THE HIGH COURT

2006 No. 763 J.R.

BETWEEN

T. T.-I. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND C. T.-I.)

APPLICANT

AND

REFUGEE APPLICATIONS COMMISSIONER, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

Judgment of Mr. Justice McMahon delivered on the 11th day of July, 2008

Introduction

1. This is an application for leave to seek judicial review in which orders are sought:

(i) quashing the recommendation of the Refugee Applications Commissioner ("the Commissioner") that the applicant not be declared to be a refugee,

(ii) requiring the Commissioner to afford the applicant an interview before a different authorised officer.

2. The applicant was born in this State on the 25th January, 2006 to Nigerian parents. She applied through her mother to the Commissioner for a declaration of refugee status and thereafter, again through her mother, completed a questionnaire in support of this asylum application on the 4th June, 2005. The applicant's mother was interviewed on the 9th June, 2005 by an authorised officer of the Commissioner. On the 12th June, 2006 a recommendation was made that the applicant should not be declared to be a refugee.

Résumé of Grounds

3. The applicant submits that the respondent acted *ultra vires* and contrary to fair procedures in:

(a) relying on undisclosed country of origin information and in failing to afford to the applicant any opportunity to make submissions thereto,

(b) having selective regard to the country of origin information relied upon, without stating any reason for preferment,

(c) making findings on matters never put to the applicant, including the finding that "the applicant could have also avoided the tradition of tribal markings by relocating",

(d) failing to make any findings on evidence of past persecution, including the subjection of the applicant's mother to female genital mutilation (FGM),

(e) finding, on the basis of undisclosed country of origin information, that state protection was available, without making any assessment of the adequacy of the protection deemed to be available,

(f) finding, on the basis of undisclosed country of origin reports and further, without stating any reason why explanations or evidence of the applicant's mother were rejected, that internal protection was an option without having any regard to the UNHCR policy document entitled "Relocating Internally as a Reasonable Alternative to Seeking Asylum",

(g) making factual inaccuracies in the assessment of the evidence.

Interview with the Applicant's Mother

4. The applicant's mother was interviewed on the 9th June, 2006 and at the conclusion thereof the applicant's mother acknowledged the accuracy of the interview notes by signing same. In the interview, the applicant's mother set out the fears she had for her daughter's safety if she returned to Nigeria. She claimed to fear that, if repatriated to Nigeria her daughter would be subjected to female genital mutilation (FGM) by her husband's family, would be subjected to a traditional right of initiation and would be involved in human sacrifice. In reply to questions from the interviewer, the applicant's mother stated that her husband's family were from Ujene Community, Ekpoma, in the Edo State of Nigeria. The applicant's mother informed the Commissioner that she was also from Ekpoma but had been in Lagos before she left for Ireland. She also told the interviewer that she had been forcibly circumcised by her husband's family and that they had told her that her daughter would also be circumcised.

Report of Commissioner

5. It is clear from the Commissioner's report that he sees his task as determining whether the applicant comes within s. 2 of the Refugee Act 1996 (as amended) which states, *inter alia,* that:-

" "a refugee" means a person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her formal habitual residence, is unable or, owing to such fear, is unwilling to return to it"

6. It is clear from the Commissioner's report that he had no difficulty in accepting the applicant's evidence that there was a serious risk of mutilation and tribal marking if she returned to the community in Nigeria with her daughter from where she came. His finding, however, was that the fear was not well founded because the country of origin information suggested that the applicant's mother could relocate to another part of Nigeria if she wished her child to be free from such danger. The Commissioner refused to accept as credible the assertion by the applicant that her husband's family "is all over Nigeria" as being a valid explanation as to why she could not relocate. Considering the size and population of Nigeria, such relocation would avoid the risk of traditional tribal marking. Female genital mutilation (FGM) constitutes treatment capable of amounting to persecution under the Convention and Protocol Relating to the

Status of Refugees ("the Convention") (see *K v. Secretary of State for the Home Department* [2007] 1 AC 412). The Commissioner relies on the following statement in support of his view that relocation was a clear option:-

> "According to BAOBAB [a non-governmental women's human rights organisation] the practice of FGM in Nigeria is quite diverse depending on tradition. In Edo State the law prohibits FGM during the first pregnancy of a woman, i.e. adult woman. However, most women throughout Nigeria have the option to relocate to another location if they do not wish to undergo FGM. Government institutions and NGOs afford protection to these women. BAOBAB was of the opinion that FGM in itself is not a genuine reason for applying for asylum abroad." *Danish Immigration Service, Report on Human Rights in Nigeria: Joint British – Danish Fact Finding Mission to Abuja and Lagos, Nigeria* (Copenhagen, 2005) at p. 27

7. I will now address the applicant's arguments:

(a) The applicant's argument is to the effect that the respondent acted *ultra vires* and contrary to fair procedures, *inter alia* in failing to disclose country of origin information to the applicant and not giving her an opportunity to respond.

