

THE HIGH COURT

2004 No. 573 JR

IN THE MATTER OF THE REFUGEE ACT 1996

BETWEEN

GLADYS AYOKA OGUNLADE, ADEOLA YEMI DARAMOLA (A MINOR) SUING THROUGH HER NEXT FRIEND AND SISTER GLADYS AYOKA OGUNLADE, SIMMIAT OYEDAMILOLA OGUNLADE (A MINOR) AND SAMMIAT OYEDAMOLA OGUNLADE (A MINOR) SUING THROUGH THEIR NEXT FRIEND AND MOTHER GLADYS AYOKA OGUNLADE

APPLICANTS

**AND
REFUGEE APPEALS TRIBUNAL (TRIBUNAL MEMBER, JAMES NICHOLSON) AND MINISTER FOR JUSTICE EQUALITY AND LAW REFORM**

RESPONDENTS

Judgment of Mr. Justice Gilligan delivered on the 29th day of July, 2005.

1. The applicants bring these proceedings seeking leave to apply for judicial review for the following reliefs:

(a) A declaration that the decision of the first named respondent of 9th June, 2004, denying the applicants refugee status, and the recommendation of the Tribunal Member of the 28th May, 2004, are *ultra vires*, and without efficacy and were reached in infringement of the applicant's rights to constitutional and natural justice and fair procedures.

(b) An order of *certiorari* quashing the decision, of the first named respondent of 9th June, 2004, refusing the applicants refugee status and the recommendation of the Tribunal Member of the 28th May, 2004

(c) An order of *mandamus* directing that the applicant's claim for refugee status be remitted for hearing by the Refugee Appeals Tribunal as directed by this court.

(d) An injunction restraining the second named respondent from taking any steps pursuant to s. 17(1)(b) of the Refugee Act 1996 to affirm the decision to deny the applicants refugee status and/or make a proposal to deport and/or to deport the applicants.

(e) Further and other relief including if necessary an extension of time for the making of this application or any part thereof.

(f) Costs.

2. The applicants are a female citizen of Nigeria, Gladys Ayoka Ogunlade, born on 14th November, 1977, her two twin daughters, Simmiat and Sammiat, born on 9th October, 2001, and her sister Adeola, born on 22nd January, 1987.

3. The first named applicant arrived in Ireland on 7th July, 2003, with her two children and her sister. Her sister was just over sixteen and half years old when she arrived in Ireland. The first named applicant has acknowledged that she would act as her sister's guardian in the asylum process. Shortly after her arrival, the applicant submitted an application for refugee status which was received by the Office of the Refugee Applications Commissioner on the 19th July, 2003. The applicant completed a form acknowledging that she wished to have her children and her sister included under her application for asylum rather than be interviewed separately.

4. The first named applicant has stated that one of her daughters suffers from sickle cell disease. Medical reports provided by the applicant confirm this, to be the position and outline the nature of the disease and its high prevalence rate in Africa. Evidence has been provided by the applicant that 20% of children in Africa will die of sickle cell related complications before the age of 5 years. The report from Dr. McMahon, consultant haematologist in Our Lady's Hospital for Sick Children, Crumlin concludes that if the applicant's daughter returns to Africa she will probably die.

5. The first named applicant is a Christian of the Yoruba ethnic group. She claims that the fact that her daughters were affected with this disease has caused them to be stigmatised in the Yoruba tradition. It is claimed by the applicant that her in laws wish to subject her children to female genital mutilation against her will.

6. She claims that she had to flee Nigeria by reason of a fear of persecution on the grounds of her ethnicity and her objection to female genital mutilation (FGM). It is also claimed by the applicant that her in laws had threatened to harm her daughter.

7. The applicants claim that they have a well founded fear of persecution.

8. The Refugee Applications Commission recommended that the applicants should not be declared to be refugees on the basis that the applicant had failed to establish a well founded fear of persecution as defined under s. 2 of the Refugee Act, 1996 as amended. Further the Commissioner was satisfied that s. 13(6)(a) applied in this case on the basis that the applicant had showed either no basis or minimal basis for the contention that she is a refugee.

9. In these circumstances the applicants appeal was dealt with by the Refugee Appeals Tribunal's member without an oral hearing and in his decision as dated 28th May, 2004, he found that the applicant was not a refugee within the meaning of s. 2 of the Refugee Act, 1996 as amended and affirmed the recommendation made by the Refugee Applications Commissioner and dismissed the appeal.

