

**THE HIGH COURT
JUDICIAL REVIEW**

[2005 No 740 JR]

BETWEEN

C. O.

APPLICANT

**AND
MICHELLE O’GORMAN SITTING AS
THE REFUGEE APPEALS TRIBUNAL AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

RESPONDENTS

Judgment of Mr. Justice Herbert delivered on the 15th day of May 2007

1. In my judgement this application for *certiorari* by way of judicial review, appears to be premised on a substantial misunderstanding of the *ratio decidendi* of the Report of the Refugee Appeals Tribunal. Four of the grounds upon which the Applicant was permitted, by order of the Court, (Dunne J., 30th March 2006), to seek an order of *certiorari* are said to relate to negative findings by the Member of the Refugee Appeals Tribunal with respect to the credibility of the Applicant. The six grounds upon which the Applicant was given leave to seek an order of *certiorari* by way of judicial review may be summarised as follows:-

1. The Refugee Appeals Tribunal found that the Applicant’s story was not credible solely on the basis of peripheral issues while at the same time disregarding relevant evidence.
2. & 3. The Refugee Appeals Tribunal failed to give any weight to the fact, confirmed by medical report, that the Applicant had been subjected to female genital mutilation, by reason of her failure to reveal this at any time prior to her Notice of Appeal to the Refugee Appeals Tribunal and, despite her explanation for that failure.
4. The Refugee Appeals Tribunal failed in its report to give adequate reasons for the findings on credibility.
5. The Refugee Appeals Tribunal based its report on a selective reading of the available country of origin information.
6. The Refugee Appeals Tribunal imposed an incorrect and insurmountable burden of proof on the Applicant.

2. This Applicant claims refugee status on the basis of an alleged well-founded fear of persecution in her country of origin on grounds specified in s. 2 of the Refugee Act, 1996, namely, religion and membership of a particular social group.

3. The Applicant claims that prior to coming to this State from her country of origin, she and her husband and his relatives had suffered persecution at the hands of non-government agents which the State Authorities in her country of origin were unable or unwilling to prevent. She claimed that she had suffered and, if returned to her country of origin would continue to suffer such persecution because, as members of the Catholic Church, she and her husband had refused to permit their infant son to be inducted, as successor to his paternal grandfather, as Chief Priest of a major traditional religion. She claims that her life would be in danger from the adherents of this traditional faith should she be returned to her country of origin. The Applicant further claims that she would suffer persecution, should she be returned to her country of origin, as a woman known to be opposed to the practice of female genital mutilation in that country.

4. I have read the report of Michelle O’Gorman the Member of the Refugee Appeals Tribunal dated 9th May 2005, which report was given pursuant to the provisions of s. 16(2) of the Refugee Act, 1996, (as amended). The Applicant’s appeal to the Refugee Appeals Tribunal was determined without an oral hearing in compliance with the provisions of s. 13(5)(a) of the Refugee Act, 1996. It would be very misleading to describe this report other than as a detailed and very comprehensive review and determination, extending to twelve pages, of the issues raised by this appeal.

5. The Member of the Refugee Appeals Tribunal prefaces her findings on the issue of credibility with the following statement:-

“An assessment as to credibility is an essential element in an analysis of the claim for refugee status. Credibility concerns arise in relation to the Applicant’s claim.”

6. The Member of the Refugee Appeals Tribunal found, that it was not plausible that the Applicant’s husband if, as accepted, he had previous knowledge of the designation of their infant son as Chief Priest elect, did not immediately inform her and take measures to protect her and their child from the very serious consequences which she claims have flowed and will continue to flow from their opposition to that choice.

7. The Member of the Refugee Appeals Tribunal found that it was not credible that the two village men sent to take the Applicant’s son back to the village would have permitted her husband to go up to her hotel room in the town to which she had fled without taking even the most elementary precautions to prevent their escaping from the hotel.

8. The Member of the Refugee Appeals Tribunal found that it was not credible that the Applicant chose to remain in the Police Station, solely because of the non-availability of taxis at night, while the men she claimed were pursuing and persecuting her, were then in detention in that Police Station and were not at liberty to pursue her, but chose to leave the Police Station the following morning after these men had been released on bail.

9. The Member of the Refugee Appeals Tribunal found that it was not credible that a District Police Officer would permit her and her husband, who were complete strangers to him, to stay in his home for ten days and give her money to move on solely because he had taken pity on her.

