

**THE HIGH COURT**

**2008 281 JR**

**BETWEEN**

**Z.W.W. AND Me.M, S.M. AND Ma.M.**

**(MINORS SUING BY THEIR MOTHER AND NEXT FRIEND Z.W.W.)**

**APPLICANTS**

**AND**

**REFUGEE APPLICATIONS COMMISSIONER AND BEN GARVEY ACTING AS THE REFUGEE APPEALS TRIBUNAL**

**RESPONDENTS**

**AND**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND**

**IRELAND AND THE ATTORNEY GENERAL**

**NOTICE PARTIES**

**JUDGMENT of Mr. Justice Cooke delivered the 16th day of April, 2010.**

1. The first named applicant (hereinafter "the applicant") and her three children the second, third and fourth named applicants (hereinafter "the minor applicants") arrived in the State on 7th October, 2005 and claimed asylum. The claim was the subject of a report and negative recommendation by the first named respondent (the "Commissioner") dated 31st January, 2006 which was then appealed to the Refugee Appeals Tribunal. An appeal hearing took place on 19th November, 2007 and the negative recommendation of the Commissioner was upheld in a decision by the Tribunal dated 12th December, 2007, (the "Contested Decision").

2. As originally commenced, the present judicial review application sought leave to apply for orders of *certiorari* in respect of both the s. 13 report of the Commissioner and the appeal decision of the Tribunal but at the outset of the hearing the application was withdrawn in respect of the s. 13 report. As a result, a number of the grounds proposed to be relied upon in the original statement of grounds were no longer relevant and counsel for the applicant also indicated that several others would not be pursued. Of the original 29 grounds set out in the statement there thus remain 14, being those numbered 9 – 13, 18 – 24, 27 and 28. Although these remaining grounds raise issues which are expressed as errors of fact or law, breaches of the requirements of natural and constitutional justice and failures in the assessment of evidence and information on the part of the Tribunal member, the central thrust of the argument as made by counsel is directed at the failure to accept as credible the applicant's account of the personal history which gave rise to her flight with the minor applicants from her country of origin and to her claim to fear persecution if returned. In order to determine whether these issues raise substantial grounds which warrant the grant of leave, it is necessary to summarise briefly the basis of that claim and the manner in which it was assessed in the two stages of the examination of the asylum application by the Commissioner and the Tribunal.

3. The applicant is a native of Eritrea and claimed to be a member of the Kunama people. Both the authorised officer in the s. 13 report and the Tribunal member in the appeal decision accepted that country of origin information indicated that the Kunama people were at risk of harassment by the Eritrean government authorities such that if she was established as being a member of that ethnic group, her claim to fear of such treatment on return might be credible as a basis of fear of persecution in the sense of the Convention. In effect, it was her claim to be of that particular ethnicity which was the focus of the appraisal made at both stages of the examination of the asylum application.

4. The account she gave was that she was born and had grown up in the Binbina district of Eritrea. In 1999 she married M.A.M.. When the war between Eritrea and Ethiopia broke out, they were driven from their lands in May 2000 by the Ethiopians and they went to live with relatives in Mogolo for six months and then returned to Binbina. A year later the authorities sought to settle returning Eritreans from Ethiopia and Sudan on the Kunama lands and she and her husband began to be threatened and terrorised. Her husband was accused of being a spy. They were forcibly moved from their lands and placed in a camp on the Eritrean/Sudan border where the applicant lived from 2001 to 2005. Her first two children were born in that camp. Her husband disappeared while they were in the camp and she has not seen him since. She was raped by soldiers, found that she was pregnant and tried to commit suicide. Two priests helped her and took her to Khartoum and from there her flight to Ireland was arranged.

5. In the s. 13 report the authorised officer had identified the central issue in assessing the asylum claim in these terms:

"Given the current situation in Eritrea for Kunama, identifying whether the applicant is actually a member of the Kunama is central to the credibility of her claim."

For that purpose the applicant was asked questions in the interview as to her knowledge of the customs, traditions and language of the Kunama people and her responses were found to be inadequate. She was asked about Kunama dances, about drum playing and to identify certain phrases relating to important Kunama ceremonies. The authorised officer concluded:

"The applicant's lack of knowledge of Kunama customs and traditions would undermine her claim to be a member of the Kunama and hence in need of international protection. Therefore the applicant has failed to demonstrate that she was persecuted in Eritrea within the meaning of s. 2 of the Refugee Act."

6. In the Contested Decision the Tribunal member summarised the applicant's account of those events in Section 3 of the decision under the heading "The Applicant's Claim". He refers to the answers she gave to questions put to her both at the s. 11 interview and at the appeal hearing. He records further questions put to the applicant at the hearing by the presenting officer. Her replies to questions about the Kunama language are detailed including the point put to her that neither she nor her parents appear to have spoken the distinct Kunama language.