10. The Refugee Appeals Tribunal member outlined his decision in the following terms:-

"Having had regard to all the relevant facts and considered in detail the applicants answers given in her questionnaire her replies at interview, and taking into consideration the submissions made on her behalf by her solicitors, I am not satisfied that the applicant has been subjected to persecution for any reason contemplated by Section 2 of the Refugee Act, 1996 (as amended), while she lived in Nigeria, for the following reasons:

1. I find the applicant's evidence that she feared her daughters would be circumcised, given that the applicant opposed this procedure, does not amount to persecution;

2. I find the applicant's evidence that her husband had a car accident, as a result of ju ju charms, to lack credibility;
3. I find that applicant's evidence that one of her children was to be sacrificed in a ritual to lack credibility, and to be contrary to country of origin information. The applicant's contention that her daughter would be sacrificed is contrary to country of origin information (The New Encyclopaedia Britannica for the Isoko People in March 1999);
4. Given that the applicant, and her husband, did not reside with his father, I find her contention that her children could be circumcised unknowingly and against their will, to be impossible;
5. I find that applicant's evidence that the police would not interfere because they did see her father-in-law attempting to kidnap her children, given that there were passers who witness the incident, and helped her, to lack credibility;
6. I find the contradictory evidence given by the applicant in relation to reporting the matter to the police, on one occasion she stated that she called them three times but they did not answer and subsequently stated that they refused to intervene, tends to undermine her credibility;
7. Given that the applicant and her children were never harmed, or assaulted, by her father-in-law, I find her assertion that he can use "fetish things" against her, does not amount to persecution.

11. In the circumstances, I find that the applicant is not a refugee within the meaning of Section 2 of the Refugee Act, 1996 (as amended).

12. Accordingly, I affirm the recommendation made by the Refugee Applications Commissioner and dismiss the appeal".

13. Grounds upon which relief is sought -

14. The applicant has set out a number of grounds on which judicial review is sought.

1. The principal ground advanced is that the Tribunal member erred in law and acted in breach of the applicant's right to fair procedures in failing to carry out any objective assessment of prevailing country conditions regarding the practice of female genital mutilation in Nigeria and/or in omitting to consider relevant information that was before him in this regard.
2. The applicant also claims that the Tribunal member erred in law and in breach of the applicants' right to constitutional justice by reason of the manner in which he assessed credibility.
3. Further the applicant claims that the Tribunal member engaged in uncorroborated personal conjecture and speculation in reaching its conclusion in relation to the application.
4. Further that the Tribunal member erred in law and acted ultra vires s. 2 and Article 1(a)(2) Refugee Act, 1996 and in contravention of the UNHCR Handbook in omitting to consider and assess whether the applicant had a well founded fear of persecution for a convention reason and whether there was a real chance or possibility of persecution if the applicant was refouled to Nigeria.
5. Further the applicant submits that the Tribunal member processed and considered the applicants hearing in contravention and disregard of the directly relevant UNHCR guidelines and criteria for assessing and determining refugee status claims for women and in particular women and/or minors in fear of persecution by reason of same and in particular the UNHCR guidelines on the protection of refugee women, July 1991, UNHCR guidelines on International Protection Against Gender Related Persecution, May 2002.

15. It has been held that with regard to the assessment of credibility, while not a matter for the court to assess, the process by which such credibility is assessed is a matter which is within the remit of judicial review, (*Bujari v. Minister for Justice Equality and Law Reform and the R.A.T.* unreported, High Court, 2nd May 2003).

16. In *Da Silveira v. The Refugee Appeals Tribunal* (unreported High Court, 9th July, 2004) Peart J. describes the issue of credibility as:-

"one of the most difficult tasks facing the Commissioner and the Tribunal member. It is an unenviable task, and one that is fraught with possible danger."

17. In *Da Silveira*, Peart J envisages that an oral hearing would possibly be necessary in the event that the applicant's story is not believed.

18. Peart J. continues to state the following in relation to the proper approach to the assessment of credibility:-

"A question related to the assessment of the credibility is the standard by which evidence of past persecution and possible future persecution must be judged by the Tribunal. The task of the Tribunal is not simply to be satisfied that there is a well-founded fear of persecution arising from the past, but also that, owing to such well-founded fear for a Convention reason is outside the country of nationality, and is unable or owing to such fear is unwilling to avail himself of the protection of that country. In other words, that if returned to that country he would be likely to suffer persecution in the future. It is therefore not sufficient for the adjudicator to be satisfied or not as the case may be about particular facts and details relating to past persecution, a lack of credibility on the part of the applicant in relation to same, but not all past events, cannot foreclose or obviate the necessity to consider whether, if returned, it is likely that the applicant would suffer Convention persecution."

19. Furthermore in *Zhuchkova v. Minister for Justice and R.A.T.*, (unreported High Court, 26th November, 2004) Clarke J. states; "A finding of lack of credibility, it is at least arguable, must therefore be based on a rational analysis which explains why, in the view of the deciding officer, the truth has not been told." The applicants have submitted that in reaching his decision, the Tribunal member has not conducted such a rational analysis regarding credibility and that the lack of rationale is compounded by the fact that the credibility findings were made in circumstances where neither the first named applicant or the other applicants for refugee status had

any opportunity to present evidence or their account of events before the Tribunal.

20. The question on the application for leave is as to whether the applicants have raised an arguable case that the Tribunal member has not reached the required standard in the assessment of their application. Clarke J. sets out the standard for assessment of credibility in *Zhuchkova* as follows:-

"where the entire determination does, as it did in these cases, turn on one matter, then it seems to me at least arguable that the Tribunal member must give a more detailed analysis justifying a conclusion on credibility"

21. In the case of *Ngeudjo v. R.A.T.*, (unreported, High Court, 22nd July, 2003) White J. granted the applicant leave to apply for judicial review on the grounds that his interview before the Tribunal was conducted in a manner which prejudiced his rights to fair procedures. White J. stated;

"The purpose of the process is a quest for truth, which quest must be conducted in a fair and humane manner with due regard to the dignity of the individual and in accordance with the principle of constitutional and natural justice. The assessor, in this case Mr. Kelly, not only has a right to question, but also an obligation to probe or test the veracity of answers that are being given to him."

