Neutral Citation Number: [2011] IEHC 393

THE HIGH COURT

2010 1492 JR

IN THE MATTER OF COUNCIL DIRECTIVE 2004/83/EC

IN THE MATTER OF S.I. 518 OF 2006 IN THE IMMIGRATION ACT 1999, AND THE REFUGEE ACT 1996

BETWEEN

J. T. M.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 11th October, 2011

1. Is it sufficient for an applicant for subsidiary protection to demonstrate that he or she has been the victim of inhuman or degrading treatment? Or must the applicant also show that the inhuman and degrading treatment has been carried out either by agents of the State or by non-State actors where that State is unable to give effective protection under its own policing and legal systems? This is one of the principal issues which arises in this application for leave to apply for judicial review pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000 ("the 2000 Act"). The other issue raised by this case concerns the availability of appropriate medical treatment for the applicant were she to be returned to Nigeria.

2. The applicant, Ms. M., a Nigerian national, seeks to quash a decision of the Minister as notified to her by letter of 29th October, 2010, to refuse subsidiary protection. Ms. M. contends that at the age of 16 she was forced into an arranged marriage. It is not in dispute that she suffers from sickle cell disease and she maintains that she is infertile as a result. She contends that after some four years of marriage, her husband's attitude to her began to change and that he physically abused her because she could not have children.

3. Ms. M. says that in view of her infertility, her husband approached a traditional healer who apparently ordered a special ritual in the forest which lasted for several days. A goat was sacrificed and the healer made a traditional herbal medicine. Ms. M. was held down on the ground in a hut, cuts were made on her wrists and abdomen and the "medicine" was apparently rubbed into these cuts. She was apparently given concoctions to drink, mixed with alcohol and the blood of a live goat. She then says that she was raped and forcibly subjected to sexual relations with the traditional healer, her husband and some other men who were participating in the ceremony. She further says that she was subject to ritualistic incisions on her abdominal area with the claw marks of an animal.

4. Ms. M. says that she became pregnant soon after the ritual but that she lost the pregnancy. Her husband then announced he was planning another ritual, at which point Ms. M. decided to run away and returned to her parent's house. Her parents apparently sided with her husband and when her husband subsequently returned to collect her, an altercation took place. Ms. M. says that she then packed her belongings, ran away first to a neighbour's house and then – at the neighbour's suggestion – to Benin City, the home of the neighbour's nephew. Ms. M. says that she did not realise that this individual was a human trafficker who arranged a false passport and identity and actually accompanied Ms. M. to Europe flying to Dublin *via* Lagos and London.

5. Ms. M. insists that it was only after she arrived here in November, 2006 that she realised that she was being brought to Ireland to work as a prostitute. She says that she managed to escape from the car from which she was being transported from the airport and fled into Heuston Station. She says that she then approached an African man who ultimately directed her to the Department of Justice whereupon she sought asylum.

6. Ms. M. says that she was unsafe in Benin City because it was only one hour away from her husband's village. While she accepts that Benin City has a very sizable population - perhaps somewhere between three to four million inhabitants - Ms. M. nevertheless maintained that she would not be safe there. It was only an hour away from her husband's village and both her husband and her family were determined that she should return to him. Besides, the neighbour's nephew also emphasised to her that she was not safe and that she should travel with him to Europe.

The decision of the Refugee Appeals Tribunal

7. Ms. M.'s asylum application was ultimately rejected by the Refugee Appeal Tribunal on 27th May, 2008. Although that decision has not been challenged in these proceedings, it is important to draw attention to the basis for that decision. While the Tribunal member does not appear to have made any express findings in respect of the abuse claims advanced by Ms. M., she nonetheless rejected the asylum claim on the basis that the persecution in question could be successfully avoided by availing of an internal relocation option.

Dr. Gillar's Report

8. Dr. Joan Giller prepared a medical report in April, 2010 for submission to the Minister in aid of Ms. M.'s application for subsidiary protection. The report recounted the background claims of Ms. M. and Dr. Giller expressly stated that she was using the Istanbul Protocol in the course of her report. Dr. Giller concluded that:-

> "The scars on Ms. M's abdomen are made in an ordered pattern, which is highly consistent with her description of having been made by ritual incisions. The scars on her wrists are highly consistent with having been made with a sharp pointed object."

