Neutral Citation Number [2007] IEHC 299

THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 1166 J.R.]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

BETWEEN

H. O.

APPLICANT

AND

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

RESPONDENTS

Judgment of Mr. Justice Hedigan delivered on the 19th day of July, 2007.

1. This is an application for an order of *certiorari* quashing the decision of the respondent dated 6th October, 2005, served upon the applicant by letter dated 17th October, 2005. The applicant lived in Delta State in Nigeria and has a B.Sc qualification in Administration from Delta State University. She married her husband in September, 2004 and following an escorting ceremony which involved friends and family going to the husband's village for a celebration, she was apparently threatened the following day with a process of female genital mutilation (FGM). She claimed that four men tried to restrain her but that she fought them back. She claims one of them raped her. She apparently went to the police to complain but some members of the husband's family were apparently already in the police station, her version of events was contradicted and in any event the police paid no attention to her complaint. She states that she fled to the city of Benin by bus and was hospitalised for nine days. She travelled from there to Lagos to stay with a friend and while there she went to the local church. It was arranged by this church that she travel to Ireland. The church apparently raised the money for her in collections. She indicated that for the three month period that she stayed in Lagos, she remained indoors because she believed she would be recognised. She stated that she feared that she might be forced to return to her husband's village and that both she and her child with whom she was then pregnant would be forced to go through the process of FGM.

2. The grounds upon which this relief is sought are advanced under two headings;

(a) State protection;

(b) Internal relocation.

3. In relation to (a) the applicant submits that the Refugee Appeals Tribunal (the Tribunal) found:

(i) She had reported the incident to police on one occasion,

(ii) She had other opportunities in Benin, Kaduna or Lagos to report the incident to the police but did not do so,

(iii) She instead sought help from her church and with the financial and logistical assistance thereof left Nigeria and came to Ireland.

4. The Tribunal, she submits, at p. 6 of its decision found "the applicant reported the incident to the police on one occasion" it continued:-

> "Thereafter, she had an opportunity of making a complaint in Benin, Kaduna or Lagos. She did not do so. Instead she sought help from her church and left Nigeria. Country of origin information indicates that:-
>
> > 'The Nigerian Police Force itself has several layers and branches that citizens dissatisfied with investigations and actions by one branch could request and get cases transferred to other branches.'
>
> It is incumbent upon an applicant to explore all possible options with regard to seeking state protection before seeking the protection of another State."

5. This the applicant submits, is an erroneous statement of the law and is central to the adverse finding of the Tribunal. She submits that based upon this incorrect statement of the legal test, the Tribunal concluded that the applicant was obliged to exhaust every possible available remedy, which in her case meant:

(i) The police in Benin, Kaduna, Lagos and throughout the Nigerian Police Force in all its layers and branches; and

(ii) Women lawyers and non-governmental organisations.

6. She submits that this in effect requires her to participate in "a bottomless process of reporting to State and non-State bodies".

7. Under this heading, the applicant further submits that the Tribunal relied on selected passages from the country of origin information and relies on the judgment of Clarke J. in *Idiakeua v. The Minister for Justice, Equality and Law Reform and The Refugee Appeals Tribunal* (Unreported, High Court, 10th May, 2005):-

> "It would appear that the true test is as to whether the country concerned provides reasonable protection in practical terms…"

8. It is further submitted that the Tribunal should have and did not give "appropriate weight to all such information" rather than accepting one set of such information and rejecting conflicting information. This conflicting information related in particular to the manifest inadequacies of the Nigerian Police.

9. In relation to (b), the applicant submits that the Tribunal did not conduct a proper "relevance or reasonableness" analysis when considering the issue of internal relocation. No reference is made to either the UNHCR Guidelines or the relevance or reasonableness analysis when considering the issue of internal relocation. She further submits that the Tribunal had a duty to properly consider or give appropriate weight to the country of origin information put before it, but did not do so.

10. The respondents submit that the applicant seeks to appeal the decision of the Tribunal rather than to judicially review it. They claim the applicant really is taking issue with the Tribunal's findings of fact and its application of the law to the facts of the case.

11. Dealing with the first of the two grounds advanced, i.e. state protection; the respondents submit that the applicant lays too much weight on the phrase used by the Tribunal at p. 6 of its decision i.e. "it is incumbent upon an applicant to explore all possible options with regard to seeking state protection before seeking the protection of another State". The decision must be read as a whole. In this context, the Tribunal also considered that there existed a situation in which state protection "might reasonably have been forthcoming". In this regard the Tribunal's decision was relying on La Forest J. in *Ward v. The Attorney General of Canada* [1993] 2 S.C.R. 689. There La Forest J. formulated the test for fear of persecution as follows:

> "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. Put another way, the 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."

12. The respondent argued further that the Tribunal had in fact referred to country of origin information (COI) quoted in the Refugee Appeals Commission report, i.e. correspondence from Nimi Walson-Jack to the Canadian Research Directorate of the Immigration and Refugee Board. It also quoted from COI submitted on the applicant's behalf.

13. The Tribunal on a proper construction of its decision did not limit the applicable test to whether all possible options for state protection had been explored. It was further not a fair reading of the decision to hold that the applicant had to seek the assistance of various NGOs when it was simply quoting from COI submitted by the applicant herself. The Tribunal was correct in its application of the test formulated by the Supreme Court of Canada.