> Contrary to what the applicant claims, she was clearly made aware of the substance of the country of origin information relied on by the Commissioner whose questions clearly indicated that:
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> (i) FGM was outlawed in her home state,
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> (ii) state protection was available,
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> (iii) internal relocation was an option,
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> (iv) NGOs were also available to assist those who wished to avoid such practices.
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> Questions relating to all these matters were put in clear language to the applicant's mother at the interview and she was given every opportunity to respond. There was no element of surprise here in relation to substantive matters.
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> In these circumstances, I do not consider that failure to put the particular documents containing this information to her constitutes want of fair procedures so as to invalidate the Commissioner's determination. The said documents merely repeat what was put to her in the interview.
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> **Failure to disclose to the applicant matters relied upon in making findings and matters not put to the applicant**.
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> It is important in this connection to note that the central issue in this case was whether the option of relocation was open to the applicant and her mother. There is no doubt that the Commissioner has an obligation in cases such as this to put to the applicant matters of substance which are crucial to the determination so that she has an opportunity of making a rebutting statement. Nevertheless, I do not think that it is essential in every case such as this that the Commissioner reads out in detail the parts of the country of origin reports on which he relies or will rely on so that the applicant has an opportunity to specifically respond in the interview. The Commissioner specifically put to her the country of origin information which suggested that a mother could refuse to have her daughter subjected to FGM. He also put to her the question as to whether police help or the help of NGOs would be available. In relation to the former she said that the police would arrive too late and in relation to NGOs she said NGOs are "not in her home" and that her husband's family would collect the child and it would be too late to seek help then.
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> In my view the question of relocation was sufficiently canvassed with the applicant in this case. And there was no need to be more specific in putting the country of origin information to the applicant.
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> The applicant also argues that the Commissioner did not adequately assess the sufficiency of the protection deemed available in the country of origin information. Clarke J. in *Idiakheua v. Minister for Justice, Equality and Law Reform* [2005] I.E.H.C. 150 stated:-
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> "It is at least arguable that reference to an isolated example of state protection is insufficient to justify a finding of adequate state action in just the same way that the establishment of an isolated incident where state protection failed may be insufficient to establish its inadequacy. It would appear that the true test is as to whether the country concerned provides reasonable protection in practical terms…. While the existence of a law outlawing the activity which amounts to persecution is a factor the true question is as to whether that law coupled with its enforcement affords "reasonable protection in practical terms.""
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> Although the Commissioner in his report gives one example where the Nigerian police force arrested 30 witch doctors, he does so by way of example, and as an illustration in support of the general statement based on country of origin information, to the effect that the police in Nigeria do take appropriate action against people they suspect are involved in ritual killings and human sacrifice.

(b) Making findings on matters never put to the applicant, including the finding that "the applicant could have also avoided the tradition of tribal markings by relocating."

> In this regard it is my view that the question of state protection and internal relocation contained in the country of origin information was put before the Commissioner and the applicant was made aware of the general nature of the same. The applicant's assertions that despite the availability of the state protection that the police would not prevent her daughter from being subjected to FGM and tribal markings were considered and rejected. I reject also that the question of internal relocation was not properly dealt with on the facts of this case, the applicant (although from Edo State) had previously lived in Lagos prior to coming to Ireland. Secondly, the applicant's explanation that she could not relocate elsewhere in Nigeria because her husband's people were "all over Nigeria" is hard to believe and the Commissioner in my view was clearly entitled as the decider of fact not to accept this explanation.

(c) Failing to make any findings on evidence of past persecution, including the subjection of the applicant's mother to female genital mutilation.

I do not find anything in the Commissioner's report or in the transcript of the interview which suggests that the Commissioner did not accept the applicant's mother's evidence of past persecution. The applicant's mother's history was part of the factual matrix against which the decision of the Commissioner was made. The principal reason he came to the conclusion he did was because the option of relocation was open to her and it was not availed of. For these reasons I reject the argument put forward by the applicant on that count.

(e) Finding on the basis of undisclosed country of origin information that state protection was available, without making any assessment of the adequacy of the protection deemed to be available.

