Neutral Citation [2013] IEHC 24

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2009 / 156 J.R.

Between:/

V. M. [KENYA]

APPLICANT

-AND-

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT OF MS. JUSTICE M. CLARK, delivered on the 29th day of January 2013.

1. This is a case which has been affected by quite extraordinary periods of delay. The applicant first applied for asylum as a seventeen year old child in May 2003. Almost ten years later, he still has no decision on his status as the Court quashed the Tribunal's appeal decision on the 13th December 2012. This judgment sets out the reasons for that decision.

2. The Court welcomes the cooperation of both parties who on the day of the hearing consented to the application for leave being treated as if it were the hearing of the application for judicial review in accordance with Order 84, rule 24(2) RSC. Thus in some small way the delays which have befallen the applicant were minimised in the hope that due expedition will follow henceforth. Mr Michael Lynn B.L. appeared for the applicant and Ms Fiona O'Sullivan B.L. for the respondents.

Background

3. The applicant's asserted fear of persecution if returned to Kenya is that as a person who was exposed to Mungiki activities and who fled while in the process of unwilling induction into that cult, he would be considered a defector or traitor and therefore liable to punishment and death. He also fears that he will be forced to join the Mungiki who are an illegal organisation in Kenya and that he will be unable to escape a life of slavery to their ideology.

4. He described his particular exposure to the Mungiki during his upbringing by his father and older brother who are members of the Kikuyu based cult. When he was nine, his father insisted that the applicant's mother and his sister should undergo female circumcision in accordance with the Mungiki quasi-tribal religious beliefs. They refused and fled leaving him in the care of his father who thereafter groomed him for membership. The family had originally been Christian and although the applicant attended a Christian school he was not permitted to attend church services. He provided information relating to his observance of his father's activities in the cult, of his attendance at meetings and awareness of the cult's increasing involvement with crime, extortion and violence towards opponents. He was frequently beaten when his father had been drinking local liquor or taking drugs approved by the Mungiki. Matters came to a head in 2002 when he was sixteen and his father insisted that he finish school and join the sect. He had no desire to be initiated but his father and brother insisted that he should join. The first step towards initiation was circumcision. His father hit him and shamed him into submission and he was circumcised. He reported this action to the police in November 2002 but no action was taken. He then ran away from home and went to live with a school-friend for six months. His friend's father was a pastor. When they believed that the applicant's father would find him, the pastor arranged his travel to Ireland.

5. Record numbers of asylum applications were made in Ireland in 2002 and 2003 which probably explains the eleven-month delay before the applicant's s. 11 interview took place in July 2004. In any event, when he was eventually interviewed he expanded on his fear of the Mungiki. He explained that while the members who were his father's friends never actually abused him he was frequently warned of the consequences of leaving the Mungiki, as such persons were considered as traitors and were tortured and killed. He explained that when the time came for him to take the oath to join the Mungiki, he knew that once he was initiated he could never go back or leave as if he did, he would be treated as a traitor. His primary claim was that although the organisation was illegal, the State would be unable to protect him from such punishment.

6. Relying on three country reports which outlined the diligence of Kenyan authorities in pursuing the Mungiki, the Refugee Applications Commissioner determined that the applicant's claim that state protection was not available could not be sustained. While accepting that such protection was not perfect he held that "*there is a definite willingness to meet the challenge posted by the Mungiki to the State*". Having found that state protection was available or alternatively internal relocation to a non-Kikuyu area was a reasonable alternative to flight, the Commissioner applied s. 13(6) (a) of the Refugee Act 1996. This was a finding that the applicant showed either no basis or a minimal basis for the contention that he is a refugee which had the effect that any appeal would be determined without an oral hearing. The decision to refuse an oral appeal was not judicially reviewed and the applicant's solicitors lodged an appeal in November 2004.

The Appeal

7. The applicant's written notice of appeal addressed all the findings made in the s. 13 report. Extensive additional information was provided which specifically addressed the contested finding that effective state protection was available, including several Kenyan newspapers reports from 2004 which outlined a series of revenge killings of Mungiki defectors, would-be defectors, former insiders and former members of the organisation. The appellant's doctor also furnished a letter confirming that he had been circumcised.

