Neutral Citation Number: [2009] IEHC 79

THE HIGH COURT

2007 1475 JR

BETWEEN/

C.D.D.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL, MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, ATTORNEY GENERAL, IRELAND AND THE HUMAN RIGHTS COMMISSION

RESPONDENT

RESERVED JUDGMENT of Mr. Justice Cooke delivered on the 6th day of February, 2009.

1. This application for leave to apply for judicial review is brought by the applicant in respect of the decision of the Refugee Appeals Tribunal, ("the Tribunal,") of 11th July, 2007, in which her appeal against the report and recommendation of the Refugee Applications Commissioner of 23rd January, 2007, was rejected and the latter recommendation that she be not declared a refugee was confirmed. If leave is granted, the applicant will apply for an order of *certiorari* to quash that decision, ("the Contested Decision") and an injunction prohibiting the Minister from making a deportation order against her.

2. The applicant is a national of the Ivory Coast. She was born in 1968. She fled her native country and claims that she did so to escape from her parents who were trying to force her to undergo female genital mutilation and who, she says, had sent men to kill her for refusing to submit to that circumcision. Briefly stated, the Tribunal member concluded that, whatever subjective fears the applicant may have had of being subjected to FGM if she returns to the Ivory Coast, there was no support for them on an objective basis and that she had not established that there is a reasonable degree of likelihood that she has a well founded fear of persecution for any Convention reason.

3. The proposed application for *certiorari* is to be based upon two of the 14 grounds originally canvassed in the statement of grounds;

> 1) The Contested Decision is irrational and unreasonable in that it makes a series of adverse credibility findings without assessing all of the evidence presented and, in particular, without giving adequate consideration to the country of origin information, to the medical and anthropological evidence, the identity documents, the explanations given by the applicant and the legal submissions made on her behalf;
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> 2) The Contested Decision is vitiated by errors of law and fact in its assessment of the availability of State protection.

Extension of time

4. A preliminary issue arises as to the need to extend time for the present application. It is not disputed that the application was commenced well outside the time limit of 14 days prescribed by s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000. The chronology, as originally explained to this court, is as follows;

> (a) The decision of 11th July was sent to the applicant under cover of a letter of 26th July, 2007.
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> (b) On 2nd August, the Refugee Legal Service, which had been representing her and which had also received the Contested Decision, wrote to her saying that it did not believe that she had grounds for an appeal, advised her of the 14 day time limit for judicial review and of her option of consulting a private solicitor.
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> (c) In early August she approached her present solicitor, Mr. Mulvihill in Cork, who informed her that his office would be closed for the holidays so that he would be unavailable for some time. He suggested that she try to find a solicitor in Dublin. The applicant claimed that the Cork solicitor told her that he would be unavailable during both August and September. His affidavit merely says: "for some time".
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> (d) By letter of 30th October, 2007, she was informed that the Minister proposed to make a deportation order.
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> (e) On 3rd November, she returned to the office of Mr. Mulvihill in Cork and the present proceedings were commenced on 9th November.

5. When this application was listed for hearing and opened to the court on 16th January, 2009, the Court expressed reservation as to its ability to find that there were good and sufficient reasons for extending the time under s. 50 on the basis of the above explanation and particularly in the absence of any explanation as to what had been done, if anything, in the period from early August 2007, until after the receipt of the letter of 30th October, 2007, and the threat of deportation.

6. On the application of counsel for the applicant a short adjournment was granted to enable enquiries to be made as to

whether any explanation for that delay could be furnished.

7. As a result, a supplemental affidavit was filed which provided the following additional information;

- The applicant contacted another solicitor on 7th August, 2007, who also said that he would be on holiday for some time and could not act for her.

- She then contacted a third firm in Dublin on 7th August, 2007. This firm asked her to post or fax her file to them. She did so and phoned them every day until she was asked to come to Dublin for a consultation on 19th August.

- She went to Dublin for a consultation with this firm on 24th August and says that, although she went to their offices and signed some paper there, she was told she should have gone to the Four Courts but at that point it was too late to go there and she went back to Cork.

- Two days later she says she was contacted by that firm and told that they could not act for her and advised her to wait for a letter to apply for leave to remain on humanitarian grounds. It is not clear what happened to the file that she had sent to them.

- She contacted another firm, she does not say when, but they too said they could not act.

- She also says that after the 14 days had expired she thought there was no possibility of starting legal proceedings.

8. The effect of this evidence is that the court is left in the position where there is no explanation offered as to why no step was taken in September or October to start proceedings. In particular, if one accepts that it might be very difficult for someone in the applicant's position to obtain the services of a solicitor during August, if the applicant had formed the intention to challenge the decision why did she not renew efforts in September? More importantly, if it is accepted that she believed Mr. Mulvihill would be away throughout both August and September, why did she not contact him in October when he was the one member of the profession who did not express an unwillingness to act for her?

