Neutral Citation Number: [2009] IEHC 5

THE HIGH COURT

2006 No. 1283 JR

BETWEEN

E.A.E., O.P.E. (A MINOR) SUING THROUGH HIS NEXT

FRIEND AND MOTHER E.A.E.

APPLICANTS

AND

REFUGEE APPEALS TRIBUNAL AND MINISTER FOR

JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT delivered by Mr. Justice McMahon the 16th day of January, 2009

The applicant seeks leave to bring judicial review proceedings seeking various orders and declarations including an order of *certiorari* to quash the decision of the first respondent dated the 3rd October, 2006 that the applicant failed to establish a well founded fear of persecution as defined under s. 2 of the Refugee Act 1996 (as amended) and a recommendation that the applicant should not be declared a refugee.

Factual Background
The applicant is a Nigerian national who left her country of origin on the 28th March, 2006 and arrived in this state on 29th March, 2006. She submitted a questionnaire for refugee status application on 5th April, 2006.

The applicant attended the University of Benin and studied pharmacy there. She got married in late 2003. Her husband also attended the University of Benin and worked as a pharmacist.

At question 22 of the questionnaire, the applicant stated that she was claiming to have a fear of persecution because of membership of a particular social group, the Urhobo tribe. At question 21, she stated that she and her husband come from a tribe whose people have traditional beliefs that every female must be circumcised. She stated that after she got married her husband's family found out that she had not been circumcised and they began to insist that it must be performed. She stated that her parents could not do anything about it because, according to tradition, once you are married you belong to your husband and his family. The applicant stated that her husband's family harassed and threatened her about the issue. The applicant claimed that when they discovered that she was pregnant the pressure on her increased and her own home became unbearable.

The applicant was living in Lagos but went to Kano to stay with her husband's friend in February 2006, when the pressure was increasing on her. She returned to Lagos when Muslims began protesting about the publication of "the Danish cartoons". (These were cartoons published in a Danish newspaper at that time allegedly critical of Muslim religious beliefs.) On her return she stayed in a friend's house. She stated that while she was there she was frightened that her husband's family would find her. The applicant left Nigeria from Lagos on the 28th March, 2006.

At question 29 of the questionnaire the applicant stated she feared that if she returns to her country of origin she will be forcibly circumcised with unsterilised traditional tools. In the applicant's affidavit of 27th October, 2006, she claims that the practice of circumcision or female genital mutilation (hereinafter "FGM") is barbaric and extremely dangerous, carrying very serious health risks including the risk of death or the contraction of HIV.

The applicant's interview under s. 11 of the Refugee Act 1996 (as amended) took place on the 14th June, 2006, and the interview was conducted in English.

The applicant's application for refugee status was refused by decision of the Refugee Applications Commissioner on the 19th June, 2006, and communicated to the applicant on the 26th June, 2006.

The applicant appealed this decision to the Refugee Appeals Tribunal. The hearing took place on the 17th August, 2006. On the 3rd October, 2006, the Refugee Appeals Tribunal affirmed the decision of the Refugee Applications Commissioner and refused the application for refugee status.

Grounds for Application
The grounds for this application for leave to bring judicial review proceedings can be set out in six headings as the applicant has done in the written submissions filed with the court:-

A. The decision of the Tribunal Member contains a material error of fact regarding the objective country conditions in relation to FGM on which the Tribunal Member has relied in the adjudication and recommendation.

B. The conclusion of the Tribunal Member that state protection might reasonably have been forthcoming and that protection was or would be available to the first named applicant if she requested it, is unreasonable, irrational and

flies in the face of common sense and the weight of information before the Tribunal Member which confirmed that there was no federal law banning the practice of FGM, no local law in Lagos and no effective state protection against this practice and which outlines the ineffectiveness of those laws that did exist in individual states where laws had been passed.

C. The Tribunal Member erred in law and acted *ultra vires* s. 2 of the Refugee Act 1996 and Article 1(A)(2) of the Geneva Convention as set out in the Third Schedule of the Refugee Act 1996 and applied an incorrect test in considering the matter of state protection. The Tribunal Member erred in law and/or misconstrued s. 2 of the Refugee Act 1996 and Article 1(A)(2) of the Geneva Convention as set out in the Third Schedule of the Refugee Act 1996. The Tribunal Member has applied an incorrect approach or criteria to the assessment of state protection. The first named applicant could not reasonably be expected to seek state protection against the threat of the application of FGM in circumstances where there was no applicable law or effective law against the practice.