8. The first Tribunal decision was vacated and the appeal was remitted for fresh consideration by another Tribunal Member. That new Tribunal Member wrote to the applicant's solicitor in November 2006 indicating that she considered the country of origin information (COI) on file to be outdated and she wished to put the appellant on notice of more recent and relevant reports on the availability of state protection from Mungiki activities. Those reports were two UK Immigration Appeals Tribunal decisions dated 2002 and 2004[1] and a 2005 Canadian IRB report.[2] The applicant's solicitor sought clarification on which parts of the appellant's reports were considered to

be outdated and submitted that the UK decisions could not be considered as COI. In further correspondence dated 16th December 2006 and 4th January 2007, the applicant's solicitor furnished extracts from nine COI reports relating to the criminal activities of the Mungiki and the growing inability of the Kenyan authorities to prevent their activities notwithstanding the government's determination to wipe out the organisation. All of these reports were sourced by the Refugee Documentation Centre (RDC). The applicant's solicitor also quoted extracts from three of seventeen attached Tribunal decisions which were said to specifically address findings on the strength of the Mungiki and the ineffectiveness of police action to protect those who had defected from the organisation. In each case the asylum applicant had been successful on appeal on this very issue.

9. Nothing further was heard until a year later on 8th January 2008 when the applicant's solicitor enquired when the decision would be forthcoming. In a reply received from the Tribunal on 5th August 2008, the applicant's solicitor was informed that the Tribunal Member was unable to locate certain documents furnished by the applicant and he was asked to provide copies of those documents. The Tribunal apologised for the delay. The applicant's solicitors then furnished copies of all documentation which had previously been submitted. On 17th December 2008 they made further written submissions and referred to extracts from COI reports which further addressed the lack of effective state protection for victims of the growing power of the Mungiki cult.[3]

The Impugned Decision
10. The Tribunal decision finally issued on 21st January 2009. The Tribunal Member approached the claim on the basis of acceptance of the applicant's narrative at face value and she then addressed the availability of state protection. The evidence from the questionnaire and interview, the COI appended to the s. 13 report, the submissions made on behalf of the applicant and assessments of state protection found in the various COI reports furnished was carefully summarised.

11. In her analysis of the claim, the Tribunal Member seemed to accept that deserters from the Mungiki sect faced danger from the organisation but her key finding was that as the applicant had never in fact been initiated, he could not be considered to be a deserter or a defector. She accepted that newspaper reports furnished indicated that the Kenyan government would not be able to stamp out the Mungiki menace but she found that "*Nowhere in this report however is there any suggestion that the state is unable or unwilling to offer protection to would be victims of the sect*". Her principal finding on the claim was as follows:-

> *"I must stress that the Appellant is not a victim, or indeed a potential victim, according to his evidence, he is merely associated with someone who is involved with the sect. The Appellant does not have any secret knowledge that might be considered to put him in danger, it is noted that many of the killings of former members of deserters or defectors are done so on the basis that they are believed to have spilled secret information concerning the sect, secret information that … they learned as a result of their membership of [and] involvement in the sect. There is no evidence before me that the Appellant has any secret information that members of the Mungiki sect would be motivated to protect by means of harming or indeed even killing the Appellant."*

12. The source of this finding was the two UK IAT decisions. COI referred to in those decisions had been disclosed to the applicant in November 2006. The Tribunal also observed that while the applicant had reported his fears to the police in 2002, there was no evidence that he followed up on his complaint in any serious manner. She was not persuaded that the material and submissions furnished established a *prima facie* a lack of protection. While it was accepted that in certain circumstances individuals may be at risk and in specific situations, the Kenyan State may not be able or indeed willing to offer protection, she was not persuaded that the applicant had discharged the burden of showing a lack of state protection for him in his circumstances.

Submissions on the challenge
13. The applicant's principal challenge to the decision is that the findings were unreasonable and were arrived at in breach of fair procedures. In particular, he argues that the determination on the availability of effective state protection was reached in breach of the Refugee Act 1996 and Directive 2004/83/EC and S.I. No. 518 of 2006 in that up to date country of origin information furnished by the applicant was ignored in favour of the COI referred to in two UK decisions which dated from 2002 and 2004. The conclusions on the adequacy of state protection were not rationally drawn from the bulk of the COI and she failed to have any regard to the Canadian IRB document dated November 2007 furnished by the applicant in December 2008. That Canadian report simply did not support her conclusion on state protection and further, the Tribunal ignored all of the previous decisions from her own Tribunal furnished which dealt with state protection and the Mungiki, in favour of two UK decisions.

14. The second challenge related to fair procedures as the applicant was never afforded an opportunity to address the entirely new proposition that he was not likely to be targeted as he did not have any secret information to divulge.

15. The final challenge related the finding that the applicant would not be treated as a defector as he had not yet joined the sect. It was argued that on the basis of what was said about the circumcision, which had been confirmed by medical examination, this was an irrational finding.