9. The conclusions of this report find ample corroboration by the photographs of Ms. M.'s abdominal area supplied during the course of the hearing which visibly corroborate her account of the extent to which she suffered extensive lacerations by means of animal claw marks. As these photographs graphically show, these claw marks have left permanent scarring all over that area of her body.

The subsidiary protection decision

10. The Minister nonetheless rejected the applicant's subsidiary protection application. It is plain that he proceeded on the basis that it was not enough for the applicant to show that she had suffered serious harm at the hands of non-State actors, but that she would have to go further and show that the Nigerian state was basically unable to afford her effective protection:-

> "However, in accordance with Regulation 2(1), non-State actors can only be considered to be actors of serious harm if it can be demonstrated that the State, or parties or organisations controlling a state or a substantial part of the territory of that State are unable or unwilling to provide protection against serious harm. It has not been demonstrated that the State are unable or unwilling to provide protection against the treatment allegedly suffered by the applicant and, therefore, the alleged inflictors of this treatment cannot be considered to be 'actors of serious harm' within the meaning of Regulation 2(1). A serious harm can only be carried out by 'actors of serious harm' within the meaning of Regulation 2(1). I do not find any evidence that the applicant has suffered treatment in her country of origin that would come within the definition of 'serious harm' as defined in Regulation 2(1)."

11. "Serious harm" is defined by Regulation 2(1) in the following terms:-

> "Serious harm consists of:-
>
> (a) death penalty or execution; or
>
> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
>
> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

12. Regulation 2(1) also defines the following term "actors of persecution or serious harm" as including:-

> "(a) the State;
>
> (b) parties or organisations controlling the State or a substantial part of the territory of the State;
>
> (c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm."

13. The phrase "protection against persecution or serious harm" is in turn defined by Regulation 2(1) in terms:-

> "'Protection against persecution or serious harm' shall be regarded as being generally where reasonable steps are taken by a state or parties or organisations, including international organisations controlling a state or substantial part of the territory of that state to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, where the applicant has access to such protection."

14. The Minister accepted that the applicant had suffered "serious physical injury". While he did not perhaps say so in as many words, in view of the Dr.Giller's reports he could not reasonably have concluded that Ms. M. did not suffer 'serious harm' within the meaning of Regulation 2(1)(b) of the European Communities (Eligibility for Protection) Regulations 2006 ("the 2006 Regulations") in the special sense that the ordeal to which she had been subjected amounted to inhuman and degrading treatment of a most appalling kind.

15. As we have already noted, however, that the Minister proceeded on the assumption that the reference to "serious harm" in Regulation 2(1) had to be read subject to and understood by reference to the term "actors of serious harm", as that latter term is defined in the same definitional Regulation. In the present case, it has not been contended that the "serious harm" has been perpetrated by State actors or by entities with de facto control of at least part of the territory of a state. Accordingly, if the Minister's interpretation of Regulation 2(1) is correct, Ms. M. could only be said to have suffered serious harm if the Nigerian state is unable or unwilling to protect her against serious harm emanating from third parties, such as her husband and his associates.

16. This brings us to a number of rather peculiar drafting curiosities of the 2006 Regulations. First, while the term "actors of persecution or serious harm" is defined by Regulation 2(1), this term does not appear to be used elsewhere in the substantive body of the Regulations. Second, the term "serious harm" is clearly understood by the Minister as referring only to circumstances where the "serious harm" has been perpetrated by State actors. Yet it is far from clear that this is warranted by an actual reading of the Regulations.

17. The key provision here is Regulation 5(1)(c):-

> "The following matters shall be taken into account by a protection decision-maker for the purposes of making a protection decision –
>
> ….(c) the individual position and personal circumstances of the protection applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm."

18. The straightforward reading of this provision is to ask whether the applicant has been subjected to "serious harm". As we have seen, that term is defined by Regulation 2(1)(c) as including "inhuman or degrading treatment" and there is no question but that Ms. M. has been subjected to violence of a most degrading kind.

