Neutral Citation Number: [2008] IEHC 363

THE HIGH COURT

2006 1096 JR

BETWEEN

N. F. M., F. A. M. (A MINOR, SUING BY HER MOTHER AND NEXT FRIEND, N. F. M.), M. O. M. (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND, N. F. M.), AND S. O. M. (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND, N.F.M.)

APPLICANTS

AND

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

RESPONDENTS

Judgment of Mr. Justice Hedigan, delivered on the 21st day of November, 2008

1. The applicants are seeking an order of *certiorari* quashing the decision of the Refugee Appeals Tribunal (RAT), dated 22nd August, 2006, to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner (ORAC) that the applicants should not be declared refugees. Leave was granted to the applicants to seek judicial review by Hanna J. on 29th May, 2008.

Factual Background

2. The first named applicant, who is a national of Nigeria, is a Muslim and a member of the Yoruba tribe. She is a sociologist by profession and she ran her own business in Nigeria. She is the mother of the second, third and fourth named applicants, who are also nationals of Nigeria. The second named applicant is now 14 years of age; she was the first named applicant's first-born daughter. Her brothers, the third and fourth named applicants, are now 12 and 6 years of age, respectively.

3. It is common case that the second named applicant has been circumcised. The first named applicant claims that she lost her second and third daughters in 1999 and 2001, respectively, when, at the age of seven months, circumcision and tribal markings were perpetrated upon them. She says that she reported the first death to the police in 1999, but was told that they could not intervene as it was a family matter and related to the family's cultural beliefs. She also says that in June, 2001, her brother-in-law's wife was killed by her husband's family when she attempted to prevent tribal marks being placed on her children.

4. The first named applicant says that in October, 2003, the first named applicant's husband was taken away by his family to prepare for the circumcision and tribal marking of his first-born son (the third named applicant) in order to identify his royal lineage; the child was then approaching his seventh birthday. Fearing that what had happened to her daughters would reoccur, the first named applicant sold her business and fled with her children in November, 2003. She says that in December, 2003, she was raped by her husband's friend and two other men. She did not report the rape or her fears in respect of the circumcision and marking of her son to the police; instead, she and her children made arrangements to leave Nigeria.

Procedural Background: The ORAC Stage

5. The applicants arrived in Ireland in January, 2004, and the first named applicant made an application for asylum on their behalf to the Office of the Refugee Applications Commissioner (ORAC). In her ORAC questionnaire she stated that her children's lives were being threatened owing to tribal marks and circumcision, which are compulsory at the age of 7 years for the first male born into her husband's family and which had resulted in the death of two of her baby daughters in the past.

6. The first named applicant attended for interview with an authorised ORAC officer on 2nd February, 2004. It is noteworthy that she said (at p.9) that she was not certain what had caused the death of her second daughter, but she thought it was a result of a loss of blood after the circumcision and she said (at p.10) that the third eldest daughter had died from an infected wound as a result of tribal marking. She also said (at p.15) that she and her husband were powerless in respect of the circumcision and marking of her daughters, even though neither of them supported the practice, and (at p.25) that she had not sought to prevent the circumcision and marking of her third daughter because she thought her second daughter might have died accidentally. A report was compiled in compliance with section 13 of the Refugee Act 1996, dated 16th February, 2004, wherein the ORAC officer drew a number of negative credibility findings, concluded that the applicants had failed to establish a well-founded fear of persecution, and recommended that they should not be declared refugees.

The RAT Stage

7. The applicants appealed from the ORAC decision to the Refugee Appeals Tribunal (RAT). With their Notice of Appeal, dated 2nd March, 2004, they submitted a booklet of documentation, including *inter alia* birth certificates, medical reports, certificates recording the cause of death of the second and third daughters, a police report detailing the complaint made by the first named applicant in July, 1999, and 14 documents comprising country of origin information (COI). The majority of the COI submitted consists of "Responses to Information Requests" (RIRs) which are compiled by the Immigration and Refugee Board of Canada (IRB) in response to queries submitted to the Research Directorate of the IRB in the course of the refugee protection determination process.

