

THE HIGH COURT

JUDICIAL REVIEW

2010 171 JR

BETWEEN

B. E.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered 25th day of June, 2010.

1. This application for an order of *certiorari* to quash a decision of the respondent Minister ("the Contested Decision") refusing the applicant's claim for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006 ("the Regulations") presents one somewhat unusual feature. One of the main arguments made as to the illegality of that decision is that the Minister erred in failing to approach the application of Regulation 5 (2) by accepting as correct a fact which the applicant herself denies. It is submitted that the Minister erred in failing to consider whether a determination that the applicant is eligible for protection is warranted by the fact that she had been subjected in Nigeria to serious harm at some time prior to her departure from that country in 2007 in that she had already been subjected to female circumcision ("FGM"). Her own evidence is that she had not so suffered but had been threatened that she would be and she claims that if she is returned she still will be. The circumstances in which this proposition arises can be summarised as follows.

2. The applicant is a native of Nigeria who lived in a village in Imo state with her parents and four siblings prior to leaving there in May 2007. She arrived in the State on 3rd May, 2007 and applied for asylum on 14th August, 2007. Her application was the subject of a report and negative recommendation by the Refugee Applications Commissioner on 31st August, 2007 and an appeal against that recommendation was rejected by a decision of the Refugee Appeals Tribunal on 18th June, 2009. In her asylum application she gave as her primary reason for leaving Ireland her dream of becoming a nurse and her wish to continue the nursing training she had commenced in Nigeria. She gave a second reason: "... also my reason of being here is because I have a problem with my clitoris". When asked what she feared might happen if returned to Nigeria she said: "...if I go back to my country of origin ... my dream will be dead and I don't know what will become of me and my family. I don't know what will become of my health because I have a problem with my clitoris and it has to be operated".

3. It was in the s. 11 interview on 28th August, 2007, that a threat of being subjected to FGM if returned was first mentioned. She said:

"My reason for coming here is because of my circumcision. In our village, where I came from the ladies there have to be 20 to 21 years before they are circumcised. I'm up to that age soon. If they are doing circumcision people will contract one infection or the other and they will bleed to death. It is traditional circumcision. If you do not do it they will cast you away from the village and they will stone you to death if you are there. My dad was scared that if something happened to me ... as I'm the first daughter of the family. My father consulted my pastor who said that he would help me get away. He consulted the congregation who all contributed money to help me fly out. I also had to leave my nursing. I had completed nine months of it."

4. The report of the Commissioner rejected the applicant's claim to have a well founded fear of persecution for one reason. In effect, the authorised officer found it not credible that the applicant could not avoid FGM by relocating elsewhere in Nigeria. She pointed out that the applicant had second level education and work experience in a private hospital. She could relocate and support herself particularly as she appeared to have the support of her father in avoiding FGM.

5. The grounds raised in the appeal against the report were directed in substance at the reality of the fear of FGM expressed by the applicant and at the finding of the availability of internal protection by relocation. Extensive country of origin information was submitted on the prevalence of FGM in Nigeria. The appeal hearing took place on 7th April, 2009 following two earlier adjournments. Shortly before that hearing, the Refugee Legal Service, representing the applicant, submitted new information in the form of two letters from Dr. D. of [...] Medical Centre, [...]. These letters or reports arise out of the gynaecological problem originally mentioned by the applicant in her asylum application. The applicant had consulted Dr. D. in September, 2008 in relation to this complaint. In the letter dated 28th January, 2009 Dr. D. says that on examination she had a large and extraordinary swelling or lesion in the area normally occupied by the clitoris. She was referred to a gynaecologist at Mayo General Hospital and seen by a number of specialists there none of whom had ever seen the condition before. She had surgery to have the lesion removed in February, 2008. Following a further consultation, the second letter of 2nd February, 2009 from Dr. Delaney gives the view: "On examination there is absolutely no sign of any clitoral tissue and neither was there in the histology of the lesion removed from that area." The letter also records something said by the applicant to Dr. D.:

"She said that in her area there is a local custom that two year old girls are brought to the village and a special leaf is pressed against the clitoris to make it grow. This is done for one week. Apparently the mother would keep an eye on events after that and the female is then brought back aged twenty where the clitoris is excised. Bobbi's mother left when she was six and her father apparently when asked as it was approaching her twentieth birthday to contribute towards the costs of the ingredients for the local feast said he had no money. He then got money which she said he used to get her safely away from there. So essentially Bobbi is saying that she did not have a clitorotomy (*sic*) or any form of FGM."