7. In section 6 of the decision under the heading "Analysis of the Applicant's Claim" the Tribunal member identifies a number of reasons as to why "the Tribunal finds it difficult to accept her claim that she was persecuted" as follows:

- In relation to the years spent in the camp he says that he does not accept "that if the Sudanese were in charge, they would have allowed Eritrean soldiers access";
- Her conflicting evidence on the customs and language of the Kunama put a question mark over her ethnicity although he also remarks "whilst this is not fatal to her claim";
- He found the country of origin documentation submitted to be conflicting and he points out that while it shows the Kunama suffered an extensive land take over between 1991 and 1997, there is no mention of that problem at the time the applicant claimed that she had faced the returning refugees.

8. Although the Contested Decision is clear in its ultimate conclusion in as much as it explicitly affirms the report and negative recommendation of the Commissioner, the approach of the Tribunal member in reaching the conclusion appears to betray some degree of hesitation. As already mentioned, the conflicting evidence in relation to customs and language is said to "put a question mark over her true ethnicity" while at the same time saying that that is not fatal to the claim. Similarly, the inability to give satisfactory answers to the questions on language is qualified by the remark "given the subdivision associated with it, her answers do not fundamentally undermine her claim to be a member of" the Kunama.

9. In essence, however, this claim for asylum has been examined by both the Commissioner and the Tribunal and found to be sufficiently lacking in credibility as to be incapable of establishing a well founded fear of persecution. Accordingly, this decision cannot be set aside by the Court unless it is demonstrated that the way in which that conclusion has been reached is so clearly flawed or irrational as to be unlawful. As has been repeatedly emphasised in the judgments of the High Court in judicial review of asylum decisions coming before it under the 1996 Act, the assessment of credibility is the exclusive function of the administrative decision makers in the asylum process. That is particularly so where the conclusion reached depends upon a judgment that the person concerned has not told the truth about his or her own circumstances or history and especially in cases where two decision makers have had the benefit of direct interview of the asylum seeker under s. 11 of the Act or at an appeal hearing. That, therefore, is the context in which the remaining grounds relied upon in the present case fall to be considered.

10. Grounds 9 – 13 together with numbers 20 and 21 in the statement of grounds are directed in various ways at alleged deficiencies in the approach of the Tribunal member to the applicant's medical condition, to the evidence contained in a medical report which had been produced and to the fact that at the appeal hearing the applicant appears to have fainted or suffered some form of collapse as a result of the stress or tension of the occasion. In her affidavit the applicant complains that when she collapsed just as the hearing concluded, the Tribunal member "immediately gathered his documents from the table and left the hearing room rapidly without rendering me any assistance, making any enquiries about my well being or arranging to call a doctor or ambulance for me in an emergency situation all of which were left in the hands of my legal representative and the interpreter with the presenting officer departing the hearing room shortly after the second named respondent." In ground number 13 it is complained that no mention of this collapse is made in the Contested Decision.

11. It is also alleged that the Contested Decision is defective in failing to apply paragraphs 206 – 212 of the UNHCR Handbook with regard to persons suffering from psychological and psychiatric conditions. Ground number 11 also invokes the Safety, Health and Welfare at Work Regulations 1993 but as that was not mentioned either in the written legal submissions or in argument at the hearing, the precise relevance of those regulations remains unclear to the Court.

12. The medical report relied upon is dated 23rd March, 2006 and was furnished by Dr. O'Hanlon of the Asylum Medical Health Screening Services of the HSE. Dr. O'Hanlon is very sympathetic to the position of the applicant and says:

"I feel she is a genuine case and would request on her behalf that she be granted permission to remain in Ireland". More pertinent, however, to the present issue is the doctor's description of the applicant's condition: "She suffered many months of abuse at the hands of her captives in a refugee camp in Sudan and has the stigmata of this abuse both physically and mentally.... She also displayed signs consistent with post traumatic stress disorder and reactive depression secondary to her past. She is on medication for this and also awaits an appointment to see a psychologist. She had had other medical conditions of a sensitive nature that have required the input of other medical specialists (these were all the result of the sexual abuse she suffered in Sudan)."

13. As indicated above, the essential complaint being made in these grounds is that the Tribunal member erred in failing to give any proper consideration to this medical evidence upon the basis that it clearly corroborates her account of abuse including sexual abuse and mistreatment which she says she suffered while in the camp in Sudan. Impliedly, her vulnerable state and fragile mental condition as a result is said to be confirmed by her collapse at the conclusion of the hearing.

14. Notwithstanding the emphasis that has been placed in argument upon the probative value of all of this evidence as lending credibility to the applicant's account of the persecution she suffered, the difficulty remains that it is not directly relevant to the issue which the Tribunal member had identified as being crucial to the credibility of the particular claim that was made as the basis for

seeking asylum. The issue was not whether the applicant would again suffer persecution if she was returned to the refugee camp where she had lived between 2001 and 2005. The issue was whether, if returned to the Binbina area of Eritrea from which she originates, she would, as a member of the Kunama people, suffer persecution at the hands of Eritrean authorities. That issue turned upon the question as to whether the applicant was in fact a member of that ethnic group and had been decided against her at both stages based upon the assessment made of her lack of familiarity with matters a member of the Kunama people would be expected to know.

15. So far as concerns the collapse at the hearing, it is clear that this occurred at the very conclusion of the hearing and it has not been suggested that further evidence or different evidence would have been given had the event not occurred. The alleged lack of courtesy or compassion on the part of the Tribunal member and the presenting officer has no bearing upon the validity of the Contested Decision.