19. The Minister insists, however, that the phrase "serious harm" cannot be read simply in this fashion and that it must be read in the light of the definition of the phrase "actors of persecution or serious harm". The problem, however, is that, as we have already noted, this term is nowhere used in the substantive body of the Regulations. If the Minister is correct, it would mean that a term defined in an exclusive fashion in the interpretation section of the Regulations ("serious harm *consists* of….") must be interpreted by reference

to another term defined in the Regulations, even though that latter term is nowhere used in the substantive body of the Regulations, not least in Article 5(1)(c) itself.

20. Besides, it is not at all clear that this is a permissible method of statutory interpretation, in view of the general interpretative rules contained in s. 20 of the Interpretation Act 2005 ("the 2005 Act"). These provide:-

> "(1) Where an enactment contains a definition or other interpretation provision, the provision shall be read as being applicable except in so far as the contrary intention appears in—
>
> (a) the enactment itself, or
>
> (b) the Act under which the enactment is made.
>
> (2) Where an enactment defines or otherwise interprets a word or expression, other parts of speech and grammatical forms of the word or expression have a corresponding meaning."

21. Section 2 of the 2005 Act defines the word "enactment" as including a statutory instrument.

22. Given that the words "serious harm" has been defined to include inhuman and degrading treatment *simplicter* it is not clear how the special definition of another term - "actors of persecution or serious harm" - can be brought into play to qualify the plain meaning of the term "serious harm". The Supreme Court has, of course, stressed that that there is a strong presumption that when a word or phrase is defined in a particular way in an interpretation section of an enactment, that it should bear that particular interpretation throughout the Act or, in this case, the statutory instrument: see *BUPA (Ireland) Ltd. v. Health Insurance Authority* [2008] IESC 42, [2009] 1 I.L.R.M. 81. It might, of course, be said that the 2006 Regulations evince a "contrary intention" within the meaning of s. 20(1) of the 2005 Act by giving the phrase "actors of persecution or serious harm" a particular and more confined meaning.

23. Yet the argument that there is such a contrary intention is undermined - perhaps fatally from the respondent's point of view - by the failure to use this latter term anywhere in the substantive body of the Regulations. After all, Regulation 5(1)(c) simply uses the term "serious harm" without any reference to the phrase "actors of persecution or serious harm". Perhaps it may prove ultimately possible to qualify the plain language of Regulation 5(1)(c) in the manner urged by the respondents, but if so, it would seem that this can only be done by an imaginative use of the existing principles of statutory interpretation. Thus, for example, it might be contended that if the applicant's contention is correct, it would mean that the definition of the phrase "actors of persecution or serious harm" is mere surplusage and that such an interpretation is to be avoided, given the presumption against surplusage.

24. Part of the problem here possibly stems from the wording of the Qualification Directive (Directive 2004/83/EC) itself, but perhaps more especially from the manner in which that Directive has been transposed into domestic law. The major difference between the style of the Directive and that of the transposing Regulations is that Article 6 and Article 7 of the former are contained in the substantive body of the Directive itself and not simply in a definition section.

25. Article 6 provides:-

> *"Actors of persecution or serious harm*
>
> Actors of persecution or serious harm include:
>
> (a) the State;
>
> (b) parties or organisations controlling the State or a substantial part of the territory of the State;
>
> (c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7."

26. Article 7 provides:-

> "*Actors of protection*
>
> 1. Protection can be provided by:
>
> (a) the State; or
>
> (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.
>
> 2. Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia , by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.
>
> 3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Council acts."

27. While the Directive is not perhaps as completely clear as it might have been in ensuring that the "serious harm" must have been committed by either a State actor or by a third party in circumstances where the State was unable to offer effective protection (in the sense envisaged by Article 7(2)), the fact that Article 6 and Article 7 are to be found in the *substantive provisions* of the Directive and not simply in the definition provisions of Article 2 all suggest that these provisions must be read in an inter-locking fashion, so that the references to "serious harm" in the Directive must be read in the light of the substantive provisions of Article 6 and Article 7.