10. In her Notice of Appeal, dated 19th January 2005, to the Refugee Appeals Tribunal against the recommendation of the Refugee Applications Commissioner dated 9th December 2004, that the Applicant should not be declared a refugee, the Applicant asserted that it was unjust and unfair to question her credibility because her husband had behaved on the particular occasion in such an extraordinary fashion which, she said, had led to angry exchanges between them. She claimed that it was entirely peripheral to her

claim of persecution to consider why the two village men had acted as they did. She claimed that country of origin information demonstrated that in her country of origin these men would not have been permitted to enter a guest's bedroom in a hotel. She explained her decision to remain in the Police Station by stating that it was night time and taxis were not available. Finally, she stated that in her country of origin, it was still possible for a person to show the sort of kindness towards a woman in distress which she claimed the District Police Officer had showed to her.

11. Counsel for the Applicant submitted that the member of the Refugee Appeals Tribunal had disregarded these matters in reaching her conclusions as to credibility. Counsel submitted that even if the decision of the Refugee Appeals Tribunal on these matters had been reached by an entirely correct process, the matters remained so peripheral to her account of the persecution suffered by her and her family that it was unreasonable and unfair on the part of the Refugee Appeals Tribunal to conclude that her story was not credible based on these findings.

12. While, in my judgment it would be unnecessary, prolix and confusing for the Member of the Refugee Appeals Tribunal to have repeated every aspect of the Applicant's story, it would have been more clearly conclusive of this particular issue on credibility had the Member of the Refugee Appeals Tribunal at least recorded these explanations given by the Applicant to explain the incidents in question, before stating her conclusion that she did not regard these aspects of the Applicant's story as being credible. However, I have no doubt that the Member of the Refugee Appeals Tribunal did consider these explanations. At the conclusion of the Section of the report headed, "BACKGROUND INFORMATION" the Member of the Refugee Appeals Tribunal states as follows:-

"The Applicant's claim is set out in the Questionnaire, Interview, Section 13 Report and Form 2 Notice of Appeal and need not be repeated here."

13. At a later point in the report she refers to what is stated at p. 12 of the Notice of Appeal. This identification of the source material setting out the Applicant's claim is to be found immediately prior to the finding by the Member of the Refugee Appeals Tribunal that, "credibility concerns arise in relation to the Applicant's claim". Earlier in the report under the heading, "CIRCUMSTANCES OF THE APPEAL", the Member of the Refugee Appeals Tribunal states that she has carefully considered all the papers submitted to her for the purpose of the Appeal and all matters which she was required to consider by the provisions of s. 16(16) (as Amended), and s. 11B (as inserted), of the Refugee Act, 1996. From the manifestly careful and painstaking nature of the report and from its internal references to and quotations of portions of these documents I am satisfied, to employ the words of O'Neill J., in *A. v. The Minister for Justice, Equality and Law Reform* (Unreported, 13th October 2005), that, "there is a high probability", that every feature of the appeal was considered and carefully addressed by the Member of the Refugee Appeals Tribunal.

14. I find that these matters were not, "peripheral" to the issues of whether the Applicant's story could have happened and, whether she was personally believable. I am satisfied and, I so find, that these were not the sort of, "minor matters or matters not central to the core issues", to which Peart J., referred in *M. S. v. The Minister for Justice, Equality and Law Reform*, (Unreported, 24th November 2005). The incidents which the Member of the Refugee Appeals Tribunal found were not plausible or credible, though seeming unimportant in themselves, yet constitute direct and material links in the Applicant's narrative which in the absence of any form of independent supporting evidence or corroboration must necessarily be evaluated by reference to its inherent consistency and lack of unresolved contradictions. (U.N.H.C.R. Handbook, paras 195 to 205).

15. I am satisfied that these findings of lack of credibility by the Member of the Refugee Appeals Tribunal required no further explanation elaboration or analysis in order to comply with the legal obligation to give reasons, which in the case of a body such as the Refugee Appeals Tribunal is an essential feature of the obligation to provide and to observe fair procedures. As regards issues of credibility the nature of the obligation to give reasons is set out by Clarke J., in *Z. v. The Refugee Appeals Tribunal* (Unreported, 26th November 2004), and, *I. v. The Refugee Appeals Tribunal* (Unreported, 10th May 2005), and, more generally by the Supreme Court in *F.P. and A.L. v. The Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164 at 172 etc., *per*, Hardiman J., (for the Court). In particular, I refer to the passage from the judgment of Geoghegan J., in *L. v. The Minister for Justice, Equality and Law Reform* [1994] 4 I.R. 26, cited by Hardiman J., at p. 173 of the report in *F.P. and A.L. v. The Minister for Justice, Equality and Law Reform* (above). In the instant case the assessor of fact clearly considered, (as it was fully open to her to consider), that what was claimed by the Applicant to have occurred was contrary to the ordinary course of conduct in human affairs considered in the context of the country of origin information and, with no verifiable explanation to account for the divergence.