16. Thus, contrary to the point sought to be made in grounds numbers 20 and 21, the Court is satisfied that it was open to the Tribunal member to consider that the content of the medical report was "of little value in assessing the well founded fear of persecution the applicant claims to have" given that the particular fear which was being considered as the basis for a claim of persecution was that of being returned to the Binbina area of Eritrea as a member of the Kunama people.

17. In that regard it is of considerable significance that the Tribunal member in the final paragraph of the Section 6 analysis points out that when the evidence of the applicant and the country of origin information is weighed, some of it supports her claim and other parts do not but that, as the UNHCR "presently encourages people to return to Eritrea it would not do so if the situation was problematic or unsafe". Thus, the Tribunal member focuses upon the specific issue as to whether the applicant would face persecution if returned to Eritrea and finds, on balance, that she would not.

18. Grounds numbers 18 and 19 are directed at the reliance placed by the Tribunal member on country of origin information and particularly at the passage mentioned above at the end of the Section 6 analysis concerning the UNHCR's encouragement of people to return to Eritrea. The complaint is made that such up to date country of origin information had not previously been forwarded to the applicant or her solicitors and no copies of it were made available to the applicant at the hearing. This ground is unfounded in fact. In the summary of the applicant's claim at Section 3 of the Contested Decision the Tribunal member records a discussion in relation to the refugee camp and possible return to Eritrea in these terms:

"It was put to her that country of origin information states that the UNHCR ran this camp. She was asked if she was ever asked to leave the camp and return to Eritrea and she said no because she did not want to return to Eritrea. It was put to her that the up to date country of origin information states that the UNHCR have returned many thousands of people to Eritrea and that it is now a safe place to go back to. The applicant replied 'I don't want to return'. It was put to her that the UNHCR would not return people knowingly to an unsafe place and the applicant replied that she would not feel safe."

19. Accordingly, insofar as it is submitted that there was a breach of fair procedures in consulting information not available to the applicant or her legal representatives, the submission is inconsistent with the fact that the issue appears to have been discussed in some detail at the hearing.

20. In ground number 22, it is argued that the Tribunal erred in law in failing to make any assessment of the applicant's claim to be a member of the Kunama ethnic group having regard particularly to the apparent acceptance by the Tribunal member of the indications given in country of origin information that the Kunama ethnic group was particularly exposed to persecution. Contrary to the suggestion made in argument, however, it is clear that the Tribunal member ultimately arrived at the conclusion that the applicant had not established her membership of the Kunama ethnic group notwithstanding the hesitation and even difficulty apparent in the language which the Tribunal member uses in the expression of the balancing exercise which he has clearly carried out in the Section 6 analysis. The Tribunal member has clearly had regard both to what transpired at the appeal hearing and to the assessment made by the authorised officer in the s. 13 report. Having done so, the Tribunal member arrived at the decision upon the appeal issues which leads to the affirmation of the negative recommendation.

21. In ground number 23 it is submitted that the Tribunal member erred in law in the findings as to lack of credibility made based upon the applicant's description of her travel arrangements. Insofar as this finding is included at the very end of the Section 6 analysis, it is clearly supplementary and incidental to the main findings in relation to the claim of persecution and even if it could be set aside upon the basis that the matter was not put to the applicant at the oral hearing, its vulnerability as a finding could not in any event serve as a basis for annulling the decision if the conclusion as to lack of credibility of her claim to be of the Kunama ethnic group is held to be sound.

22. Ground number 24 appears to be directed at the fact that in Section 5 of the Contested Decision headed "Law" the Tribunal member has included extracts from the European Communities (Eligibility for Protection) Regulations 2006. The complaint is made that the applicant was given no notice that these regulations would be a factor or a consideration in the hearing of the applicant's appeal claim. As such, the ground is lacking in any substance because no reliance whatsoever is placed upon those regulations in reaching the findings set out in Section 6 of the Contested Decision.

23. Finally, grounds numbers 27 and 28 are of the general character alleging that the decision is irrational and unreasonable and contains errors on its face. Insofar as these matters were relied upon in argument, they are covered in the more substantive grounds dealt with earlier above.

24. For all of these reasons, accordingly, the Court is satisfied that no substantial ground is raised which would warrant the grant of leave for a judicial review of the contested decision. As has been pointed out, this is a decision which turned essentially upon the question of credibility of the applicant's claim to be a member of the Kunama ethnic group which has undoubtedly been identified in country of origin information as one of the groups exposed to some risk of displacement, discrimination and harassment in Eritrea. As the Court has indicated, it is satisfied that notwithstanding the hesitation expressed by the Tribunal member in weighing up all of the applicant's evidence and the information gleaned from country of origin documentation, the conclusion reached was sufficiently sound and clearly expressed to be incapable of being interfered with by this Court.

25. Finally, this was a case in which an extension of time in the region of 52 days would have been required before leave might have been granted. Having regard to the conclusion the Court has reached on the lack of substance in the grounds proposed to have been raised, it is unnecessary to rule upon the issue.