22. In the case of the applicants, there is clearly an arguable case that the obligation to probe the veracity of their story was not upheld.

Oral Hearing

23. The applicants have submitted provisions of the UNCHR handbook which they argue underline the requirement to consider all the circumstances of the case. The sections of the handbook referred to are as follows:

199 "While an initial interview should normally suffice to bring an applicant's story to light, it may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts. Untrue statements by themselves are not a reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case."

200. "An examination in depth of the different methods of fact-finding is outside the scope of the present Handbook. It may be mentioned, however, that basic information is frequently given, in the first instance, by completing a standard questionnaire. Such basic information will normally not be sufficient to enable the examiner to reach a decision, and one or more personal interviews will be required. It will be necessary for the examiner to gain the confidence of the applicant in order to assist the latter in putting forward his case and in fully explaining his opinions and feelings. In creating such a climate of confidence it is, of course, of the utmost importance that the applicant's statements will be treated as confidential and that he be so informed".

201. "Very frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained. Taking isolated incidents out of context may be misleading. The cumulative effect of the applicant's experience must be taken into account. Where no single incident stands out above the others, sometimes a small incident may be "the last straw"; and although no single incident may be sufficient, all the incidents related by the applicant taken together, could make his fear "well-founded" (see paragraph 53 above)".

24. It is clear from this that the UNHCR envisages a process where the applicant is given an opportunity to put forward their story, even if it is only an initial interview. Recent case law would suggest that the standard required in this jurisdiction demands a deeper investigatory process to be carried out by the Tribunal before a decision on an application is reached. In the case of *Idiakheua v. R.A.T.* (unreported, High Court, 10th May, 2005) Clarke J. described the process as;

"an inquisitorial one in which a joint obligation is placed on the applicant and the decision maker to discover the true facts."

25. Clarke J. refers to the case of *Ngeudjo v. Refugee Applications Commissioner* (unreported, High Court, White J., 23rd July, 2003) where the High Court made an order of certiorari quashing the decision of the Refugees Appeals Commissioner on the basis that the decision was made in breach of constitutional and natural justice by virtue of the failure to give the applicant the opportunity to deal with matters which would appear to have been crucial to the determination made in the case then under consideration.

26. This process would, in the least, seem to demand that an interview be carried out. In the event of a conflict of facts, the process demands that a further oral hearing be carried out. It follows from precedent on the assessment of credibility that to fully protect the rights of the applicant, the process to grant or refuse refugee status may well require more than an initial interview.

Relevance of Health for Determining Refugee Status

27. It is submitted by the respondents that the difficulties suffered by the daughter of the first named applicant due to the medical condition of sickle cell anaemia do not fall within the remit of the 1951 Convention. The first named applicant has given evidence that she fears that her daughter would be subject to persecution in their country of origin because of her condition.

28. The applicants have submitted that their situation is analogous to that of the applicant in the recent case of *A.O. and A.O. v. The Refugee Appeals Tribunal and the Minister for Justice* (unreported, Peart J., High Court, 26th May, 2004). In this case the applicant challenged the refusal of the tribunal member to grant her refugee status on the grounds that they did not have regard to her fear of persecution in her country of origin by reason of her status as a person who was HIV positive. Peart J. referred to the case of *Kuthyar v The Minister for Immigration & Multicultural Affairs* [2000] FCA 110, a judgment of the Federal Court of Australia, where the Court held that;

"the central question to address in relation to the applicant's medical condition is whether what he might experience if he were to return to India is persecution within the meaning of the Convention."

29. Given this, the Federal Court continued that the real question was:

"whether the Indian authorities are in a position or are trying to protect HIV sufferers from persecutory discrimination.."

Peart J. held that the view of the Court in *Kuthyar* correctly identified the task of the Tribunal in A.O. and A.O. when faced with the question of determining whether the applicant in that case faced persecution in their country of origin on the basis of being HIV positive and that there was a failure of the part of the tribunal in failing to even consider that aspect of her case.

30. In these proceedings the first named applicant has claimed that the fact that her daughters were affected with sickle cell disease has caused them to be stigmatised in the Yoruba tradition. In *A.O. and A.O.* the applicant was provided with an interview by Tribunal but there was no further investigation into the treatment of HIV sufferers in the applicant's home country. This would seem to be analogous to the facts of the current proceedings. I am satisfied to hold that there is an arguable case that fair procedures were not adhered to in assessing the merits of their application.

31. In these circumstances I will give leave to the applicants to apply for judicial review for the reliefs as set out in the statement grounding application for judicial review at paras. 4(a), (b) and (c) upon the grounds as set out at para. 5(a) to (u) inclusive.