Neutral Citation: [2013] IEHC 536

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2009 / 666 J.R.

BETWEEN:

S. O. (A MINOR, SUING BY HER MOTHER AND NEXT FRIEND O. O.) [NIGERIA]

APPLICANT

AND

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

RESPONDENTS

JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 1st day of November 2013

1. This case centres on the assessment of internal relocation. The applicant who is a national of Nigeria seeks an order of certiorari quashing the decision of the respondent Tribunal to recommend that she should not be granted refugee status. A telescoped hearing took place on 18th April 2013. At the close of the hearing the Court indicated *ex tempore* that substantial grounds had not been established and that leave would be refused. The Court now gives its reasons.

Background

2. The applicant was three years old when she arrived in Ireland in 2005 with her mother and they both applied for asylum. Her father joined them later and claimed asylum on an independent basis. The applicant's parents are both educated to third level, were in paid employment in Nigeria and lived in the Lagos area although the mother's family are originally from the Delta region. The claim made on behalf of the child was initially solely based upon a fear of female genital mutilation (FGM). At the appeal stage this fear was enlarged to include a fear of persecution based on the fact that the child had a sickle cell condition.

3. The applicant's mother claimed that as a member of the Igbo tribe, where FGM is highly prevalent, her daughter would be expected to undergo that procedure and that pressure would be brought to bear on her and her husband to have the ritual carried out. The mother herself had faced pressure and physical attack from family members when they tried to force her to undergo FGM and similar pressure had been brought to bear on her to have her daughter circumcised.

4. The history provided by the applicant's mother was that neither she nor her husband supported the idea of circumcision. She and her own mother had resisted circumcision and she had received education on the dangers of the procedure while she was at boarding school. Her own asylum claim (which was also unsuccessful) had been based on her personal fear of circumcision and she described efforts by her father's aunt (her great aunt) to coerce her to subject herself to the genital cutting. The great aunt who lived in the Delta region was asserted to have attempted to abduct the mother and was the cause of her flight in search of asylum. That great aunt – the applicant child's great, great aunt - was said, in spite of her now venerable age, to be the person who would persecute the child if she returned to Nigeria. It was feared that she would insist on circumcision or even abduct the applicant to carry out a circumcision against her parents' wishes if the child were returned to Nigeria.

5. Of factual relevance to the claim, shortly after their arrival in the State, the applicant's mother gave birth to a son and in 2006 the applicant and her brother were both diagnosed with a sickle cell condition. This was described by their medical social worker as "*a serious congenital haemolytic anaemia which results in significant mortality for those suffering from the condition*." It appears that the condition reduces the body's immune system and thus renders those who have the condition prone to infection and dependence on lifelong antibiotics and frequent admission to hospital for management of any infection. The applicant's mother claims that due to the lack of adequate medical treatment for sickle cell disease in Nigeria and also due to the fact that those suffering from the condition often experience discrimination, to return them to Nigeria would amount to persecution. She claims that as attitudes to sickle cell are pervasive throughout Nigeria, internal relocation would not be relevant.

The Tribunal Decision

6. The Tribunal Member determined that the fear of FGM was not well founded on the basis that the mother and father who were well educated and opposed to FGM would be able to protect their daughter were any threat to arise. The Tribunal observed that as the applicant's mother and grandmother were not circumcised and since her mother had received anti-FGM information at school and only knew one person who was circumcised, her account was not consistent with the claim that FGM is part of the applicant's family's traditional beliefs.

7. On the issue of the sickle cell disease, the Tribunal noted that COI describes that treatment is available for those suffering with the disorder in Nigeria, although such availability may vary. She relied upon the judgment of the Grand Chamber of the European Court of Human Rights in *N v. The United Kingdom* (2008) 47 E.H.R.R. 39 that while Article 3 of the European Convention on Human Rights compels the retention by the Court of a degree of flexibility to prevent expulsion in exceptional cases, it does not place an obligation on the Contracting State to alleviate such disparities through the provision of healthcare to all aliens who do not have a right to stay in its jurisdiction. The Tribunal Member acknowledged that it was held in *E.M.S. v. The Minister for Justice, Equality and Law Reform* [2004] IEHC 398 that in an appropriate case it may be considered that discrimination against a particular social group in the provision of health care may amount to persecution but in this case there is nothing to suggest that the applicant would be treated differently to any other child in Nigeria with sickle cell disease. There is treatment for sickle cell in Nigeria although it may not be free. The applicant does not challenge that finding in these proceedings.

8. Having found that there was no objective reality to the applicant's subjective fear of FGM, the Tribunal went on (quite unnecessarily) to engage in an assessment of the availability of state protection and the option of internal relocation. She held that, considering her parents' age and the fact that they are educated people with the support of the applicant's father's family who do

not embrace FGM in their culture, they could seek assistance for the applicant in Nigeria and further that country of origin information (COI) supported such a finding. It is that finding that the applicant challenges in these proceedings.

The Submissions
9. The applicant argues that the assessment of internal relocation was carried out in breach of the Regulation 7 of the *ECs (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006) (the 'Protection Regulations') and the UNHCR *Guidelines on International Protection: "Internal Flight or Relocation Alternative"* (2003). The Tribunal Member should have identified a particular place or area where she could relocate, and she should have taken account of the applicant's health condition. The internal relocation finding is central to the decision; it is not a minor finding and it cannot be severed. The applicant also makes a number of subsidiary points relating to the credibility findings made, the assessment of the sickle cell aspect of her claim and the reliance placed by the Tribunal Member on legal measures for combating FGM as an indication of state protection.