Dr. D. concludes:

"While this entire story is confusing I regret this is all I can offer you on it."

6. The notes taken of the appeal hearing include the following passage:

"P.O. (Presenting Officer): Did you have FGM carried out in Nigeria?"

Applicant: No.

P.O.: Then why is there no tissue left?

Applicant: They took it away in the hospital.

The note also records the presenting officer as having made submissions in relation to the doctor's report and saying "Of course circumcision may have been carried out already in Nigeria".

7. In the appeal decision of 18th June, 2009, the Tribunal member rejected the appeal essentially upon grounds of credibility. In particular, the Tribunal member emphasises the fact that no claim to a fear of FGM was made in the original asylum application and that it was not mentioned until the s. 11 interview on 28th August, 2007. The Tribunal member was dissatisfied with the responses of the applicant when this discrepancy was put to her. The Tribunal member further regards this important discrepancy as supplemented so far as lack of credibility is concerned by the fact that the applicant lied about her age on arrival and claimed to be a minor and that she told a social worker she had been brought to Ireland by an aunt to work as a domestic help. She denied ever having said this to the social worker. In her asylum application form she listed her aunt as living in Nigeria but then said that the aunt was already in Ireland before she arrived here. Her account of her travel to this country was also found to be implausible. Because the applicant was found to be lacking in credibility the Tribunal member made no examination of country of origin information. The fact that the practice of FGM was widespread "does not alter my view that I am not satisfied that the applicant came to Ireland in order to escape FGM". The Tribunal member was satisfied that the applicant's true reasons for coming here were her ambition to pursue her nursing career and her gynaecological problem. In that regard the Tribunal member observes: "The medical reports certainly highlight an unusual medical dimension to a case where the applicant says she fears FGM, denies having had any form of it, and yet displays absolutely no sign of any clitoral tissue".

8. Following the rejection of the appeal the applicant was notified by the respondent of his intention to make a deportation order against her under s. 3 of the Immigration Act 1999. In response to the invitation in the letter of notification the applicant had representations against the making of such an order made on her behalf and in addition made an application for subsidiary protection under the Regulations. On 8th December, 2009, the Minister signed a deportation order in respect of the applicant. The consideration of the representations made on behalf of the applicant and the analysis of the statutory matters required to be taken into account under s. 3 (6) of the 1999 Act were set out in a memorandum headed "Examination of File under Section 3 of the Immigration Act 1999" which was signed off by officers of the department on 30th November, 2009 and furnished to the applicant with the notification of the making of the deportation order. That analysis had been made so as to include consideration of the impact of Article 8 of the European Convention on Human Rights on the position of the applicant upon the basis that she was an unmarried woman with no family connections in the State. Unknown to the Minister and his officials, however, the applicant's situation had recently altered.

9 On 20th November, 2009, the applicant had married an Irish citizen. On 27th January, 2010, the applicant and her husband instituted proceedings seeking judicial review of the decision to make the deportation order including an order of *certiorari* to quash it. By order of 12th March, 2010, Hanna J. refused to grant leave for the making of such an application for judicial review. On 21st January, 2010, the applicant had been arrested and detained in the Dochas Centre, Mountjoy Prison for failing to comply with the terms of the deportation order. The present proceeding was initiated on 12th February, 2010. By order of this Court dated 15th February, 2010, leave was granted to apply for judicial review in respect of the reliefs set out at para. (d) (i), (ii), (iii) and (iv) upon the grounds mentioned below. By order of 15th April, 2010, the Court granted an interlocutory injunction to restrain deportation of the applicant until the date which had been fixed for hearing of the substantive application on 15th June, 2010. By order of 23rd April, 2010, the Court ordered the release of the applicant from custody upon certain conditions set out in that order. For the sake of completeness it should be recorded that on 25th January, 2010, the applicant applied to the Minister for revocation of the deportation order apparently upon the basis of the change of circumstances resulting from the marriage to an Irish citizen. At the hearing of the present application, the Court was informed that the application in question had since been rejected by the Minister but it was intimated that this decision too would be the subject of judicial review proceedings.

