

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2010 No. 704 J.R.]**

**BETWEEN**

**C.N. (KENYA)**

**APPLICANT**

**AND**

**REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, ATTORNEY GENERAL AND IRELAND**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Eagar delivered on the 2nd December, 2014**

1. This is an application for judicial review seeking an order of *certiorari* quashing the decision of the first named respondent dated 14th May, 2010, to confirm the recommendation of the Refugee Applications Commissioner, and seeking an order permitting appeal of the applicant for a determination *de novo* by a separate member of the Refugee Appeals Tribunal.

2. The grounds upon which reliefs are sought are:-

(1) The applicant's claim for a declaration of refugee status under s. 17(1) of the Refugee Act 1996 (as amended) has not been lawfully determined by means of a procedure which complies with the minimum standards required to be met by Council Directive 2005/85/EC of 1st December, 2005, in that the said procedure deprives the applicant of an effective remedy against the first instance determination of her application for asylum before a court or tribunal in compliance with the requirements of Chapter V of the said Directive.

(2) The Tribunal failed to perform its function of assessment of the facts in accordance with the Refugee Act 1996, or the UNHCR Handbook and/or S.I. 518 of 2006/Council Directive 2004/83 and/or Council Directive 2005/85EC. The Tribunal erred in law and acted in breach of fair procedures in the manner in which such adverse credibility findings were arrived at. Such findings were based on conjecture and in the main referred to peripheral matters. The Tribunal further failed to make any findings on significant elements of the evidence, including evidence of past persecution. The Tribunal erred in law in making findings in respect of state protection and internal relocation which were unsupported by the evidence of which were made without regard to the adequacy or efficacy thereof. Country of origin reports were selectively relied upon. The Tribunal erred in law in taking into account matters irrelevant to its determinations and/or failed to take into account relevant considerations.

**Background**

3. The applicant swore an affidavit on 1st June, 2010. She stated that she was born on 26th October, 1974. She stated she was forced to join the Mungiki, which is an ethnic organisation and sect in Kenya. It is largely based in the Kikuyu tradition. The applicant stated that numerous attempts were made to force her to suffer Female Genital Mutilation (FGM). She said she was raped on two occasions by Mungiki members. She said that police protection is hopeless and is unavailable to her. As a result of her fears and her history which has left her with psychiatric difficulties, she fled from Kenya and arrived in Ireland on 15th May, 2009, and applied for asylum. She was interviewed by the Refugee Applications Commissioner on 12th June, 2009, and she was subsequently notified that the Commissioner had refused her asylum status by letter dated 14th July, 2009. She appealed against this determination to the first named respondent. Submissions were forwarded to the Chairperson of the Refugee Appeals Tribunal by letter of the solicitors for the applicant, and the hearing of the appeal by the first named respondent took place on 14th December, 2009.

4. The applicant stated that she was living with her son in Gathaithi village in the Nyeri, Central Province in Kenya. She stated that in October, 2008 she was approached by members of the Mungiki. It is generally accepted by both sides that in 2007, the Mungiki were a political religious sect in Kenya established in the 1980s. The group's members were mainly from the Kikuyu, Kenya's largest ethnic group (Mungiki were said to reject western values and support the values of traditional tribal customs and beliefs).

5. The sect advocates female circumcision (otherwise Female Genital Mutilation). They rejected westernisation in all things that they believed to be trappings of colonialism, including Christianity. In 2007 the Mungiki embarked upon a murderous campaign to instill fear by beheading drivers, conductors and Mungiki defectors. They are known for their extreme violence and are one of the most feared criminal organisations in Kenya. Substantial Country of Origin information documents were referred to in the course of submissions.

6. I note that Practice Direction HC56, dated 19th December, 2011, states at para. 24 that:-

"Where materials (such as volumes of Country of Origin information) are extensive they should be bound separately from the statement of grounds, affidavits and contested documents."

In large volumes of Country of Origin documentation particular passages relied on should be highlighted. It would have been very helpful to have had this material in accordance with the Practice Direction.