I have already commented on this earlier in this judgment and I repeat that there was no onus on the Commissioner to carry out an in depth study of the adequacy of the protection in the absence of any independent allegations of inadequacy or only on the basis of the reason proffered by the applicant, namely that her husband's family were all over Nigeria. The applicant's only complaint in relation to police protection was that the police would not get there in time to prevent FGM. This general allegation, however, is hardly proof of inadequacy. Even in this country the same complaint could be made of our police force. The State can never guarantee that the police force will arrive in time to prevent a crime. The general country of origin information does not refer to any such deficiency and the Commissioner has given one instance to suggest that the police are responding.

(f) Finding, on the basis of undisclosed country of origin reports and further without stating any reason why any explanation/evidence of the applicant's mother was rejected, that internal protection was an option, without having any regard to the UNHCR policy document entitled "Relocating Internally as a Reasonable Alternative to Seeking Asylum".

The applicant's evidence was that she lived in Lagos before she came to Ireland and that the only reason she could not relocate was because her husband's family "is all over Nigeria". There is no evidence that "under all the circumstances it would not have been reasonable to expect [her] to do so". In my view it is not necessary for the Commissioner to examine the question of internal relocation more specifically than he did in the present case. There certainly may be cases were there would be an obligation on her to closely scrutinise alternative locations if, for example, there were financial or logistical reasons which would render the safe part of the country not reasonably accessible or if the claimant was required to encounter great physical danger in travelling there or if he or she was required to undergo hardship in travelling or staying there or if the quality of the internal protection failed to meet basic norms of civil, political and socioeconomic human rights (see the UN Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees). But no such suggestion has been made by the applicant that any of those conditions apply in this case. In the absence of such a claim it would be clearly unreasonable to expect the Commissioner to trawl through all the possible places in Nigeria to which the applicant could relocate. This question may have to be considered in some cases where the issue is specifically raised but not in the present case.

(g) Making factual inaccuracies in the assessment of the evidence.

The applicant alleges that the Commissioner, at para. 4.2 of the report, makes a significant error when he states:-

"Ms. T.-I. stated that the applicant will be sacrificed because her father ran away from the community"

What in fact the applicant stated in her interview was:-

"I fear that she will be sacrificed. My husband ran away and then they tried to sacrifice my son. If I returned with my daughter, they will kill her and sacrifice her to the gods of the land."

This was in response to the interviewer's question:-

"Could you tell me more about the human sacrifice and what you fear for your daughter in relation to this?"

8. It should be pointed out that first of all this is not a significant error. Secondly, in para. 4.2 of his report, what the Commissioner is doing is merely summarising the applicant's evidence at interview and it is not a finding in any way. Thirdly, it has no significance to the overall assessment by the Commissioner, whose focus remained clearly on the option to relocate. The Commissioner in his report at no point casts any doubt as to the history provided by the applicant's mother and while the Commissioner's summary may have been somewhat inaccurate, it in no way could be said to have contaminated the process.

9. Standing back from the detail and taking an overall view I have come to the conclusion that there is no serious breach of fair procedures in this case and for this reason I refuse the applicant leave to seek judicial review. I am satisfied that most of the applicant's complaints relate to the outcome and concern matters which can be fully and adequately addressed at the appeal which is a full oral rehearing. (*Stefan v Minister for Justice, Equality and Law Reform and Ors*. [2001] 4 I.R. 203)

10. The Commissioner also took into account articles submitted by the applicant's mother pertaining to the Okija shrine in Nigeria. These are submitted because the same thing happens in her husband's village and, like Okija, by the time the police get to her daughter's new location, the applicant's mother fears that it will be too late also. The Commissioner relied on country of origin information which demonstrated that the police in Nigeria do take appropriate action against people involved in ritual killings and human sacrifice. In his report he says that in August, 2004 IRINnews.org reported that the Nigerian police force had arrested 30 witch doctors on suspicion of carrying out human sacrifices after finding 50 mutilated bodies and 20 skulls in an area in the south eastern area of Nigeria known by local people as "evil forest". The bodies were missing breasts, genitals and hearts or other vital organs. The Commissioner takes from this that the police do not tolerate human sacrifice and carry out inquiries of this ritual. It is not an unreasonable assumption that police vigilance extends to all illegal tribal rituals.

11. In sum, the Commissioner does not accept that the applicant's mother with the applicant is prevented from relocating because of the extended nature of the father's family "all over" Nigeria.