8. The oral hearing that is relevant to the present challenge was held on 6th June, 2006. The first and second named applicants gave evidence; the first named applicant, in particular, was questioned about a number of aspects of her claim. It is noteworthy that the applicants were legally represented at the hearing. Having been so requested at the hearing, the first named applicant forwarded to the Tribunal two medical reports confirming the circumcision, one by a GP dated 12th June, 2006, and the second by a Consultant Paediatrician, dated 14th July, 2006.

The RAT Decision

9. In her decision, dated 22nd August, 2006, the Tribunal Member pointed out a number of inconsistencies in the first named applicant's account of events. It does not seem that the decision ultimately turned on any of these discrepancies.

10. After discussing the law, the Tribunal Member stated that "it is not accepted that there is a genuine subjective fear for the following reasons", and then made credibility findings as to the death of the baby girls and the risk to the third named applicant of circumcision and tribal marking. Thereafter, reiterating that she did not accept as credible the applicants' "core story", she also drew negative credibility findings in respect of the rape claim and the fact that it was not reported to the police. Ultimately, the Tribunal Member found that State protection might reasonably have been forthcoming in respect of rape, circumcision, or tribal marking, and she affirmed the earlier ORAC decision.

The Applicants' Submissions

11. The applicants' primary complaints in relation to the Tribunal Member's decision may be summarised as follows:-

a. Flawed assessment of credibility;

b. Failure to comply with section 16(8) of the Refugee Act 1996;

c. Flawed assessment of State Protection.

(a) Assessment of Credibility
12. The Tribunal Member stated as follows with respect to the claim that two daughters had been lost to the practices of circumcision and tribal marking:-

> "It was put to the applicant that country of origin information indicates that parents can veto such procedures as circumcision and indeed tribal markings if they so wish, however she stated that the children belong to the father and not the mother and in any event it cannot be vetoed because it is to do with the rite of royal blood. There was no country of origin information submitted which indicates that this is in fact the case. It is *well known generally* that in cases of circumcision mothers can veto such a procedure. In the instant case both parents were opposed to this and therefore it is not accepted that preventing such a procedures occurring was not possible / is not possible should parents / mothers wish to prevent this." (emphasis added)

13. The applicants complain that this finding was made without an evidential basis and that it flies in the face of the COI submitted with the Notice of Appeal; it is also noted that no additional COI was disclosed by the Tribunal Member. The same complaints are levied in respect of the Tribunal Member's later conclusion that there is no objective COI to indicate that male circumcision occurs, that it is up to a parent whether a child is given facial markings, and that male circumcision occurs at the behest of parents; it is said that there is no evidential basis for those findings.

14. It is contended that far from indicating that parents can veto the practice of circumcision, the documentation submitted by the applicants with their Notice of Appeal indicates the prevalence of FGM in Nigeria. Reference is made to an RIR compiled by the IRB in November, 2003, entitled *Nigeria: Current information on the practice of FGM*, which records that although the prevalence of FGM in Nigeria is declining, it remains widespread, with various surveys indicating that between 25 to 60% of women have been affected, depending on ethnicity and geographical location. The applicants also point to a US Department of State report on FGM in Nigeria, dated June, 2001, which records that about 60% of the nation's total female population has undergone one of the four forms of FGM. Reference is also made to a further RIR compiled by the IRB in October, 2002, which records that facial scarification is practiced by Yoruba to identify the ethnic group, town or family.

15. It is contended that the only section that might have supported the Tribunal Member's contention as to the mother's power of veto was in an RIR compiled by the IRB in February, 2003, entitled *Nigeria: FGM practices among the Yoruba ethnic group and the consequences of refusal for parents*, which states as follows:-

> "Reference to the consequences faced by parents who refuse to have their daughters undergo FGM could not be found among the sources consulted …"

16. The applicants point out that the same RIR records that in 1995, 90% of the Yoruba ethnic group who live in south-west Nigeria practiced FGM, albeit that the RIR also records that the practice has since begun to decline, that there was a reduction in associated ceremonies, and that there was increasing medicalisation and indigenous secular campaigning based on the provision of information.

17. The applicants also point out that when it was put to her at the oral hearing that COI indicates that parents have a veto, the first named applicant explained that no such veto is available in relation to her children because the practices are designed to indicate the royal lineage of her husband's family.