10. The respondents point out a number of inconsistencies in the applicant's identity documentation which were not relied upon by the Tribunal Member. They submit that this is not a case where the applicant is impoverished and cannot move elsewhere in Nigeria. The lengthy Tribunal decision should be read as a whole. In cases involving a country as large as Nigeria, it is "legal nitpicking" to expect the decision-maker to identify a specific area for relocation. It is clear that one can relocate to practically anywhere in Nigeria to avoid the threat of FGM, owing to the extent of protection provided. It is clear the decision maker thought that all of the states could in some way be a possibility. It is also clear that the facts and personal circumstances were considered and weighed in the balance. The decision maker specifically recited that all of the documentation that was considered.

The Court's Decision
11. As the Court held at the hearing, there cannot reasonably be any valid criticism of the finding, described as internal relocation but in fact part of a general assessment of credibility, which was closely related to the facts presented. The interpretation that the applicant's appeal failed because of a relocation alternative option is far-fetched. The decision was not that the child was at risk but could relocate but rather that the child was not at risk of FGM and therefore had no well-founded fear of persecution for Convention reasons but in any event, could move away from any risk from the great-great aunt.

12. In the view of the Court the decision is clear. The Tribunal Member rejected the claim that the applicant was at risk of FGM for the obvious and valid reason that the personal circumstances of the applicant's family negated the risk of forcible FGM by the mother's great aunt or indeed any other such relation. The applicant's family opposed FGM and had done so for three generations. Her father opposed FGM. They are educated people who live and work in Lagos and not in Igboland. The Court might add to those findings that the Tribunal Member was entitled to consider the plausibility or otherwise of the claim that an elderly great, great aunt would be so fixated on the requirement for female circumcision for a remote niece that she would travel a large distance or arrange for a proxy to travel to Lagos to illegally abduct and assault a little girl against her parents' wishes.

13. The applicant next argued that the process by which it was determined that internal relocation was an available remedy was in breach of the Protection Regulations and the UNHCR Guidelines. While the decision maker was bound by the terms of the Protection Regulations, which define acts of persecution and protection from such persecution and outline the requirements for the determination of internal relocation as an answer to international protection,, the challenges made in this case are simply not sustainable on the facts presented and the credibility findings made on those facts.

14. The Court is satisfied that it is clear from reading the decision a whole that the Tribunal Member fully understood the two aspects to the claim made on behalf of the infant applicant - (i) a risk of FGM and (ii) a lack of treatment for and discrimination arising from sickle cell disease – and that she carefully considered both. The Tribunal decision quoted from COI which explains that people with the disease can access treatment in Nigerian hospitals and clinics. She also considered the family's personal circumstances as facts to be weighed in the balance when considering the availability of treatment for the child.

15. While it has to be accepted that FGM is highly prevalent among the Igbo people, the case before the Tribunal was of a girl whose parents were opposed to genital cutting for sound reasons. The child's father is Yoruba and the family lived in Lagos and the child's own mother and grandmother had not been cut. The risk was therefore minimal, if it existed at all and the findings of fact are soundly based.

16. In cases where it is accepted that an applicant has a well-founded fear of persecution for a Convention reason in a particular part of his / her country of origin and it is accepted that the risk does not exist in another part of the country then the protection decision-maker may seek to identify a general location within the country to where the applicant can reasonably be expected to relocate if returned. Internal relocation is in that case an antidote or alternative to refugee status. Here, no well-founded fear of persecution was found and therefore internal relocation in the legal sense as opposed to a common sense approach was not necessary. As the child was found not at risk of FGM if returned to Nigeria, there was in fact no need to go on to consider internal relocation and it is therefore immaterial that the decision did not identify a specific area to which the family could internally relocate.

17. In cases where the availability of internal relocation is a determining factor for the refusal of asylum to an otherwise qualified applicant, the decision maker is obliged to adhere to Regulation 7 of the *Protection Regulations* and the UNCHR Guidelines cited above, and to identify a general location for internal relocation. The extent to which the decision-maker is obliged to enquire into the circumstances of the identified area or place will depend on the prevailing conditions in the specified location and the personal circumstances of the asylum seeker. The Tribunal Member in the present case had no obligation to identify an area as the internal relocation alternative was not a determining factor for the refusal of asylum.

18. The final issue in this case relates to the Tribunal Member's assessment of the availability of state protection. The applicant argues that the proper application of Regulation 9(2) (b) of the *Protection Regulations* means that the legal measures taken to oppose FGM in Nigeria would not satisfy the requirement for state protection. It is unnecessary to decide this issue as the Court has already determined that the Tribunal's finding that this applicant will not be at risk of persecution if returned to Nigeria was reasonable. In the circumstances it was unnecessary and superfluous for the Tribunal to consider the availability of state protection and any flaw in that assessment is immaterial.

Conclusion
19. The Court is satisfied that there is no identifiable flaw in the decision. The application is therefore unsuccessful. The Court reiterates its observation at the hearing the length of time that this young child has been in the State may be relevant to any future application to remain on humanitarian grounds as she has had no exposure to tropical diseases such as malaria which may be dangerous to her sickle cell condition.