9. In accordance with s. 5 of the 2000 Act this Court cannot extend the time for this application, unless there is good and sufficient reason to do so. The 14 day time limit is undoubtedly a tight one, especially when one has regard to the nature of the subject matter and the difficulties under which both an applicant and legal advisers may operate. The asylum seeker may be in a vulnerable and distressed condition. He or she may be frightened of all authorities, traumatised by experience and have difficulty in communicating. Documents may require translation and interpretation to English from a rare dialect may be needed. All of these are factors which the court must bear in mind. In many of these cases, delay for a few weeks after the statutory time has expired can thus almost routinely be excused.

10. In this case, however, the delay is substantial, being from 14 days after the apparent receipt of the Tribunal's letter of 26th July, 2007, forwarding the decision, that is to say from about 10th August until 9th November, 2007. Even if the entire holiday month of August is discounted, the delay is still in excess of two full months.

11. In its judgment on the article 26 reference of the Bill for the 2000 Act, the Supreme Court considered the constitutional compatibility of this 14 day limitation. While recognising the very short limit imposed, the Court found the section compatible with the Constitution because, largely, of the generous jurisdiction of the court to extend time.

12. It is clear, therefore, having regard to that approach to the section and to the inherent problems that an asylum seeker may face as one in an entirely strange country speaking no English and without any resources or friends, that the Court should, where possible, lean in favour of extension where it is reasonably possible to do so in the light of the factors to be taken into account. Nevertheless, the section embodies a clear and constitutionally valid legislative objective and the generosity of the court's discretion cannot be stretched so that it undermines the section or deprives it of effect. Even in a case where substantial grounds for leave are well established, there may be no basis upon which time can be extended.

13. It is clear that at the early stage when she contacted Mr. Mulvihill and then sought unsuccessfully to engage a solicitor in Dublin the applicant can be said to have exercised the required diligence. One might also be inclined to assume that she had an intention to commence proceedings had anyone been willing to act for her at that point, if only because most asylum seekers can be expected to take any step reasonably available to obtain refugee status. There remains, however, the very substantial and unexplained inaction throughout September and October until the threat of deportation was raised. It is also clear from the case law that the court should have regard to whether the case proposed to be made is at least arguable. (see the judgment of Hardiman J. in the *GK* case). This is of importance because the case law indicates that even in extreme cases of delay over years, an extension may be required to a limitation period in order to avoid the risk of serious injustice to an applicant or claimant. For this reason, having heard the submissions of the parties on the application to extend the time, the court invited them to proceed to present their arguments as to the existence of substantial grounds in this case justifying the grant of leave.

14. As already indicated, the applicant arrived in Ireland to claim refugee status as a 38 year old woman, a mother of two children who remained in the Ivory Coast and as a widow, her husband of 20 years having died of natural causes roughly a fortnight before her departure. She claims to have been under pressure from her parents on reaching puberty to undergo FGM and that they had assaulted her in their attempt to force her when she was 15 years old. She left them and lived with an aunt for three years. She was raped at 18 years of age by her aunt's husband and left that home to stay with friends. She then met her partner or husband and lived with him and under his protection, in effect, until his death in November, 2006. Her claim to refugee status is based on her fear of persecution if returned to the Ivory Coast, in that having lost the protection of her husband she would again be under threat from her parents, who would still be intent on killing her because they believe that harm or bad luck would befall the family as a consequence of her refusal to submit to such treatment.

15. Two particular aspects of the applicant's account of her history seem to have featured in evaluation of her credibility before the Tribunal. On the one hand, the applicant accepted that she had no direct problem from her parents in the

years she lived with her aunt, although they visited the aunt's house. The Tribunal member expressed doubt as to the reality of the parents' attempts to force her to undergo FGM if they knew where she was when she was still a child and visited there. She explained that her aunt always alerted her in advance of the visits and she would stay away while the parents were there.

16. Secondly, after her husband's death her parents' threats to her were resumed and she describes how, having returned home after a gynaecological procedure on 16th November, 2006, she came upon two intruders who were either in the house or attempting to break in and she believed that these men had been sent by her parents to kill her. She escaped from the house with her two children and fled to the house of a friend of her husband. Discrepancies in the account of this incident are commented upon in the Contested Decision and the Tribunal member finds that the account is too vague and lacking in detail to be accepted as being linked to her parents' alleged threat to kill her.

17. The Contested Decision rests effectively on two conclusions in rejecting the applicant's claim;

> 1) Even if she has a subjective fear of her parents' threats to kill her, the fear has no objective support and the applicant has not, therefore, established a well founded fear of persecution for a Convention reason. Country of origin information indicates that while FGM may still persist in the Ivory Coast it is performed on young girls at puberty as a traditional right of passage. The applicant is 38 years of age, a mother of two children, who has, in effect, successfully resisted attempts to coerce her since the age of 15;
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> 2) The applicant is not in need of international protection because she has not taken reasonable steps to exhaust the means of redress available to her from the State authorities in the Ivory Coast. Most recent country of origin information shows that FGM is illegal in the Ivory Coast and that criminal penalties are imposed on those who perform it. Several practitioners were prosecuted in 2004 and the Tribunal was satisfied that police protection would be available to the applicant.