16. The respondents defend the coherence of the decision and the use of fair procedures and stress that the applicant's claim had always been that he was not a member of the Mungiki; he had not been initiated and had not taken the oath. He chose not to join and ran away and found protection for six months elsewhere in Kenya. On those facts the Tribunal Member was entitled to rely on the distinct meaning attributed to the term "defector" in COI which related to Mungiki members who have gone to the police and who have damaged the sect in some way. The Tribunal Member was entitled to have regard for the fact that the applicant was not harmed in the six months period before he came to this State. The thrust of the COI is that while protection is not perfect, it is available. The Tribunal Member must be taken to have been aware and to have considered all the documents furnished as she stated both at the start and at the end of her decision that she had regard to all COI furnished.

Decision
17. As was indicated at the hearing, the Court is satisfied that the Tribunal decision should be quashed and the appeal returned for fresh consideration by a different Tribunal Member. This view is informed by the fact that no suggestion is made in the decision challenged that the applicant's credibility was doubted or impugned nor were the negative credibility findings made at first instance adopted. The Tribunal Member considered the case afresh and she made her own assessment on credibility, apparently accepting his narrative at face value.

18. That being the case, it is the decision of this Court that the Tribunal Member simply mischaracterised the applicant's claim when she minimised his status within the Mungiki sect to one of a non-member merely associated with someone in the sect and thus concluded that he was not at risk. In that characterisation, the Tribunal Member appears to have completely ignored that the applicant was raised in a family actively involved in the Mungiki and from an early age he was groomed to become a member. His mother and sisters fled when he was nine, abandoning him to the care of his Mungiki father and his older brother who was also in the Mungiki. Growing up, he attended Mungiki meetings and accompanied his father and brother who engaged in violent criminal acts with

other Mungiki members. In 2002 he was told that the time had come for him to join the cult. He attended preparatory talks about Mungiki customs and was obliged to undergo circumcision as the first step towards initiation. He was unwilling to be circumcised but was shamed by his father to submit. His unwillingness to take the final oath as a Mungiki caused him to flee his home and live with a school friend. His father and brother expected him to become part of the cult and he feared that he had disgraced them by refusing and that they would find him and that he would be forced to join. When he heard that they were seeking him, he fled Kenya.

19. It appears to the Court that this evidence of upbringing and involvement in his father and brother's Mungiki activities goes far beyond mere association with someone involved with the sect and therefore not at risk from the sect itself. The Court accepts the applicant's submission that this particular finding quite simply misunderstood the case made and is therefore unreasonable.

20. The conclusion that the applicant would not be in danger as he had no secrets to divulge must also be legally unsound for three reasons. First, the proposition was never suggested to the applicant which clearly breaches fair procedures. Secondly, the finding that he had no secrets to divulge follows on from and is closely related to the mischaracterisation of his relationship with the Mungiki and therefore based on assumption. Finally, there is no objective evidence within the reports furnished or relied upon by the Tribunal Member which support the proposition that only initiated Mungiki members who are privy to secret information are targeted if they defect.

21. One further aspect of this case of serious concern to the Court is that the appeal was conducted without an oral hearing. The Court is powerless at this remove to review or amend the Commissioner's finding that s. 13(6) of the Refugee Act 1996 applied on the facts relied on in the applicant's claim. The Court therefore looks with heightened vigilance at the process of the documentary appeal in circumstances where an appellant has no opportunity to appear and explain or expand on any perceived inconsistencies or deficits in his / her claim. Unlike when the appeal is conducted orally, the Tribunal had no particular advantage over the Court in the assessment of credibility of an appellant as the same papers are before the Court as were considered by the Tribunal. At its core, the appeal concerned the evaluation of the validity of the s. 13 negative recommendation and the applicant's written submissions on the availability of state protection for Mungiki defectors.

22. It is by now very well established that when considering a documents-only appeal, the standard required is of necessity one of extreme care as the Tribunal Member has no opportunity to form a personal impression of the applicant as at an oral hearing. For instance, had this particular appeal not been blighted by extraordinary delays, the initial interview and possibly also his appeal would have been considered in the context of a child who could not even turn to his parents for protection. His mother had left and his father was an active Mungiki adherent prepared to lose his wife and daughter in pursuit of Mungiki beliefs. Instead, arising from the delays, by the time the appeal was considered the applicant was no longer a vulnerable seventeen year old asylum seeker but a 25 year old faceless adult whose claim was, quite bizarrely in the Court's view, found to have had no basis and thus confined to a paper based appeal.