18. The applicants complain that the Tribunal Member's findings in this regard go to the heart of her decision to reject what she saw as the applicants' "core story", i.e. with respect to FGM, male circumcision and tribal markings. It is contended that this impacts on any application they may make in the future, i.e. seeking leave to remain in the State or applying for subsidiary protection. This, according to the applicants, heightens the degree to which the applicants are prejudiced by the alleged errors.

(b) Section 16(8)
19. Section 16(8) of the Refugee Act 1996 states that:-

> "The Tribunal shall furnish the applicant concerned and his or her solicitor (if known) … with copies of any reports, observations, or representations in writing or any other document, furnished to the Tribunal by the Commissioner copies of which have not been previously furnished to the applicant … and an indication in writing of the nature and source of any other information relating to the appeal which has come to the notice of the Tribunal in the course of an appeal under this section."

20. It is submitted that if the Tribunal Member was seeking to rely on COI outside of that submitted with the Notice of Appeal in order to substantiate her assertion as to the power of veto, she was obliged under section 16(8) to disclose such COI to the applicants, but did not do so. Reliance is placed *on Olatunji v The Refugee Appeals Tribunal* [2006] IEHC 113, where Finlay Geoghegan J. held as follows:-

> "The obligation in s.16 is a mandatory obligation. The obligation would appear to include all information relevant to the appeal."

(c) State Protection
21. Having rejected as incredible the first named applicant's claim that she was raped but did not report the rape to the police, the Tribunal Member noted as follows:-

> "Even if it did occur, rape is not a family matter […]. Rape is a criminal offence in Nigeria as it is in all democracies. Sanctions are in place to deal with such crimes. While it is accepted that there is a level of corruption and inefficiency in the police force in Nigeria and the system is an imperfect one in need of serious overhaul, the State is not required to provide perfect protection. What is required is a reasonable willingness to detect and prosecute criminals. […] Country of

> origin information submitted by the applicant indicates the deficiencies in the system but also indicates an over zealousness by the police force when dealing with criminals … but it does not indicate that there would be a refusal to investigate a complaint if one were made."

22. The applicants contend that the Tribunal Member erred in this regard as FGM and male circumcision are not outlawed in Nigeria. Reliance is placed on *Imoh v The Refugee Appeals Tribunal* [2005] IEHC 220, where Clarke J. held:-

> "It is difficult to understand the references on both occasions by the RAT to police protection. The evidence suggests that female genital mutilation is not unlawful in Lagos. In those circumstances it is difficult to see how there could have been expected to be any protection available from the police of which, it might be suggested, the applicant could have availed. In those circumstances it seems to me to be at least arguable that the decision maker was in error in concluding that there would have been any point in police protection on the basis of the evidence before her."

23. The applicants further contend that the COI submitted by the applicants indicates that the police force in Nigeria is corrupt, ineffective and unable to provide protection. In this regard, reference is made to a RIR compiled by the IRB in March, 2000, entitled *General Perceptions of the Police and Security*.

The Respondents' Submissions
24. The respondents contend that the applicants have failed to provide objective COI to substantiate their claims and to thereby discharge the burden of proof.

(a) Assessment of Credibility
25. The respondents submit that it was open to the Tribunal Member to remark, as she did, that it is "well known generally" that parents can veto circumcision and tribal markings. This argument is advanced on two bases: first, that there is an evidential basis for the assertion in the COI submitted by the applicants with their Notice of Appeal; and secondly, that the Tribunal Member is entitled to curial deference and to rely on her general body of knowledge.

26. The respondents argue that it is clear from the COI submitted by the applicants with their Notice of Appeal that parents play a role in the circumcision and marking of their children. Reference has been made to a series of paragraphs in a number of the COI documents that were before the Tribunal Member. The respondents contend that there is no ambiguity in the highlighted paragraphs. The applicants submit, in reply, that it cannot be inferred from this information that there was a veto available.