18. The grounds proposed to be raised against the validity of the Contested Decision are, in effect, directed at the assessment of credibility made by the Tribunal member. It is submitted that the Tribunal member made errors of fact and has been irrational and unreasonable in reaching the negative findings of credibility. More importantly perhaps, it is argued that evaluation of credibility failed to consider and to give adequate weight to the medical and anthropological evidence and to country of origin information.

19. In so far as the alleged errors of fact are concerned the Court is satisfied that, if such they be, they have no material bearing on the fundamental basis of the Tribunal member's appraisal. The date of her husband's death is given as December, 2006, when he actually died in November of that year. It is suggested that the decision's description of the break in on 16th November is wrong in detail but this relates to whether she found the intruders in the house when she returned to it or was awoken by them trying to break in. There is no arguable case therefore that the contested Decision ought to be quashed on grounds of factual error.

20. The Court is equally satisfied that there is no substance to the challenges to the adverse findings of credibility. There clearly was a basis in the evidence and information from which the Tribunal member was entitled to draw inferences giving rise to doubt;

> A. It is a fact that the applicant reached her present age without submitting to FGM, even if for most of the years since she was 15 she had been protected by her husband. It is perfectly tenable as an inference to draw from the fact that if she could evade her parents coercion when she was a child and most exposed to the risk of FGM, that she is in far less danger now;
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> B. Her explanation that her aunt warned her of her parents' visits in no way rebuts the inference that her parents' attempts to coerce her over a period of three years could be, at best, exaggerated;
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> C. The doubts about the break in are also reasonable and rational. She does not claim to have seen or identified the men. They may have been burglars, but it is only surmise on the applicant's part that they were sent by her parents.

21. The ground based on medical and anthropological evidence turns largely on a medical legal report of Dr. Joan Giller, an obstetrician and gynaecologist who has a degree in social anthropology who has worked in Africa and made a study of the practice of FGM. This report confirms that the applicant's gynaecological problems have nothing to do with her mistreatment at the hands of her parents but she says that the scar on the applicant's right buttock is "consistent" with her account of having been beaten by her mother during her teenage years. Dr. Giller devotes part of her report to describing the practice of FGM and its place in the cultural practices of West Africa, including the Ivory Coast. She says the practice is on the increase there and that in 2005, 80% of girls had been circumcised. She describes the practice as usually performed on girls in their teenage years in a forest followed by a big village feast. She says it is not only a question of honour but can be a question of life and death for a family as; "It is believed by animists that harm will come to the family if the ritual is not observed". She then gives her opinion that this is the reason that Ms. Douhore's parents have continued to pursue her even though she is now an adult.

22. It is by reference to this opinion and the other country of origin information on the prevalence of the practice in the Ivory Coast that it is argued that the Tribunal member failed to assess correctly the reality of the basis for the applicant's fear of persecution. There could be no doubt, however, that the Tribunal member did take account of this evidence. The Giller report is expressly mentioned on the third page of the Contested Decision and its description of the gynaecological problems as being unrelated to the assault is referred to and relied upon at page 17. The Tribunal member expressly prefers, however, to rely on more recent direct country of origin information on the situation as regards FGM in the Ivory Coast than on, as it is put, the "doctor's certificate as an alleged source of information on this topic". Whatever one may think of the language thus used about the report by Dr. Giller, there is no doubt that she is expressing a purely personal opinion when she says the animist fear of harm befalling a family explains why the applicant's parents continued to pursue

her.

23. The Tribunal member is entitled and indeed obliged to make an objective assessment of the reality of a fear claimed by an applicant. Country of origin and anthropological evidence may corroborate the persistence of such a practice in the region and may explain its tradition and cultural force but the Tribunal member must assess whether the actual circumstances of a particular claimant are such that the alleged fear has a real and objective basis in the specific case. In this case the Tribunal member was faced with a 38 year old woman who had not submitted to alleged coercion since she was 15 years old, who had left two children in the safe custody of her brothers and had left the Ivory Coast within a few weeks of losing her husband and in claimed fear of the renewed harassment of her parents. The Court considers that the basis of the Tribunal's finding on that issue in the specific personal circumstances of the applicant could not reasonably be said to be undermined by the general information drawn from Dr. Giller's report or the country of origin information submitted by the applicant.

24. Finally, it is equally clear that the Tribunal member had a cogent basis for concluding that the protection would be available to the applicant from the authorities against the threats of her parents. It is true that she claimed to have complained to the police when she was 18 years old about the coercion to under go circumcision and that they dismissed it as a traditional matter. There does not appear to have been any attempt to seek police protection against the alleged death threats at any time after her husband's death and before she fled.

25. The Court, therefore, finds that it is not in a position on the evidence offered to find that there is good and sufficient reason to extend the time, such as would be necessary to overcome the substantial delay in this case, particularly as regard the inaction in September and October 2006. The Court is comforted in having to reluctantly reach that conclusion by the necessary assessment that there does not appear to be a reasonable or arguable basis in the proposed grounds which would require or justify interfering with the Contested Decision. If leave were to be granted therefore, the Court considers that the proposed grounds afford no reasonable prospect of success.

26. Leave will therefore be refused.