23. It now falls to the Court to review the Tribunal Member's conclusion that the Kenyan State is both willing and able to protect this particular applicant from the Mungiki if he were returned to Kenya. The general tenor of the COI which was before the Tribunal Member was that the Kenyan government is doing its best but cannot control the Mungiki who are associated with the largest tribal grouping in Kenya which is a country frequently riven by violent inter-tribal land disputes. The cult finds support with young, disaffected unemployed slum dwellers. Their activities in the Mungiki are often entirely criminal and involve ritual killings, car-jackings, tribal warfare, extortion and general lawlessness. Relevant to this claim is that Mungiki defectors, former members and those who want to leave the cult are targeted and killed in unspeakable circumstances and while witness protection programmes exist and courts are willing to try and convict those accused of Mungiki motivated crimes, the police cannot protect those who have defected or seek to quit the organisation. The difficulty is not that the Tribunal Member disregarded these key documents or that she misunderstood or misrepresented their conclusions but rather that the focus of her analysis was the availability of protection for the general category of "*people who are afraid of the Mungiki sect*" and not on the adequacy of protection for the specific category of persons associated with the Mungiki who have defected. What is clear is that while the cult is proscribed by the State and efforts are taken to control their activities, the police are simply unable to protect that category of persons, who are particularly at risk from the Mungiki.

24. The remaining submissions made by the applicant relate to the reliance by Tribunal Member on decisions of the UK Immigration Appeals Tribunal as guidance on conditions on the ground in Kenya relating to the Mungiki, rather than relying on the up to date COI and previous RAT decisions furnished by the applicant. As a matter of principle, there cannot be any objection to any Tribunal consulting the decisions and findings of decision makers of other member states of the EU or other Refugee Convention countries as sources of information. The particular UK decisions relied on contained an in-depth analysis of the Kenyan government's intentions to wipe out the Mungkiki and their efforts to do so. Their special significance arises from the fact that the system in the UK is quite different to the Tribunal appeals system in this State. In the UK, a practice has developed whereby certain cases are selected as country guidance cases determinative of particular conditions in named countries until specifically displaced by later cases. In such cases, expert testimony is sought and presented for cross examination. The findings in the two UK cases relied on by the Tribunal Member were relevant to their particular time and contained in-depth information on who or what the Mungiki were. The vast majority of the 17 previous RAT decisions which were presented to the Tribunal Member and then the Court were, on the other hand, of very little relevance to the facts of this case and they do not purport to be country guidance cases. While some of the previous RAT decisions quote COI which supports claims made in this case that the Mungkiki were still of some force notwithstanding well publicised statements by the government that they were under control, neither they nor the UK Tribunal decisions are determinative of the issue before the Tribunal which essentially was whether the applicant had a well founded fear of persecution if returned to Kenya in 2009. The appropriate source for that information was recent objective COI on the danger faced by a son of a Mungiki family partially initiated into the sect but unwilling to carry through with the taking of an oath of allegiance. While there can be no objection to a Tribunal Member relying on decisions of other tribunals whether in Ireland or in the UK or elsewhere, sole reliance on those decisions cannot either satisfy or supplant the requirement under Regulation 5(1) (a) and (b) of S.I. No. 518 of 2006 where the obligation is *"to have regard to … all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of that country and the manner in which they are applied" and "the relevant statements and documentation presented by the protection applicant."*

25. In conclusion, the Court is satisfied that the Tribunal decision is flawed by reason of an irrational finding on the central issue of state protection, by a breach of fair procedures and a breach of statutory duty and should be quashed. The appeal will be remitted to the Tribunal for fresh consideration by a different Tribunal Member. As a postscript, the Court observes that should a Tribunal Member so desire, he / she has the power under s. 16(6) of the Refugee Act 1996, for the purposes of his / her functions under the Act, to request the Commissioner to "*make such further inquiries and to furnish the Tribunal with such further information as the Tribunal considers necessary*". The Court is unaware of any authority which prevents a Tribunal Member from seeking a re-interview of an applicant under s. 11 of the Refugee Act 1996 on specific matters not previously raised by the ORAC, in cases where a finding has been made under s. 13(6). In expressing these views, the Court is mindful of the emphasis placed on the right to be heard by the Court of Justice in its decision in *MM v. The Minister* (Case C-277/11, 22nd November 2012) and by Hogan J. in his recent follow-on

decision in the same case (*MM v. The Minister* [2013] IEHC 9).

[1]. *Joseph Njoroge Wambui v. SSHD* [2002] UK1AT 03402 dated 1st August 2002 ad *J.A (Mungiki – not a religion) Kenya* [2004] UK1AT 00266 dated 22nd September 2004.

[2]. Canadian IRB (Research Directorate) Response dated 23rd February 2005 entitled "*Kenya: The Mungiki (Mongiki) cult, including its organisational structure, its leaders, its criminal activities, and the state protection available to victims of this cult (June 2002 – February 2005)".*

[3]. A Canadian IRB paper (November 2007), a World Organisation Against Torture report (November 2008), a Human Rights watch report (March 2008), a Wikipedia page accessed in December 2008, an article from the WorldWide Religious News (May 2007), and a Sky One television programme *Mungiki Defectors*