27. Further or in the alternative, the respondents contend that the Tribunal Member is entitled to curial deference in the sense that she was entitled to use her general body of knowledge in relation to conditions in Nigeria. Reliance is placed, in this regard, on *Okeke v The Minister for Justice, Equality and Law Reform* [2006] IEHC 46, in which Peart J. held that the principle of curial deference allows the High Court to afford to the Tribunal a measure of appreciation, and was a matter to which weight could be given, particularly where the applicant had failed to produce any evidence as to why she could not have internally relocated. He continued:-

> "Clearly the Tribunal is entitled to the assumption that it is generally aware of the size and population of Nigeria, as well as the general political situation, and the nature and extent of the state protection authorities which exist in that State."

28. The respondents submit that this principle was approved and applied by this Court in *O.S. v The Refugee Appeals Tribunal* [2008] IEHC 342, where it was held:-

> "There can be no objection to a decision-maker relying on knowledge acquired in the course of their training and experience. … It would be irrational if decision-makers were precluded from relying on objective information with which they gain familiarity through their work."

29. The respondents further contend that it is, in fact, "generally well known" that parents can oppose the practice of FGM. Reliance is placed on *O.A.A. v The Refugee Appeals Tribunal* [2007] IEHC 169, where Feeney J. noted (at paragraph 4.4) that:-

> "The country of origin information indicated that mothers of young daughters were able to veto FGM if they were opposed to it and all the more so if their husbands were against it."

(b) Section 16(8)
30. The respondents contend that the Tribunal Member relied only on the COI put into the asylum process by the first named applicant herself; no further COI was relied on and the requirements of section 16(8) do not, therefore, arise.

(c) Assessment of State Protection
31. The respondents submit that the availability of State protection in respect of FGM is addressed in an IRB Report entitled *Nigeria: Current information on the practice of FGM; state protection to those being targeted*, dated November, 2003, where it is noted that although there was, as yet, no federal law criminalising the practice, a bill outlawing the practice had been passed by the lower House of the National Assembly and was before the Upper House; moreover, eight states had passed laws prohibiting the practice. The IRB report also records that the Federal Minister of Health had – in May, 2003 – announced a national policy and plan of action on the elimination of FGM, which was approved by the Federal Executive Council; furthermore, the Government Minister of Women Affairs and Youth Development was pushing for legislation, and 13 NGOs had formed a national coalition with a view to continuing their efforts to eradicate the practice.

32. Furthermore, in reply to the applicants' submission that male circumcision and tribal marking is not outlawed, the respondents contend that forcible circumcision or marking would amount to an assault, which is outlawed and in respect of which COI suggests State protection would be available. Reference is made to an RIR compiled by the IRB in March, 2000, entitled *General Perceptions of the Police and Security*, which, under the heading "*Taking a Complaint to the Police*", cites correspondence with the Executive Director of the Centre for Responsive Politics in Port Harcourt (Mr. Walson-Jack), to the effect that in relation to cults and educational institutions:-

> "To the best of my knowledge, reports of threat to violence, threat to life, maim or harm, are promptly dealt with by the Police. The Nigeria Police Force itself has several layers and branches that citizens dissatisfied with investigations and actions by one branch could request and get cases transferred to other branches."

33. The context in which Mr Walson-Jack made the above observations was discussed in *G.O.B. v The Minister for Justice, Equality*

and Law Reform [2008] IEHC 229. Birmingham J. held that even though there was some ambiguity as to whether the observations were quoted out of context, it was open to the Tribunal Member to take account of the observations as set out in the RIR, particularly in light of the fact that the decision-makers were not coming blind to the question of State protection in Nigeria, having dealt with "a great number of other cases" on the same question and having "acquired a broad familiarity with the general perception of the Nigerian police force."

34. Reliance is also placed on *Kvaratskhelia v The Refugee Appeals Tribunal* [2006] IEHC 132, in which Herbert J. found the principles applicable to State protection as set out in *Canada (AG) v Ward* [1993] 2 SCR 689 to be "both persuasive and compatible with the jurisprudence of this State".

The Court's Assessment
35. As to the appropriate standard of judicial review, I would reiterate that whether or not the term "anxious scrutiny" is considered appropriate, this Court will continue to be very careful and thorough when reviewing decisions that potentially impact upon human and constitutional rights.