14. As to internal relocation, the respondents argue that the Tribunal's approach was in fact consistent with the UNHCR Handbook and notably with para. 91 thereof:-

> "The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so."

15. The respondents further noted that the Tribunal decision relied on the decision of Peart J. in *Okeke v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, 17th February, 2006) where he quoted with approval from Hathaway, The Law of Refugee Status (Butterworths, 1991) at p. 133 to the effect:-

> "A person cannot be said to be at risk of persecution if she can assess effective protection in some part of her state of origin. Because refugee law is intended to meet the needs of only those who have no alternative to seeking international protection, primary recourse should always be to one's own state."

16. In relation to the applicant's argument that the Tribunal member did not have regard to country of origin information provided in relation to the possibility of internal relocation the respondents cite p. 7 of the decision:-

> "Thus, while the applicant should have reported the matter to the police in Benin or Lagos, she did have the alternative of seeking protection elsewhere should she so wish. She failed to do this. Country of origin information further indicates that internal relocation is possible for women wishing to avoid FGM. It states that the NHRC express surprise if someone actually had to leave Nigeria in order to avoid FGM, instead of taking up residence elsewhere in Nigeria. NHRC added that it might be difficult for women residing in the south who wish to avoid FGM to take up residence in the Northern part, whereas all Nigerians have the possibility to take up residence in Lagos due to the ethnic diversity and size of the city."

17. This, the respondents point out, is a reference to the UK Home Office Report on Nigeria for April, 2005. The NHRC is the Nigerian Human Rights Commission. This was apparently the most up-to-date source of information before the Tribunal.

18. In sum, the respondents submit that the Tribunal did in fact take into account all of the COI submitted and relied on it fairly to reach the decision.

19. The nature of judicial review in these cases and the test to be applied may well be open to debate. Whether in cases involving human or constitutional rights the court should go further than the standard in normal judicial review as is set out in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 or whether there is some more detailed scrutiny required as appears to be suggested by Fennelly J. and McGuinness J. in the case of *L. and O. v. The Minister for Justice* [2003] 1 I.R. 1. Whilst I would sympathise with this stricter approach by the courts in cases involving potentially serious violations of human or constitutional rights, in the context of this case I am of the view that it is sufficient to note that, as in leave applications, there must be weighty and substantial reasons why the court should intervene. The High Court must not act as a Court of Appeal interposing its judgment of the facts in place of the established Tribunal save where there are weighty and substantial reasons to do so. With regard to state protection, the applicants claim that the Tribunal decided that the applicant was obliged to explore all options and to participate in what she called a bottomless process of reporting to State and non-State bodies. The applicant claims the rationale on which the Tribunal proceeded was a misreading of the Ward case to this effect. In my view this is itself a misreading of the decision in question led by focusing too heavily on a single phrase. It goes without saying that any decision must be read in the round. Reading it thus it seems to me that the applicant's case under this heading is unsustainable. The statement made at p. 6 of the decision and of which the applicant complains, i.e. "it is incumbent upon an applicant to explore all possible options with regard to seeking state protection before seeking the protection of another State" does seem to me to be too narrow. However reading the decision in the round, it appears clear to me that the Tribunal in fact adopted a broader approach. It noted the country of origin information submitted on the applicant's behalf wherein it was pointed out that there were women's groups and NGO's to whom she could turn for protection and assistance. Furthermore it noted that country of origin information indicated internal relocation was possible for persons wishing to avoid FGM. In this context I note the claim by the applicants in their oral submissions that the Tribunal confused relocation with state protection. I do not think it did so. State protection may be available in some internal locations but not in others. The two may therefore, in some circumstances, be linked. In its reliance on Ward it seems to me that the Tribunal set out the correct formulation when it noted that state protection must be sought where it "might reasonably have been forthcoming", it seems to me that what the Tribunal decided in this regard was that there was a range of options open to the applicant to seek protection in addition to the police in her husband's

village but that she did not avail of any of them. It seems to me that what the Tribunal was really saying in its decision was not that she must try every single possible source of protection but rather that, but for the village police, she had tried none of them. There seems ample evidence upon which the Tribunal could base this finding.

20. The applicants further argued that the Tribunal relied on selected passages from the country of origin information put forward by the applicant. It is clear that the Tribunal must take into account COI that is submitted to it. The manner in which it balances that COI it seems to me is a matter for the Tribunal of fact. Absent some glaring and manifest flaw, I cannot see how the court could intervene in such an assessment of the facts without becoming in effect a Court of Appeal on the facts. This is something it must avoid. I note in any event that at p. 5 of the decision the Tribunal relied upon COI to establish one of the essential criteria, i.e. a genuine subjective fear and a valid basis for it. It appears therefore that the Tribunal relied on the COI in a finding favourable to the applicant. It further seems to me that among the most convincing elements of the COI submitted by the applicant was the Nigerian Human Rights Commission's expression of surprise that someone actually had to leave Nigeria in order to avoid FGM instead of relocating.

21. Reading the decision of the Tribunal as a whole as I consider the court must do, it seems to me to be a fair and balanced one and one taken within its jurisdiction. Consequently I must refuse the order sought by the applicant.