D. The Tribunal Member in her recommendation had considered irrelevant and extraneous factors in assessing state protection. In particular, the Tribunal Member has erred in considering protection from NGO groups. Without prejudice to the foregoing, reliance by the Tribunal Member on the purported availability of protection from NGOs is unreasonable and irrational having regard to the information in that regard which was before the Member.

E. The Tribunal Member erred in law and acted *ultra vires* s. 2 of the Refugee Act 1996 and Article 1(A)(2) of the Geneva Convention as set out in the Third Schedule of the Refugee Act 1996 and in breach of the first named applicant's right to fair procedures in failing to assess and/or properly assess the objective element of the first named applicant's fear of persecution and the reasons for it. The Tribunal Member further erred in law and acted *ultra vires* ss. 2 and 16 of the Refugee Act 1996 and in breach of fair procedures and natural justice in failing to consider and/or have regard to or keep in mind in the assessment conducted, all available information regarding objective country conditions.

F. The Tribunal Member erred in law and acted *ultra vires* and/or in breach of natural justice and in contravention of relevant United Nations High Commissioner for Refugees (UNHCR) guidelines with respect to the approach adopted to and consideration of the matter of internal relocation.

Relief Sought

1. A declaration that the decision of the 4th October, 2006, of the first named respondent and the recommendation of the Tribunal Member of the 3rd October, 2006, are *ultra vires* and without efficacy and were reached in infringement of the applicants' rights to constitutional and natural justice and fair procedures.

2. An order of *mandamus* directing that the applicants' claim for refugee status be remitted for hearing by the Refugee Appeals Tribunal as directed by this court.

3. An order of *certiorari* quashing the decision of the first named respondent of the 4th October, 2006 and the recommendation of the Tribunal Member of the 3rd October, 2006, refusing the applicants a declaration of refugee status.

4. Further and other relief including an extension of time for the making of this application or any part thereof.

5. Costs.

Summary of Applicants' Submissions

The applicant submits that the Tribunal has accepted in totality the applicant's account of her past experiences. In circumstances where the applicant's credibility was totally accepted, it is stated, the sole basis for the negative decision of the Tribunal Member was the matter of state protection and the Member's conclusion that adequate state protection would be available to the applicant.

The applicant submits that, as in *Imoh v. Refugee Appeals Tribunal* (Unreported, High Court, Clarke J., 24th June, 2005) there are substantial grounds to contend that in circumstances where there is no federal law against the harm and risk feared and no adequate machinery in reality on the ground for the detection, prosecution and punishment of the acts of persecution feared, the Tribunal Member's conclusion that there is adequate state protection available is invalid, unlawful and/or unreasonable and irrational. The applicant submits that the Tribunal Member in her decision failed to apply the test with respect to state protection correctly. Furthermore, it is submitted, the Tribunal Member has erroneously relied on the existence of a procedure *per se* as a basis for a conclusion that there is adequate protection available. The applicant submits that the correct test to apply is one that focuses on the operation of the system in reality and not its mere existence.

The applicant also submits that the applicant was not obliged to approach the authorities in circumstances where there is no effective system of protection and where protection against the persecution feared cannot reasonably be expected to be forthcoming.

The applicant also submits that there was an obligation on the Tribunal Member to have regard for the totality of the country information which was before her and not to engage in selective reliance with respect to it. The applicant relies on the absence of "…rational analysis of the totality of the evidence" referred to by Clarke J. in *Muia v. O'Gorman (Refugee Appeals Tribunal)* (Unreported, High Court, 11th November, 2005)

Summary of Respondents' Submissions

The respondents submit that the Tribunal Member was entitled to have regard to the applicant's opportunity to report to the police and that she was entitled to have regard to the availability of protection both from non-state and state bodies, including the National Human Rights Commissioner (NHRC).

It is submitted by the respondents that the Tribunal Member's approach to the issue was in accordance with the approach indicated by the Canadian Supreme Court in *Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689. In *Ward*, La Forest J. stated:-

> "[T]he claimant will not meet the definition of 'Convention refugee' where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state."

The respondents also refer to the decision of Birmingham J. in *G.O.B v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 3rd June, 2008) in which case the learned judge said:-

> "I feel I must also have regard to the principle, accepted both domestically and internationally, that absent clear and convincing proof to the contrary a state is to be presumed capable of protecting its citizens."

The respondents submit that the applicant has not demonstrated substantial grounds for impugning the first named respondent's decision of the 3rd October, 2006.