(a) Assessment of Credibility
36. I am of the view that there is, in the COI that was before her, a sufficient evidential basis for the Tribunal Member's remark as to the role of parents with respect to circumcision and tribal marking. In its RIR of November, 2003, the IRB cites statistics as to the "percentage of women who … reported to have at least one daughter circumcised or who say that they intend to have their daughters circumcised". The IRB also makes reference to "those parents who do not believe in the supposed benefits of the practice", albeit that it goes on to state that even those parents "have to subject their children to female genital mutilation to ensure their acceptability in the society and improve their chances of marriage."

37. In the RIR compiled by the IRB in February, 2003, it is noted as follows:-

> "Reference to the consequences faced by parents who refuse to have their daughters undergo FGM could not be found among the sources consulted …"

38. A further RIR compiled by the IRB in May, 2003, entitled *Tribal and traditional family marks of Yoruba living in the Republic of Benin*, notes that the Minister Counsellor for Economics in the High Commission of Nigeria in Ottawa "was not aware of consequences for refusing to be marked."

39. A report from the Jehovah's Witnesses official website entitled Facial Marks - Nigeria's Failing Identity Card, dated January, 1999, tells the story of a parent who resisted having his child tribally marked. Therein, it is noted that parents "must decide whether to mark their children" and that today, for "more and more parents", the traditional reasons for tribal marking "are not compelling". It continues:-

> "Even among those who are proud of their marks, comparatively few risk the tribal surgeon's knife on the faces of their children. This is especially true in cities. The pain and the risk of infection along with the scorn and discrimination the child may face later in life are all factors that make parents reject facial marking. Clearly, the popularity and acceptance of facial marks are fading fast."

40. The above, in my view, constitutes a clear evidential basis upon which the Tribunal Member could have based her remark as to the parents' role. While it may, indeed, have been preferable for the Tribunal Member to refer expressly to the country of origin information from which she drew her general knowledge as to the role of parents in preventing traditional practices, it cannot be said that the absence of such an express reference amounts to a breach of fair procedures in circumstances where there is a clear evidential basis for her conclusion in the COI that was before her. I must also bear in mind the established principle that this Court must be careful not to substitute its own view for that of the Tribunal Member, and that it is immaterial whether this Court agrees with the assessment of credibility carried out by the Tribunal Member provided that the assessment was rational and reasonable, grounded in objective COI, and reached in accordance with fair procedures.

(b) Section 16(8)
41. In the light of the finding that there was a clear evidential basis for the Tribunal Member's remarks in the COI before her, it is clear that there was no breach of section 16(8).

(c) State Protection
42. In the case of *Canada (AG) v Ward* [1993] 2 SCR 689, the Supreme Court of Canada held that in the absence of clear and convincing proof that a State is unable to protect its citizens and absent a complete breakdown of State apparatus, it is to be presumed that State protection is available. This principle has been cited with approval in a number of Irish decisions (see e.g. *G.O.B. v The Minister for Justice, Equality and Law Reform* [2008] IEHC 229).

43. I am not satisfied that clear and convincing evidence has been adduced by the applicants in the present case that the protection of the Nigerian State might not reasonably be forthcoming if they were to return and the third named applicant was threatened with forcible circumcision and/or markings. The evidence that was before the Tribunal Member was that although the police force is imperfect, a level of protection is, indeed, available where complaints are made in respect of criminal offences. As noted by the respondents, forcible circumcision and the forcible marking of a child would fall within the realm of an assault, which is outlawed. Moreover, there is clearly no breakdown of the State apparatus in Nigeria in the terms set out in *Ward* such that the presumption of State protection would be undermined.

44. Furthermore, as was noted by Birmingham J. in *G.O.B.*, the applicants are in a particularly poor position to complain, given that apart from the complaint made in July, 1999, they did not seek State protection before deciding to flee. This, of course, is not, of itself, evidence that State protection was not available, but it is nevertheless a factor to be weighed in the balance.

45. In the light of the foregoing, I am satisfied that it was open to the Tribunal Member to conclude, as she did, that State protection might reasonably be forthcoming, if sought.

Conclusion
46. In the circumstances, I am satisfied that the Tribunal Member did not err in reaching the conclusions that she did; rather, she acted rationally and reasonably and in accordance with fair procedures. Accordingly, I must refuse the reliefs sought.