10. It is in these circumstances accordingly, that the substantive application for judicial review of the refusal of subsidiary protection came before the Court for hearing. The primary grounds raising the issue mentioned at the outset of this judgment are those set forth in three subparas of ground (ii) as follows:

(1) The respondent acted in breach of Regulation 5 (1) (b) of the 2006 Regulations by failing to take account of medical information indicating that the applicant had previously been subjected to FGM in Nigeria.

(2) The respondent acted in breach of Regulation 5 (1) (c) of the 2006 Regulations by failing to take account of the personal position and circumstances of the applicant in assessing whether she could be exposed to persecution, ongoing persecution or serious harm in Nigeria.

(3) The respondent acted in breach of Regulation 5 (2) of the 2006 Regulations by failing to consider whether compelling reasons arising out of previous persecution or serious harm alone may warrant a determination that the applicant is eligible for protection.

11. Before outlining the case which the Minister was asked to consider when subsidiary protection was sought and the manner in which it was addressed in the Contested Decision, it is useful to outline some of the relevant provisions of the Regulations. In Regulation 2 (1) a number of definitions are set out:

"'Protection' is defined as meaning 'protection as a refugee or as a person eligible for subsidiary protection' (except in the definition of 'protection against persecution or serious harm').

'Protection against persecution or serious harm' is to be regarded as 'being generally provided where reasonable steps are taken by a state or parties or organisations including international organisations, controlling a state or a substantial part

of the territory of a state to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, where the applicant has access to such protection.'

'Serious harm' is defined so as to include 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin'. (It is not contested in this case that to subject a woman to FGM against her will, would constitute serious harm in that sense.)

'Actors of persecution or serious harm' is defined as including (a) a state, (b) parties or organisations controlling a state or a substantial party of the state or '(c) non-state actors, if it can be demonstrated that the actors mentioned in para. (a) and (b) including international organisations, are unable or unwilling to provide protection against persecution or serious harm.'"

12. The particular provisions of the Regulation relied upon in the grounds mentioned above are as follows:

Regulation 5 (1) provides:

"The following matters should be taken into account by a protection decision-maker for the purposes of making a protection decision;

(a) *omissis*

(b) the relevant statements and documentation presented by the protection applicant including information on whether he or she has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the protection applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm."

Regulation 5 (2) provides:

"The fact that a protection applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, should be regarded as a serious indication of the applicant's well founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated, but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection."

13. Regulation 4 (3) provides that in determining whether a person is eligible for subsidiary protection the Minister is required to take into consideration both matters mentioned in Regulation 5 above and particulars furnished by the applicant when applying for subsidiary protection on the form required under Schedule 1 to the Regulations. In the application made in this case on 12th August, 2009, the RLS on behalf of the applicant gave the following particulars as the basis of the application.

o If returned to South Africa the applicant "would continue to experience the same problems which he had previously experienced".

o Return to Nigeria "could constitute torture and inhuman and degrading treatment contrary to Article 5 of the Universal Declaration of Human Rights";

o She has a well founded fear of persecution "due to her membership of a social group: for a full understanding of (this) please refer to the asylum file".

o It is submitted that the threats and attack already suffered support the contention that she is at risk of further torture if she is returned and that this is borne out by country of origin information;

o Protection against serious harm is not available to the applicant.

14. In addition it was pleaded that the applicant was educated to secondary level and had work experience in a private hospital and that she would be willing to accept any form of employment offered if allowed to remain.