7. The Mungiki are said to operate in secrecy and the sect is described as amorphous with its members largely unrecognisable to outsiders. The group reportedly had a system of informants; members often changed their appearance in order to avoid detection by the police. According to Amnesty International, between April 2007 and mid June, 2007 the Mungiki killed "tens of people" including

police officers in Nairobi and central Kenya. Some of the victims were beheaded.

8. The applicant stated that she was living with her son and that she traded in the market. In October, 2008 she was approached by Mungiki members and she was told to join the movement for her own sake. She stated that a Mr. Nagiri came and asked her to join. The applicant said she had no choice but to join or something bad would happen to her and her whole family could be punished. The applicant said that if she went to the police the Mungiki would have killed her, and the police could betray her to the Mungiki. She said that members of the Mungiki do not go to church, that they went and prayed in the mountains and rejected western clothes. The applicant said she was born a Catholic. She got a message to go to an official ceremony where she took an oath to join the organisation. She said that a goat was slaughtered and roasted and traditional beer was drunk. She was forced to drink a concoction of blood and urine, and said that she was told that she was part of the Mungiki until death. The applicant said that she was told that she had to be circumcised and they had to go for circumcision after the oath taking. The applicant did not go to be circumcised as she was against this practice. The applicant said that she was involved with the Mungiki everyday and received secret messages given by Mr. Nagiri. In February, 2009 she said she became involved in collecting money for the organisation. She would stay behind a bush and villagers would come and contribute money. She stated that she noted the names of the contributors and how much they contributed. The applicant said that when she was collecting money she was with another Mungiki member and he would take the money at the desk. She also claimed that she was asked to recruit for the organisation and spy on people.

9. She said that in March, 2009 four people and Mr. Nagiri came to her house and asked her why she had not been circumcised. She said she was caught and pushed and the men were holding a knife threatening to circumcise her. She was told that as a punishment they were going to make her son watch. The applicant said she was shaking and begging and asked them not to do it in front of her son, and she told them that she would go to a woman in the village to have the circumcision performed. The applicant said she was then beaten up and told she had not lived up to her promise to recruit people. She was told she was not very active in the organisation and was probably a traitor. The applicant said it was just by God's grace that she was not circumcised at this point and she told the men in her house that she would go the following day to be circumcised. She said the men left and later that night Mr. Nagiri returned with two other people and she said she was assaulted and raped, and that her son heard everything. She said two days later Mr. Nagiri came back and raped her and threatened her again.

10. On 20th April, 2009, the Mungiki and the villagers were fighting (this seems to be documented by the Country of Origin information), and the applicant said she got her son and ran to the bush. She left her son with her mother and ran to a pastor's house in Nairobi. The pastor introduced the applicant to an agent and the pastor paid the agent 400,000 Kenyan shillings (about €3,359.00) to pay for the applicant's flight from Kenya. The applicant said that she had not previously known the pastor, but her cousin was a member of the pastor's church when her cousin lived in Nairobi. She felt unsafe when she was hiding and she could not go to her mother, as her mother's house was in the village. She said the Mungiki were in all towns in Kenya and the pastor told her that he knew someone to assist her. She was introduced to the agent whose name was Thompson Smith, and that the agent had decided that she should travel to Ireland and he told her that he was going to take her to a safe place. Her travel took her to London and then on to this State. The applicant said she had not applied for asylum in London as she was following the agent. When they arrived in Ireland, Thompson Smith disappeared and took the passport and boarding pass.

11. The first named respondent analysed the applicant's claim and the first finding of the first named respondent was that the applicant spoke English and was relatively well educated. The first named respondent also stated that it would be reasonable to expect that the applicant would have sought asylum as soon as practicable after leaving Kenya rather than risk travelling onward in an illegal manner, and the first named respondent referred to s. 11B(b) of the Refugee Act 1996, as amended, indicating that her actions in this regard were not indicative of a person fleeing persecution.

12. It is my view that this issue was peripheral to the core issue and whilst accepting that the first named respondent was entitled to take it into consideration, it could not have been a key element in the determination.