28. As we have already seen, it is otherwise with the Regulations in that the terms "serious harm" and "actors of persecution or

serious harm" are both defined in the interpretation provisions of the Regulations and the latter term is not used elsewhere in the substantive body of these Regulations. Had it been intended that an applicant for subsidiary protection must show that the serious harm of which he or she complains was also perpetrated by a State actor or by a third party in circumstances where the State had failed to offer effective protection, this should have been made clear in the substantive provisions of the Regulations themselves. Thus, for example, the problem would have been avoided completely had the reference to "persecution or serious harm" in Regulation 5(1)(c) been qualified by words such as "committed by actors of persecution or serious harm", since it would then be clear by reference to the definition of the latter term that it referred only to State actors and not *generally* to third parties.

29. It is unnecessary to offer any fixed view at this juncture on this difficult question. Of course, the Regulations must be interpreted in a manner which best assorts with the underlying purposes of the Directive it was designed to transpose: see, *e.g., Maher v. An Bord Pleanála* [1998] 2 I.L.R.M. 198 per Kelly J. At the same time, the Regulations cannot be interpreted in a fashion which is *contra legem* or which seeks to give the Directive a form of horizontal direct effect: see, *e.g.,* Case 397/01 *Pfeiffer v. Deutsches Rotes Kreuz* [2004] E.C.R. 8835, *Albatross Feeds Ltd. v. Minister for Agriculture and Food* [2007] 1 I.R. 221 and *Environmental Protection Agency v. Nephin Trading Ltd.* [2011] IEHC 67. It is sufficient for present purposes simply to say that in this respect the applicant clearly has demonstrated the existence of substantial grounds by which she can challenge the refusal of the Minister to grant her subsidiary protection and I propose to grant her leave on this point.

The Sickle Cell Disease Issue

30. The second argument advanced by Ms. M. is that if she is returned to Nigeria she will not secure adequate treatment for her sickle cell disease. This is a debilitating blood disorder which is characterised by chronic anaemia and by periodic crises. During these crises the blood cells change shape and clump together, causing reduced blood flow, severe pain and damage to other vital organs. Sufferers typically have chronic severe anaemia (Ms. M. has a haemoglobin between 7-8 g/dl, whereas adult females normally have haemoglobin levels of around 12 g/dl), enlargement of the liver and other complications.

31. Not surprisingly, sickle cell sufferers have reduced life expectancy, so that average life expectancy of a female sufferer is about 48 years. Sufferers typically need access to blood transfusions and pain management during these periodic crises. It is clear, however, that Ms. M. had access to blood transfusions while she was in Nigeria. Moreover, unlike the situation which obtains with regard to other potentially more expensive treatments, the country of origin information suggests that the condition by managed within the Nigerian health care system and that access to such treatment is not purely theoretical. Thus, the British-Danish 2008 Fact Finding Mission reported that:-

> "…no cure exists for sickle cell anaemia, but people with the condition can be monitored and managed effectively in Nigerian hospitals. Blood transfusion services are available in most hospitals in Nigeria if needed by people suffering from sickle cell anaemia. Some hospitals, however, suffer from a lack of blood transfusions, bone marrow transplants are available in hospitals where trained haematologists exist."

32. I have recently made occasion to consider at some length the extent of the State's obligations by virtue of both Article 40.3.2 of the Constitution and Article 3 ECHR with regard to the impact on the right to life of an asylum seeker where she be returned to her country of origin in circumstances where she would otherwise in practice be denied access to life saving treatment: see *MEO v. Minister for Justice, Equality and Law Reform*, High Court, 25th September, 2011. In that case I granted the applicant leave to apply for judicial review in circumstances where the evidence suggested that she would have no realistic access to life saving treatment and that she would be likely to die in penury, friendless and without dignity within a few months of her return to Nigeria.

33. The present case is somewhat different. The country of origin information suggests that access to treatment for sickle cell disease is a realistic option in Nigeria. Nor can it can be said that the applicant faces certain death within a relatively short period if she is returned to Nigeria even if such treatment were not reasonably available or even at all.

34. While I accept that the quality of treatment likely to be available to the applicant in Nigeria will be inferior to that available here, it cannot be that this case comes within the exceptional category of cases of which the well known decision of the European Court of Human Rights in *D. v. United Kingdom* (1997) 24 EHRR 423 is perhaps the best example. For this reason, I do not think that this is an appropriate case in which to grant leave in respect of this issue.