15. It will be noted that the application for subsidiary protection made no direct or specific claim based upon FGM either as having been actually suffered in the past or as feared for the future. The claim made was that she "would continue to experience the same problems which she had previously experienced" and that these were to be discovered by consultation of the asylum file. Although the particulars furnished under point 8 of the Schedule form referred to "the threats and attack already suffered by the applicant", no specific "attack" is identified and it is to be assumed (in the absence of any other indication) that the threats mentioned refer to the description she gave during the asylum interview and hearing of her father's family exerting pressure for her to undergo FGM.

16. In the memorandum determining the application for subsidiary protection compiled by an executive officer of the department on 11th November, 2009 and later sent to the applicant's solicitor under cover of the letter dated 4th February, 2010, the assessment of the application was made as follows. Under the heading "Serious Harm Claimed" a summary is given of the ground put forward for the application. This records that she claims to fear FGM upon the basis that at the age of 20 "the people in her father's village said that according to local tradition" she should undergo FGM. The father's approach to the church for help is mentioned and the issue is stated as being "would the applicant be able to return to Nigeria without risk of 'torture or inhuman or degrading treatment or punishment' and whether the applicant can avail of state protection against these threats".

17. Under the heading of "Assessment of Facts and Circumstances" the author of the memorandum records and examines extensive information relating to the prevalence of FGM in Nigeria. The observation is made "although FGM does occur in Nigeria, the federal government publicly opposed FGM and also a number of states in Nigeria have banned the practice".

18. Information in relation to avenues of complaint and protection against the practice are then set out. It notes that the Nigerian police force does operate but accepts "that these complaint mechanisms may not always be totally effective" but it is "still the case that these avenues of complaint have been established and anyone may avail of their help". Information on the possibility of

relocation within Nigeria is also set out and the comment made: "As can be seen from the above country of origin information, internal relocation would be a viable option for the applicant".

19. Information is then given about human rights institutions, organisations and activists who facilitate protection in the light of these problems and the observation is made: "From the above, it is clear that protection provided by non-governmental organisations in Nigeria is both available to and accessible by the applicant". The overall conclusion on this aspect of the application is then as follows:

"Overall, and having regard to all facts on file, I am not satisfied that the applicant has demonstrated that she is without protection in Nigeria and I do not find that there are substantial grounds for believing that the applicant would be at risk of serious harm by torture or inhuman or degrading treatment or punishment in Nigeria if she is returned there."

20. The personal circumstances/characteristics of the applicant are considered as known at the time namely, that she was a 22 year old who was unmarried with no children whose parents and aunt lived in Nigeria. The opinion is expressed: "Having considered this information I find that on the basis of the applicant's personal circumstances, there is nothing to suggest that the acts which the applicant could be exposed to would amount to serious harm".

21. Finally, the issue of credibility and whether the applicant should be afforded the benefit of the doubt is addressed. Here, the writer quotes extensively from the decision of the Refugee Appeals Tribunal on the issue of credibility and the information contained in the two letters/reports of Dr. D.. The contents of the two letters are cited including the opinion already mentioned above in the second report to the effect that "there was absolutely no sign of any clitoral tissue and neither was there in the histology of the lesion which had been surgically removed". The extract from the RAT decision then concludes with the conclusion already cited above at para. 7 as to the report's highlighting the unusual medical dimension of the case.

22. The memorandum then concludes with the following:

"I have considered the papers on file in relation to [B.E.]'s application for subsidiary protection and I conclude that substantial grounds have not been shown for believing that [B. E.] would face a real risk of suffering serious harm if returned to Nigeria."

The determination of the application is then made by an assistant principal that the applicant is not eligible for subsidiary protection.