13. The first named respondent said that it was not credible that a violent group such as the Mungiki, who specifically came to the applicant's home with the intention to forcibly circumcise the applicant and who had told the applicant to be circumcised in October, 2009 when she joined the group, would not have performed the procedure simply because the applicant begged and said that she would get it done in the village by the relevant woman the next day.

14. The first named respondent also indicated that it was not credible that a pastor who had utilised such a significant sum of money, particularly in Kenyan terms, to single out the applicant and pay the applicant's travel to the UK and then onward to Ireland. The applicant's statement that when she was leaving Kenya she did not know where she was travelling to and it was only on arrival in the United Kingdom that she was told she was going to Ireland. The applicant's account in this regard raises further credibility issues for the first named respondent and cited a document from the Immigration and Refugee Board of Canada which said that while the Mungiki were banned in Kenya in 2002, sources from 2006 and 2007 indicate that police in Kenya have been cracking down on the Mungiki. A special police unit and a shoot to kill policy had reportedly been established in order to deal with the banned organisation. The first named respondent concluded that while it is clear the Mungiki do pose a problem for the Kenyan authorities and that some police officers and politicians are said to have links to the Mungiki, nevertheless the Mungiki are a banned organisation and the authority have arrested leaders and members of the Mungiki and are dealing with the threat the Mungiki pose.

15. Criticism was made of the decision of the first named respondent in that she did not indicate whether or not the applicant was a member of the Mungiki organisation. It is noticeable that the first named respondent's decisions on credibility did not relate to her membership of the Mungiki, and I interpret that as indicating that the first named respondent found that the applicant was, indeed, a member of the Mungiki and had been so initiated into the organisation.

16. In summary, the first named respondent raises the following issues of credibility:-

(1) Her travel and not seeking asylum in the United Kingdom.

(2) It is not credible that a violent group such as the Mungiki who specifically came to the applicant's home with the intention of forcibly circumcising the applicant would not have performed the procedure.

(3) It is also not credible that a pastor would utilise such a significant sum of money.

Having found these issues of credibility she then went on to deal with the issue of state protection and quoted a number of Country of Origin sources.

## **State Protection**

17. On the question of state protection, the first named respondent referred to a significant volume of Country of Origin information. Some of this tended to suggest that former member or defectors, as they are referred to, of the Mungiki are being subjected to a regime of murder, revenge and terror. It is, of course, the case that on reaching a decision on the adequacy of state protection it is unnecessary to be satisfied that the state in question is in a position (which no state is) to provide absolute protection to its citizens.

18. The role of the court in judicial review proceedings was summarised by Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] I.R. at p. 39. He summarised the decision of Henchy J. in *the State (Keegan & Lycett) v. The Stardust Victims Compensation Tribunal* [1986] I.R. 642 and set out the following three circumstances in which the court may intervene to quash a decision on the grounds of unreasonableness or irrationality:-

"1. It is fundamentally at variance with reason and common sense.

2. It is indefensible for being in the teeth of plain reason and common sense.

3. Because the court is satisfied that the decision maker has breached his obligation whereby he must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."

### **The Decision**

19. In relation to the issues of credibility, I have already expressed the view that the travel arrangements through Britain were peripheral to the core issue. However, I do find that the finding in relation to the credibility of the applicant in relation to the forcible circumcision of the applicant by a group of men does not appear to be a reasonable decision and taking into account what was likely to be involved in a forcible circumcision of the applicant.

20. This is the key issue of credibility, and it appears to me to be an unreasonable one. Forcible genital circumcision is not generally carried out by men and the first named respondent failed to give any reason as to why she did not believe why she found it incredible that the group of men did not perform the circumcision. This is the key issue of credibility, and it appears to me to be an unreasonable one. With regard to state protection, again it seems that the limited attention to the Country of Origin information has been selected in relation to the position of the Mungiki and the police in Kenya.

21. The decision of the court will be to grant an order of certiorari quashing the decision of the first named respondent and remitting the matter for consideration by another tribunal member.