Neutral Citation No. [2005] IEHC 374

THE HIGH COURT
JUDICIAL REVIEW

[2004 No. 1197 J.R.]

BETWEEN

CHIMENE MANZI

APPLICANT

AND

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

RESPONDENTS

Judgment of Mr. Justice Clarke delivered the 8th November, 2005.

1. Background Facts

1.1 The applicant is a Burundian national who would appear to have arrived in Ireland on 19th July, 2003. Thereafter she made an application for refugee status. In the questionnaire which she was, in accordance with normal practice, required to complete in support of her application for such refugee status she stated that her father Faustin Manzi and her mother Jeanette Manzi (nee Matama) were of mixed ethnicity in that her father was Hutu and her mother Tutsi. It is clear that her mixed ethnicity formed the basis of her claim to refugee status. In addition to completing the questionnaire, again in accordance with normal practice, the applicant was interviewed on behalf of the Refugee Applications Commissioner ("RAC"). In her case two such interviews took place.

1.2 In the information given to the RAC the applicant gave an account of the fact that her father and brother had been murdered and that subsequently her mother had also been murdered.

At question 39 of the questionnaire she stated as follows:-

> "As the mere offspring of a Hutu father and Tutsi mother I was never accepted. Given what happened to my father, mother and my brother Jerome, I fear for my life if I were to return to that country, as a member of that family.
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> On account of my ethnic origins my father was killed by the rebels. Because he had married a Tutsi they could not trust him. My brother, who had been with him during that time, also lost his life, because he had Tutsi blood from my mother's side. It would have been the same with me if I had been with my father during that period."

1.3 In the course of the first of two interviews (held on the 22nd January, 2004) on behalf of the RAC the applicant gave an account of the circumstances in which she says her mother had been killed in the immediate run up to her departure from Burundi. This occurred, she indicated, when a Captain Kiboko of the FAB (Forces Armees Burundaise) who had been "going out with my mother for two years since my father and brother were killed" and who had helped both her and mother came to the house where she was staying and, apparently drunk, stated that "a Hutu must not live in a house and they must live in a refugee camp". She stated that Captain Kiboko ripped her dress with his bayonet. At that point his phone rang giving her a chance to escape.

1.4 When interviewed on the second occasion by an officer of the RAC on the 1st March, 2004, on being asked what might happen to her if she was sent back to Burundi, the applicant stated as follows:-

> "God knows what would happen. I don't know where I could go if I was sent back to Burundi because of what happened to my mother my father and my brother who were killed by the people who are supposed to protect them. I have been running all my life and refused freedom and justice in my own country. If I was sent back the Captain would want to sleep with me and other people like "Sans Echecs" would kill me and I have nobody in Burundi to protect me. Both the Hutu and Tutsi groups don't trust me because I am of mixed race. I have no side and I have nobody to consider me as a human being even the government".

1.5 The RAC recommended that the applicant should not be declared a refugee. The recommendation is contained in a "report and recommendation" prepared pursuant to s. 13(1) of the Refugee Act 1996. It should be noted that, in part, the reasoning set out in that report questioned the credibility of the applicant.

1.6 Against that decision the applicant appealed to the Refugee Appeals Tribunal ("RAT") by notice of appeal dated 13th July, 2004. A hearing took place on 8th September, 2004 before the first respondent, as a member of the RAT, following which a decision issued dated 2nd November, 2004.

1.7 The decision follows the usual pattern of such decisions in it that it sets out a summary of the evidence, follows this by a statement, in general terms, of the relevant law, goes on to indicate that the Tribunal has noted "the country of origin information, the form 1, and the questionnaire and the replies at interview", and, in the operative part of the decision sets out the substance of the recommendation. That portion is, in this case, very brief and I propose quoting it in full. It reads as follows:-

> "I have carefully considered the submissions made to me with regard to this matter and all that is necessary to be considered pursuant to s. 16(16) of the Refugee Act 1996 (as amended).

Having considered this case I am satisfied that the applicant's difficulties in Burundi do not amount to persecution within the meaning of s. 2 and my reasons for this decision are as follows:-

> The applicant fled Burundi immediately following the death of her mother having fled to her mother's friend's house in which her godfather was present. The reason why the applicant fled was in order to escape the sexual desires of a Captain Kiboko. I find from this evidence that the applicant had been pursued not by virtue of her mixed race but by virtue of the sexual desires of this Captain Kiboko. In my view, after reviewing the evidence, there is no s. 2 nexus which brings the applicant within the definition of a refugee as having a well founded fear of persecution by reason of her mixed ethnic background, her mother being a Tutsi and her being a Hutu. The applicant is therefore not a refugee within the meaning of this Act".

1.8 On that basis the first named respondent affirmed the recommendation made by the RAC.

2. The Applicants Challenge

2.1 In these proceedings the applicant seeks leave to challenge, by way of judicial review, the decision of the RAT. In order to succeed in obtaining leave, the applicant needs to establish substantial grounds for her contentions (that is to say grounds which are not trivial or tenuous).