Judgment
It is to be noted that the credibility of the applicant as to the facts of her case were not disputed by the Tribunal. Essentially, the Tribunal found that although there was no federal law or state law in Lagos condemning FGM, there were some states in the north in particular where it was denounced in legislative terms although enforcement by the police was unreliable and not always availed of as a remedy by women who were threatened with FGM, since many of the police consider it as a family matter. Moreover, as the applicant admitted that she did not seek assistance from the police the Tribunal Member finds that, she could not in the circumstances claim that her own government could not or would not protect her. The Tribunal Member also considered that relocation was clearly an option for the applicant. The relevant part of the RAT's decision can be quoted with profit at this juncture.

> "A Convention refugee is a person outside her country who needs and deserves international protection because she reasonably believes that her civil or political status puts her at risk of serious harm in that country, and that her own government cannot or will not protect her." (At p. 5 of decision)

Addressing each of the matters in the definition the member of the Tribunal accepts that the applicant is outside her country of origin and that there is a genuine subjective fear present and a valid basis for it. The member of the Tribunal also apparently accepts that the persecution is for a Convention reason. The Tribunal next turns to the question of state protection:-

> "There must be serious harm on a failure of state protection. In this regard see *Islam & Shah v. S.S.H.D.* [1999] 2 All E.R. 545 per Lord Hoffman (United Kingdom House of Lords, 25th March, 1999) wherein it states:-
>
> > 'The evidence was that the state…denied them the protection against violence, which it would have given to men. These two elements have to be combined to constitute persecution…persecution = serious harm + failure of state protection.'
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> Where persecution does not emanate from a state, it has to be demonstrated that the state is either unwilling or unable to provide protection. The state is not required to provide perfect protection. The applicant's case is that she did not seek the assistance of the police in Nigeria as they would say it was a family matter." (At p. 6)

She then continues:-

> "Even if we accept that the risk of harm (Female Genital Mutilation) by the non-state agent (the applicant's in-laws) is Convention related, the issue of state protection has to be addressed. However, when one asks the question was there a failure of state protection, same cannot be answered in any definitive sense because the applicant did not seek state protection. In such circumstances, it is not possible to judge whether there would have been, in the circumstances of the individual, a sufficiency of protection available and therefore it is necessary to gauge whether the system in place is theoretically adequate, (see *Attorney General v. Ward* [1999] 2 S.C.R.. 689)."

With regard to the level of protection available in Nigeria and such circumstances, the Tribunal member relies on country of origin information which she summarises as follows:-

> "In that regard the country of origin information annexed to the section 13 at Tab A (Operational Guidance Note Nigeria – 2005) indicates at para. 3.9.4 that in states where FGM is prohibited in law, a female seeking to avoid FGM in spite of pressure from her family to do otherwise has the opportunity to make a complaint to the Nigerian Police Force (NPF) or the National Human Rights Commission (NHRC). However, in practice very few complaints are made to those bodies. The matter is usually dealt with within the family and on occasion traditional leaders may also be asked to intervene. However, the traditional attitude of a police officer or a village council would normally determine their level of concern and intervention. Cultural attitudes would still be prevalent and some victims would probably never have the courage to take the case to court. Most women therefore resort to relocating to another location if they do not wish to undergo FGM. Furthermore, there are between ten and fifteen NGO's operating throughout Nigeria who are exclusively devoted to supporting women including those escaping FGM. The support provided includes provision of accommodation and shelters.
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> At para. 3.9.7, it indicates that while protection and/or assistance is available from governmental and non-governmental sources, this is limited. Those who are unable or owing to fear are unwilling to avail themselves to (*sic*) the protection of the authorities can safely relocate to another part of Nigeria where the family members who are pressurising them to undergo FGM would be unlikely to be able to trace them.
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> Other country of origin information (Nigeria Country Report, April 2005) indicates that the attitude of the Federal Police is that FGM is a family matter, but that if a girl desires to avoid FGM in spite of pressure from her family to do otherwise she has the opportunity to complain to the Nigerian Police Force or the NHRC and in addition she may seek protection from women lawyers or NGO's (para. 6.105). It would appear that unless a complaint is made the NPF ignore the practice. Thus it is clear that there is room for improvement with regard to the eradication or discouraging of FGM, nonetheless protection is available if same is sought.

> This raises the question as to the level of state protection which is to be expected from a home state. It is clear that there must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of behaviour which is contrary to the purposes which the Convention requires to have protected. Furthermore, there has to be ability and a reasonable willingness to operate that machinery. As already stated, the state is not required to provide perfect protection. Thus on that basis, one could say that hers was a situation in which state protection 'might reasonably have been forthcoming' when viewed in the context of that information. In such a situation an applicant's failure to approach the state for protection defeats the claim (*Attorney General v. Ward* [1999] 2 S.C.J. 689).
>
> Thus I am of the view that protection was/would be available and consequently the principle of surrogacy does not arise." (At pp. 7-9 of decision)

Reading the country of origin information relied on by the Tribunal member herself, I have come to the conclusion, as urged on me by counsel for the applicant, that the conclusion reached by the RAT is arguably unreasonable. It is very debatable in my opinion, from the country of origin information relied on, that a more reasonable conclusion would be that the state protection would not be forthcoming, where there is no federal or state law on the matter, and where the police's attitude is that FGM is a family matter.