23. Insofar as the determination of the application is challenged by reference to Regulation 5 (1) (b) namely, upon the grounds that the Minister has failed to take into account relevant statements and documentation presented by the applicant by way of information as to whether she has been or may be subject to serious harm, the case in the opinion of the Court is unfounded. It is clear from the explicit terms of the memorandum that account has been taken of both aspects of the information furnished on behalf of the applicant namely her own account of the "threats" alleged to have been made against her in Nigeria and, secondly, the medical information derived from the two reports and considered in the form of the detailed quotation from the RAT decision. Insofar as "documentation" is concerned, it should be noted that, as the Tribunal member pointed out, the country of origin information as to the prevalence of FGM is largely irrelevant. It is uncontested that the practice remains widespread in spite of legislative efforts to suppress it and the attempts of various agencies and organisations to assist women who are threatened with it. The issue in this case is not whether FGM could happen to a woman in Nigeria of the applicant's age but whether there is a "real risk" that this particular applicant would, as she purports to claim, be subjected to FGM if returned. Insofar as the "documentation and information" can be said to consist of the content of the two reports, these too have been taken into account explicitly in the memorandum. That information is, however, ambivalent as explained later in this judgment. (See para 26 *infra*.)

24. The same answer can, in effect, be given to the reliance placed upon an alleged non-compliance with Regulation 5 (1) (c) to the effect that the Minister has failed to take into account the individual position and personal circumstances of the applicant. Again, her personal circumstances and the details to the claim to fear serious harm she makes are set out and examined in the memorandum as already indicated above.

25. As mentioned at the outset of this judgment, the central emphasis in the arguments advanced on behalf of the applicant was directed at the ground which relies upon Regulation 5 (2). This was to the effect that the contents of the two medical reports gave rise to "compelling reasons arising out of previous serious harm alone" which the Minister had failed to consider as a possible basis warranting the grant of subsidiary protection. In effect, the argument made on behalf of the applicant was as follows. Notwithstanding the applicants own explicit statement that she had never undergone FGM in Nigeria, the Minister ought to have considered whether on the basis of the medical evidence, she had already been subjected to serious harm. In the written legal submissions lodged for the hearing of this application, it is expressly claimed that it is clear from these two reports that "she has been subject to FGM". It is also asserted: "In the instant case, it is clear from the medical information submitted on behalf of the applicant that she continues to suffer from the consequences of having been subjected to FGM".

26. In the judgment of the Court, the information contained in the two medical reports is far too inconclusive or ambiguous to place upon the Minister any obligation to form an opinion or make an assumption which would effectively contradict the applicant's own assertion. The medical reports describe a gynaecological condition which was, apparently, considered highly unusual and unprecedented by the specialists who examined the applicant. They state that when first examined there was a large swelling or lesion which commenced where the clitoris should have been. This, as already described, was removed surgically and, as Dr. D. says in the second report, on subsequent examination there was "absolutely no sign of any clitoral tissue and neither was there in the histology of the lesion removed from that area". There is no statement made or opinion expressed in either report to the effect that the applicant had undergone or must have undergone a circumcision at any earlier stage in her life. Nothing is said one way or another as to whether the applicant suffered from a possible gynaecological abnormality from birth. Dr. D. records the information given by the applicant as to the local custom of placing some "special leaf" in that area when a girl is two years old. The applicant has not, however, at any stage claimed that this was ever done to her or that it was the cause of the abnormal condition for which she sought treatment when she left Nigeria.

27. In the Court's judgment there is no basis in these circumstances upon which it could be said that the Minister was under any obligation to accept that the applicant had already suffered serious harm such as would have brought into play the provision of Regulation 5 (2). In any event, even if (*quod non*,) such an assumption could be made there is nothing in the medical reports which would give rise to "compelling reasons" which would warrant a determination that she now faces a real risk of such serious harm if returned. If anything, the implication of the medical opinion is that (whatever the applicant's subjective fears,) there is no objective basis for there being a real risk of her now being subjected to FGM. Quite apart from the fact that she is now an older woman and married, the operation is no longer possible. In the course of argument a subsidiary case was made to the effect that information

relating to cases of FGM demonstrated that women who had been subjected to the treatment never fully recovered from the trauma thereby caused and thus faced a form of "continuing persecution".