16. In my judgment, it is necessary to differentiate between the second and third of the permitted grounds for seeking Judicial Review and the first and fourth grounds, though all are included in the Applicant's challenge to the findings of the Member of the Refugee Appeals Tribunal under the heading of "Credibility". Having addressed the Applicant's claim to a well-founded fear of persecution in her country of origin for the alleged s. 2 reason of, "membership of a particular social group", which the Applicant identified as, "women opposed to female genital mutilation", the Member of the Refugee Appeals Tribunal concludes as follows:-

"The Applicant submitted no evidence in her Questionnaire or Interviews to support her contention that she would be persecuted in her country of origin because of her opposition to FGM despite having numerous opportunities so to do and therefore her claim in this regard is not credible."

17. Despite these latter words, this is not in substance a finding as to credibility, (though the Member of the Refugee Appeals Tribunal does find that the Applicant's explanation for not mentioning female genital mutilation prior to the delivery of the Notice of Appeal, is not credible). I find that it is a determination by the Member of the Refugee Appeals Tribunal that this Applicant has failed to establish a well-founded fear of persecution on this ground through lack of evidence and, not because the evidence offered by her was not credible. I consider that it is important to set out in full what the Member of the Refugee Appeals Tribunal found with respect to this matter:-

"The Applicant did not mention her difficulties in relation to Female Genital mutilation (FGM) in the questionnaire or in the interviews. The Applicant stated that she was very happy with the manner in which her interviews were conducted (page seventeen of the interview dated 26th August 2004). She gave a detailed account of events in her country of origin which led her to flee to Ireland at both interviews. Her explanation for not mentioning FGM prior to the Notice of Appeal is not credible. The Applicant stated that she did not wish to mention this aspect of her claim as she thought she would not be believed or that she would be considered too dramatic. The Applicant is a very well educated lady. She was informed at page one of the Questionnaire that all relevant information in relation to her claim should be provided in the Questionnaire and that medical evidence should be brought to the interview. She was informed at the interviews that she had a duty to cooperate fully and she indicated at the interviews that she understood this duty by signing her name prior to the interviews to that page outlining this duty. At page sixteen of the interview, dated 26th August, 2004, the Applicant was asked was there anything else she would like to add in support of her claims and in reply she failed to mention fear of persecution in her country of origin because of her opposition to FGM. The Applicant had a baby since

arriving in Ireland and would have undergone medical examination. She produced a medical report at the second hearing to corroborate her claims. This medical report would have required extensive examination of the Applicant if FGM was to form part of the Applicant's claims, one would expect that this matter would have been mentioned in the medical report dated the 3rd August 2004. The Applicant submitted no evidence in her Questionnaire or interviews to support her contention that she would be persecuted in her country of origin because of her opposition to FGM despite having numerous opportunities so to do and therefore her claim in this regard is not credible.

Country of Origin information would suggest that assistance would be available to the Applicant if she feared being persecuted because of her opposition to FGM and that any fear she may hold in this regard is unfounded. The Government publicly opposes FGM. The Ministry of Health and the non-governmental organisations have sponsored public awareness and education projects informing communities of the health hazards associated with FGM. It has been banned in one State since October, 2000. Seven other states have also passed laws prohibiting the practice. A bill outlawing the practice of FGM was passed by the Federal Government in May, 2004. Country of origin information on file (Tab H) states that there are no credible records of killings directly related to FGM."

18. Contrary to what was submitted on behalf of the Applicant, it is clear from the foregoing why the Member of the Refugee Appeals Tribunal found that the Applicant's explanation as to why she had not mentioned FGM prior to the delivery of her Notice of Appeal was not credible. The report of the Refugee Appeals Tribunal does not specifically make mention of the medical report of 17th January 2005, though it does refer to the medical report of 3rd August, 2005. The medical report of 17th January 2005, by Dr. C. H., merely confirms that the Applicant had suffered total circumcision. It is perfectly clear from the foregoing extracts from the report of the Refugee Appeals Tribunal that the conclusion reached by the Member of the Refugee Appeals Tribunal was not in anyway dependent on a finding as to whether or not the Applicant had herself suffered female genital mutilation. Therefore the absence of a specific reference to the medical report of 17th January 2005 and, of a positive finding that the Applicant had herself suffered female genital mutilation, is in my judgment entirely irrelevant. Even if it was known amongst the village traditionalists that the Applicant was opposed to female genital mutilation this would not render the conclusions of the Member of the Refugee Appeals Tribunal unreasonable whether one applies a standard of "real risk", "reasonable risk" or, "serious possibility".