2.2 The applicant puts forward three grounds. In summary they are as follows:-

> 1. That the RAT failed to consider and deal with the full extent of the applicant's case. In substance the contention under this heading is that by concentrating solely on the immediate circumstances surrounding the applicant's departure from Burundi (that is the events involving Captain Kiboko) the applicant failed to consider the wider aspect of the applicant's contention that she had a well founded fear of persecution by reason of her mixed ethnicity.
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> 2. It is suggested that in coming to the view referred to above the RAT was guilty of a fundamental error of fact; and
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> 3. It is suggested that the decision of the RAT was irrational either in the sense in which that term is used in *O'Keeffe v. An Bord Pleanála* [1993] I.R. 39 or, on the contention of the applicant, by reference to a higher test appropriate to cases involving fundamental human rights.

2.3 It does not seem to me that there is any real distinction between grounds 1 and 2 in that they both focus on the manner in which the RAT approached the range of issues put forward by the applicant as the basis for her claim to refugee status. I would therefore propose dealing with both of these matters together.

3. The Approach of the RAT (The Law)
3.1 It is well settled that the proper test for a consideration of refugee status is the position that pertains as at the time of a consideration by the relevant decision maker of the application. While the precise basis upon which a person may leave their country of origin is, in most cases, a most material factor, it not necessarily the only issue that needs to be considered. In certain cases a person who may, at a certain point in time, have a well founded fear of persecution for a convention reason which leads them directly to flee their country of origin, nonetheless may not qualify for refugee status if, at the time of a subsequent application for such status, circumstances have changed so as to no longer expose the applicant concerned to a well founded fear of persecution if returned to their country of origin at that later time. The circumstances of departure or flight are not, therefore, strictly speaking, relevant in themselves but are normally significantly relevant as an indication of the sort of circumstances which the applicant might expect if he or she were to return.

3.2 It was on that basis that the United States Court of Appeals for the Ninth Circuit considered *Khup v. Ashcroft* (2004) U.S. App. LEXUS 14656. In that case the applicant was a Seventh Day Adventist Minister engaged in preaching in Myanmar. He suffered a relatively minor degree of personal abuse which the relevant US authorities did not consider amounted to persecution. However a colleague preacher was murdered in brutal circumstances. It is worthy of some note that the process with which the Court of Appeals was concerned was a review process which appears to be similar to the role of the courts in this jurisdiction. On the facts of that case, and having concluded that the finding of the immigration judge to the effect that the applicant had, himself, not been subjected to persecution was sustained on the evidence, the Appeal Court went on to indicate that the immigration judge:-

> "Did not address, however, whether the arrest torture and killing of Khup's fellow preacher, and the terror these acts would have aroused in Khup, constitute past persecution. He and U Myint were together warned by the military not to preach. Khup and U Myint preached together in disregard of the military's warning. The military subsequently arrested, tortured and killed U Myint and dragged his dead body through the streets as an example to others. In addition, the military was looking for Khup as well and he was forced to go into hiding and flee from village to village before escaping the country. In the absence of an explicit adverse credibility finding, we must accept this testimony as true. In the light of Khup's testimony a reasonable fact finder would be compelled to conclude that Khup was a refugee fleeing persecution".

3.3 To similar effect the United Nations High Commissioner for Refugees Handbook at para. 43, having set out the considerations necessary to establish the objective element of a well founded fear of persecution, states the following:-

> "43. These considerations need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he will also become a victim of persecution is well founded. The laws of the country of origin and particularly the manner in which they are applied would be relevant. The situation of each person must, however, be assessed on its own merits. In the case of a well known personality, the possibility of persecution may be greater than in the case of a person in obscurity. All these factors e.g. a person's character, his background, his influence, his wealth or his outspokenness, may lead to the conclusion that his fear of persecution is "well founded".

3.4 Two points need to be made. Firstly it seems to me that the view expressed by the US Appeals Court in relation to credibility findings represents the law in this jurisdiction. In the absence of a clear finding of lack of credibility on the part of the applicant concerned, a court exercising a review role (such as this court) must do so on the basis that the applicant's evidence is correct. A finding of lack of credibility may, of course, be either general or may relate to some but not all of the applicants account.

3.5 Secondly it is clear both from *Khup* and the UN Handbook (which has been approved by the courts in this jurisdiction as an appropriate source for the interpretation of the convention and the law (see for example *Z. v. Minister for Justice* (Unreported, High Court, Finnegan J. (21st March, 2001) and *V.Z. v. Minister for Justice* [2002] 2 I.R. 148) that the decision maker (in this case the RAT) is not confined to a consideration of the individual's own circumstances but is also required to look at surrounding circumstances involving those with a significant connection to the applicant where those circumstances might be said to have a bearing on the question of whether the individual applicant has a well founded fear of persecution.