28. Whether or not that is so in general terms, the difficulty is that no such case was made to the Minister in support of this application. Furthermore, the applicant herself has not said that at any time since reaching the age of puberty (when presumably the issue might have arisen,) she was subjected to any circumcision procedure. There could not therefore be any "continuing persecution" or trauma in that sense when no original persecution had occurred. Indeed, as already indicated above, the application for subsidiary protection was based upon the "same problems which she had previously experienced". The two medical reports had been submitted, without comment, under cover of a letter of 25th February, 2009 after the appeal to the Tribunal had been made and shortly before the hearing took place on 7th April, 2009. The applicant was represented at the hearing by counsel and so far as can be judged from the rough notes taken of the hearing, no case of "continuing persecution" appears to have been made. Obviously, the possibility that she had already been subject to FGM was raised but she denied it. The notes of the closing submissions of counsel on her behalf clearly indicate that the case was made on the basis that she feared that she would still suffer FGM if returned to Nigeria although counsel appears to have conceded that "aspects of her medical condition are a bit unclear".

29. Finally, it should be noted that subsidiary protection is a form of international protection which complements that provided for under the Geneva Convention based upon flight from a country of origin due to "fear of persecution" for a number of specific reasons. The concept of "serious harm" covers death penalty or execution, torture or inhuman or degrading treatment or punishment and serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. To be eligible for subsidiary protection an applicant must establish some cogent basis for the existence of some real risk of harm falling into one of those categories. The risk must have some actual basis in fact when objectively assessed. The subjective fear that such a risk exists on the part of an applicant is insufficient if it is not demonstrated to have some actual basis in fact.

30. At least since she first raised the matter after applying for asylum on different grounds, the applicant's claim has always been that she feared that she would be subjected to FGM if returned. In that regard she has been disbelieved for the reasons set out in the two stages of the asylum application and accepted by the Minister both in deciding to refuse the declaration of refugee status under s. 17(1) of the 1996 Act and in determining the present application. Insofar as an entirely new basis for the risk is sought to be established in reliance upon the contents of the medical reports namely, that she has already been subjected to FGM, the Court is satisfied that there has been no error on the part of the Minister in failing to take that into account for the purposes of Regulation 5 (2). The medical reports contain no clear medical conclusion such as would warrant disregarding the applicant's own assertions and the basis upon which she had put her own claim. Furthermore, and in any event, in the absence of any evidence from the applicant herself that she is exposed to "continuing persecution" as a result of FGM already suffered, nothing in the medical reports or in any other information or particulars supplied to the Minister, constituted a basis requiring the application to be approached in that way.

31. Of the remaining grounds in respect of which leave was granted the Court considers that those raised at paragraphs (e) (i) and (iii) are too generally phrased and lacking in particularity to form the basis for any finding of illegality in the Contested Decision. The former merely alleges that the Minister failed to apply the Regulations and the latter alleges that the decision is unreasonable and irrational. It will be clear from the Court's findings above that the conclusion reached is based on the case as made to the Minister on behalf of the applicant and as such is both reasonable and rational.

32. The final ground at paragraph (e) (ii) (IV) appears to allege that the Minister considered whether the applicant had a well founded fear of persecution rather than whether she was a person in respect of whom there were substantial grounds for believing she faced a real risk of serious harm if returned to her country of origin. This argument is, according to the legal submissions lodged, based on the opening sentence of the file memorandum where under the heading "Serious Harm Claimed" the writer records: "The applicant claims to fear Female Genital Mutilation (FGM) in Nigeria." As such the statement is correct: she claimed explicitly that her father's family were forcing her to undergo FGM and would do so again if she returned. The same paragraph of the memorandum makes it clear that the writer identifies the issue as that relevant to the Regulations and the application under consideration namely, "...would the applicant be able to return to Nigeria without risk of torture or inhuman or degrading treatment or punishment?" and whether the applicant might "avail of state protection against these threats." That is also the issue addressed in the conclusion on the final page of the memorandum: "I conclude that substantial grounds have not been shown for believing that [the applicant] would face a real risk of suffering serious harm if returned to Nigeria." The ground is thus misconceived.

33. For all of these reasons the application for judicial review is rejected.