19. The court is quite unable to accept the argument advanced on behalf of the Applicant that the Member of the Refugee Appeals Tribunal based her decision on a selective reading only of the country of origin information. I have carefully read the vast body of country of origin information, (207 pages) submitted to the Refugee Appeals Tribunal. I am satisfied from the solemn statements to that effect in the report of the Refugee Appeals Tribunal, from the express statutory obligation imposed on the Member of the Refugee Appeals Tribunal by the provisions of s. 16(16), (as amended) of the Refugee Act, 1996, to consider that information before deciding the application, from internal references contained in the report and from the lack of any form of submitted concordance of material passages claimed by the Applicant to have been overlooked or disregarded by the Member of the Refugee Appeals Tribunal, that there, "is a high probability", that the Member of the Refugee Appeals Tribunal based the report on a full and proper consideration of the whole of the proffered country of origin information. There is no statutory or legal obligation on the Member of the Refugee Appeals Tribunal to refer in the report, even in a very summary form, to every aspect of the country of origin information furnished to the Refugee Appeals Tribunal for the purposes of an Appeal. Citations of particular passages from the body of the country of the origin information is not evidence that everything else was either disregarded or insufficiently regarded by the Member of the Refugee Appeals Tribunal. The Applicant must discharge the burden of convincing this court on the balance of probabilities, by referring to and citing clearly identified passages from the country of origin information, that despite statements and indications to the contrary in the report, the Member of the Refugee Appeals Tribunal could not have reached the conclusions in the report without ignoring or giving insufficient weight to important aspects of the country of origin information.

20. It was submitted on behalf of the Applicant that the Member of the Refugee Appeals Tribunal determined the Appeal on the basis of lack of credibility only. The Court is quite unable to accept this submission. I am satisfied and so find, that, "credibility concerns", is not the reason for the decision of the Member of the Refugee Appeals Tribunal. Even if the conclusion of the Member of the Refugee Appeals Tribunal on the matters identified in the report of the Refugee Appeals Tribunal and referred to earlier in this judgment was to the entirely opposite effect, - that these matters did not lack credibility, - the decision of the Member of the Refugee Appeals Tribunal, that the Applicant had not established a well-founded fear of persecution for a reason specified in s. 2 of the Refugee Act, 1996, would remain the same. It is clear from the finding by the Member of the Refugee Appeals Tribunal in relation to the Applicant's claim of a well-founded fear of persecution based upon her alleged opposition to female genital mutilation in her country of origin and in relation to her alleged objection on religious grounds to the induction of her son as Chief Priest, that the Authorities in her country of origin were not unwilling or unable to assist the Applicant, so that any subjective fear which she might have, had no objective basis. Regardless therefore of any "credibility concerns" the Member of the Refugee Appeals Tribunal may have expressed in the course of the report, her ultimate decision was not in any way dependent upon such findings.

21. It was submitted on behalf of the Applicant that the Member of the Refugee Appeals Tribunal had imposed an insurmountable burden of proof on the Applicant by giving no weight to any of the documentary evidence produced by the Applicant, such as newspapers, photographs, affidavits, hospital reports, medical records or other pieces of communication, none of which was found by the Member of the Refugee Appeals Tribunal to be false or misleading.

22. I am satisfied, for the reasons which I have already expressed that the Member of the Refugee Appeals Tribunal carefully considered all the evidence, including documentary material before her. In the report the Member of the Refugee Appeals Tribunal discusses over a number of pages the general law applicable in asylum cases and in particular the burden and the standard of proof. The fact that the Member of the Refugee Appeals Tribunal concluded that the evidence offered by the Applicant was not sufficient to establish her claim to refugee status does not mean that the Member of the Refugee Appeals Tribunal disregarded that evidence or gave no weight to it. The evaluation of the evidence presented is uniquely a matter for the Member of the Refugee Appeals Tribunal. The Member of the Refugee Appeals Tribunal concluded and, explained the factual and legal basis why she so concluded, that the evidence offered by the Applicant did not satisfy her that the Authorities in the applicant's country of origin were unable or unwilling to provide protection to the Applicant and did not support the Applicant's contention that she would be persecuted in that country because of her alleged opposition to the practice of female genital mutilation or because of her opposition on religious grounds to the induction of her son as Chief Priest. She concludes her analysis as follows:-

"Mr. Justice Finnegan in *Z.* (29th March 2001) approved the following passage of Lord Hope in *Horvath*:

'I consider that the obligation not afford refugee status arises only if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals. I think that it follows that in order to satisfy the fear test in a non state agent case, the applicant for refugee status must show that the persecution with he fears consists of acts of violence or ill treatment against which the state is unable or unwilling to provide protection. The applicant may have a well founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill

treatment for a convention reason, which may be perpetrated against him. But the risks, however severe, and the fear, however well founded, do not entitle him to the status of a refugee. The Convention has a more limited objective, the limits of which are identified by the list of Convention reasons and by the principle of surrogacy.'

I am not satisfied that the authorities in her country of origin were unwilling or unable to assist the applicant."

23. For the foregoing reasons the court will refuse the application for Judicial Review.