4. Application to this case
4.1 In this case the RAT made no finding adverse to the applicants credibility. This case must, therefore, be considered on the assumption that the applicants account is substantially true. On those facts it does not seem to me that a review court could go so far as the US Appeals Court did in *Khup* by indicating that the only reasonable finding on the facts before it was one of a well founded fear of persecution. However it does seem to me that it is, to say the least, substantially arguable that the decision maker in this case failed to have regard to the possibility that, notwithstanding that the immediate cause of the applicant's flight may have been as a result of a potential sexual assault, the overall circumstances in which the applicant found herself were nonetheless sufficient to warrant a finding of a well founded fear of persecution.

4.2 In that context it is also relevant to give a brief consideration to the country of origin information which was before the decision maker and which, according to the decision itself, the decision maker took into account. That country of origin information does establish a significant degree of ethnic difficulties between the Hutu and the Tutsi in Burundi. It is true to say, as was pointed out by counsel for the respondents, that the country of origin information also reveals attempts from the earlier part of 2003 to bring about a cessation of those difficulties. It should be said, however, that on the evidence before the RAT it was by no means clear that the problems associated with the earlier difficulties had abated or at least fully abated. For example as late as the 26th February, 2004 the country of origin information suggests that fresh fighting between the army and the FNL (Rwasa) displaced thousands of people in Bujumbra Rural. It certainly appears to have been the case that, as of the late 1990s, there was a recognition that there were legitimate fears on the part of persons of mixed ethnicity. So much so that 280 refugees from Rwanda and Burundi were given permission to emigrate to the United States on that basis.

4.3 It may be that it would have been open to the RAT to reach a view, based on a rational analysis of the country of origin information, that the problems which existed in the latter part of the 1990s in relation to those of mixed ethnicity had diminished to such an extent by the time that the decision was reached, so as to lead to a conclusion that such persons were no longer at risk. However there is no evidence in the decision in this case that the RAT came to any such view.

4.4 Similarly it might have been open to the RAT, taking into account the wide variety of factors identified by the US Appeals Court in *Khup*, to take the view that notwithstanding the general risk to persons of mixed ethnicity (to such an extent as it was satisfied that risk continued) the degree of risk to the applicant was not such as would give rise to a well founded fear of persecution in her case. However again the RAT did not come to such a conclusion. The decision did not seek, as it is at least arguable it should have done, to assess the applicant's case against the background of country of origin information. Given that that country of origin information, at least on one view, would be supportive of the general tenor of the applicant's contentions, it would, it is in my view arguable, have required a much more detailed consideration by the decision maker as to the precise circumstances in which the applicant found herself, set against both the remainder of her account and the country of origin information, if the RAT was properly to conclude that she was, nonetheless, not in a position where she could advance a well founded fear of persecution. In the circumstances of this case, and having regard to those other factors, it seems to me to be arguable that, by concentrating solely on the immediate cause of flight, the decision maker fell into error such as led the decision maker to fail to give the detailed consideration required to that country of origin information and the general circumstances surrounding the applicant's family and the extreme difficulties which, on her evidence, they encountered by reason of mixed ethnicity.

4.5 In those circumstances I am satisfied that the applicant has made out a substantial case for her contention that the RAT considered her application on a basis which was significantly narrower than required by law. In coming to that view I have not ignored the argument put forward on behalf of the respondents which draws attention to the fact that in the operative part of the decision reference is made to the applicant's "difficulties" from which it was suggested it might be inferred that the decision maker had had regard to all of the potential difficulties to which the applicant might be exposed. However in respect of that contention it is necessary to note that the reason given by the RAT for coming to that view in respect of "difficulties" is one which is solely concerned with the incident involving Captain Kiboko. In those circumstances it appears to me to be more than arguable that on the only fair reading of the decision, the Tribunal member concerned confined her considerations to that question. It is, therefore, arguable that she failed to take into account relevant factors.

5. Irrationality

5.1 As a further ground the applicant contends that the decision is irrational. It does not seem to me that this contention is well founded. The decision is rational insofar as it goes. It was open, in my view, to the decision maker to form the view which she did about the specific incident involving Captain Kiboko which led, in the immediate sense, to the applicant's departure. There do not seem to me to be substantial grounds for reviewing that aspect of the finding even on the basis of a higher standard of review. The true direction of the applicant's complaint is that that finding, in itself, is insufficient to lead to the overall finding of a lack of refugee status because of the failure to have regard to the other matters which I have identified above. If the applicant has a legitimate complaint about the decision it is therefore that it was based on too narrow a ground rather that it was, insofar as it goes, irrational.

6. Conclusion

6.1 In those circumstances I propose giving the applicant leave to seek judicial review so as to seek the reliefs set out at para. 4 of the statement, on the grounds set out at para. 5 with the exception of ground (vii). Finally I should note that the application for leave in this case was a very short period out of time. However no point is taken by the respondents on this issue and in the circumstances I would also propose making an order extending time.