, following the alleged persecution or serious harm, to obtain work (see para. 5.5 of the decision). This implicitly rejects the factual premise for the social group argument in any event because it removes the logical foundation for it to be suggested that there is a significant risk of destitution.

(viii). Being a member of a social group is not sufficient because other criteria need to be satisfied: *R.A. v. Refugee Appeals Tribunal* [2015] IEHC 686 [2015] 11 JIC 0403 (Unreported, High Court, 4th November, 2015). That is not so here.

8. These grounds are independent, but obviously come to a mutually reinforcing conclusion.

Order

9. Mr. de Blacam launched much rhetoric on the court about the child having been born here and not knowing anything about Nigeria. That seems to have limited relevance to any issue I have to decide. The child is only here because the first-named applicant came here unlawfully and remained here for four years, and then used the protection system to make a belated and what is now clearly unfounded, protection claim. The mother was in Nigeria for nine years after the alleged persecution, lived in the U.K. for three years without claiming protection, and then was in Ireland for a further four years without making such a claim. Having had a partner who successfully claimed asylum and then giving the totally implausible evidence that she did not know about the option of availing of asylum, raises an inference that her claim was spurious. No challenge has been mounted to the rejection of the credibility of the mother's account. She is manifestly an economic migrant and no injustice has been demonstrated to either applicant by the tribunal's decision.

10. The order will be:

(i). that the proceedings be dismissed; and

(ii). that the respondents be released from any undertakings regarding enforcement of the deportation orders.