The country of origin information relied on indicates that:-

> "There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of behaviour which is contrary to the purposes which the Convention requires to have protected."

The Tribunal member emphasises "the state is not required to provide perfect protection", but on the information available the decision maker must surely examine whether a reasonable level of state protection is provided and this does not shine through the material relied on by the Tribunal member.

It is also valid to point out that the obligation to provide protection is on the *state* and emphasising the presence and assistance sometime forthcoming from NGO's and women's lawyers groups would not meet the Convention standard in that regard.

Finally, the applicant takes issue with the final sentence of the Tribunal Member's decision quoted above:-

> "In such a situation an applicant's failure to approach the state for protection defeats the claim (*Attorney General v. Ward* [1999] 2 S.C.R. 689)."

The applicant's argument is that this is not an absolute rule of law. Each case must be determined on its own facts. Even the country of origin information relied on indicates the limited response that such complaints elicit in many (if not the majority of) cases. It is arguable that before such a conclusion could be reached a more thorough analysis and investigation should have been undertaken. In my view, the authority relied on by RAT to reach her conclusion i.e. *Attorney General v. Ward* does not justify the member's final determination.

La Forest J. in addressing failure to seek help from the state in *Ward* having quoted Professor Hathaway goes on to say:-

> "Like Hathaway, I prefer to formulate this aspect of the test for fear of persecution as follows: only in situations in which state protection 'might reasonably have been forthcoming', will the claimant's failure to approach the state for protection defeat his claim."

The question then is whether state protection 'might reasonably have been forthcoming'. This will depend on the circumstances of the case and the country of origin information available to the decision maker. The country of origin information as already mentioned, does not inspire confidence in that regard. On the contrary, it would seem to support the evidence of the applicant that recourse to the police would have been futile. Further, it must be remembered in such an uncertain environment a request to the police in such cases might have risks attached to it for the applicant, whose location may be disclosed to her in-laws.

In *Imoh v. Refugee Appeals Tribunal* (Unreported, High Court, 24th June, 2005) Clarke J. in a case where the matter of state protection against FGM in Nigeria with respect to Lagos was also considered made the following statements in the course of granting leave:-

> "Having stated the above general principles it is necessary to turn to the facts of this case. It is clear that the relevant country of origin information before the RAT established that there was no federal law outlawing Female Genital Mutilation in Nigeria, that there were state laws so outlawing in a relatively small number of Nigerian states but that even in those cases it was very difficult to secure from the authorities any action for enforcement."

Referring to the Tribunal member's consideration of state protection he continued:-

> "It is difficult to understand the reference 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."

This reflects my view also in the present case. Furthermore, even though *Imoh* can be distinguished on its facts because in that case the decision maker proceeded under the error that the practice of Female Genital Mutilation was illegal in Lagos, I am nevertheless of the view that Clarke J's statement on which this court relies is correct in principle.

I would like to make it clear that I have carefully considered the various authorities relied on by the respondent and there is much in these cases with which I have no quibble. (See *Okeke v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Peart J., 17th February, 2006); *Darjania v. O'Brien sitting as the Refugee Appeals Tribunal* (Unreported, High Court, McGovern J., 7th July, 2006); and *H.O. v. Refugee Appeals Tribunal* (Unreported, High Court, Hedigan J., 19th July, 2007).

I accept for example that in the context of refugee applications it must be assumed that a state is presumed capable of protecting its citizens. But none of these authorities hold that this is an irrebuttable presumption and that such a presumption may not be warranted in respect of some countries in specified cases. Further, I accept that one way of strengthening his/her argument that state protection would not be forthcoming is for the applicant herself/himself to have sought it and being refused. But again, failure to seek such assurance from the state cannot lead to the universal conclusion that the applicant must always fail for this omission alone. The facts and circumstances of each case as established by the evidence, from the applicant herself here, whose credibility in other matters was nowhere challenged, and from the country of origin information relied on by the decision maker, may lead to the conclusion that seeking such assistance would be a futile exercise. In my view, it is arguable in this case that the applicant has demonstrated substantial grounds to justify this court granting her leave to have the decisions of RAT judicially reviewed.

I will confine the applicant to grounds A, B, C and D upon which relief is sought.