THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 489 JR]

BETWEEN

H. T. K. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND P. A. K.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE REFUGEE APPLICATIONS COMMISSIONER

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 15th day of January, 2016.

1. The applicant is a minor born in Ireland on the 5th June, 2006. She is a citizen of Nigeria whose mother, a failed asylum seeker, presented a claim for asylum on behalf of the applicant by completing an application for refugee status questionnaire on the 15th March, 2010. The applicant's mother said that the persecution faced by her daughter amounted to forced marriage, compulsion to practice Islam, the possibility of being tattooed and subject to female genital mutilation. Following the s. 11 interview the Minister's authorised officer prepared a report pursuant to s. 13 of the Refugee Act 1996. He described the persecution said to be feared by the applicant in the following terms:-

> *"The applicant's mother alleges that she fears her daughter could be forced into an arranged marriage by her father when she reaches puberty, that her daughter won't be free to choose her own religion when she grows older, her daughter would not be allowed to have premarital sex, her daughter could be forced to get a tattoo and that her daughter could subjected to circumcision (FGM) if returned to Nigeria…"*

2. At s. 3.3 of the s. 13 report the author says:-

> *"The applicant's mother claims that she fears that her daughter, the applicant, could have problems described in Section 3.2 above if returned to Nigeria. However, there are several issues that serve to undermine the well foundedness of the applicant's claim."*

3. The Minister's official notes that the applicant's mother claims that her fears for her daughter all stem from her daughter's father and family. The report states:-

> *"It is not reasonable that the applicant's mother would remain in contact with the applicant's father if he posed a genuine threat to her. The applicant's mother was asked why she is still in contact with the father of her child considering it was now easier for her to find the applicant in Ireland to which she replied 'because I have his child with me'."*

The report states:-

> *"Considering the applicant's claim and her mother's response, it is not credible that the applicant's mother would remain in contact with the applicant's father if she believed he would harm the applicant as claimed".*

4. As to the mother's asserted fear that her daughter will not be able to change her religion from Islam, the report concludes:-

> *"The applicant's mother's assertion that she would be concerned that her daughter may not be able to change from Islam is undermined by the claim that she has decided to raise her child through Islam. The applicant's mother's insistence to remain in contact with the father of the applicant undermines her claim that it is a fear of hers that he will force the applicant to remain Muslim."*

The report also states:-

> *"The applicant's mother claimed at section 8 interview that she feared her daughter could be forced to marry in Nigeria. The applicant's mother asserted that she is raising her child a Muslim and if the man she is going to be forced to marry is not a Muslim, her daughter would be forced to change her religion to that of her husband. However, the applicant's mother asserted in the questionnaire and at section 11 interview that her daughter will be forced to marry a Muslim man and that this would prevent her from changing from Islam in the future if she so wished. These contradictory fears expressed by the applicant's mother further undermines the applicant's claim.*

The Minister's authorised officials conclude in respect of these matters by saying:-

> *"Considering points 3.3.1 to 3.3.3 above, the applicant's claimed to fear of persecution is not credible. The applicants claim does not satisfy the objective element of fear based on persecution in her own country for the reasons stated in Section 2 of the Refugee Act 1996 (as amended)."*

5. In these proceedings the applicant's first legal complaint is that the question of female genital mutilation was not addressed "*in any way under the heading of Well Founded Fear in the [s. 13 report].*"

6. I disagree with the claim that the s. 13 report does not deal with the claimed fear of female genital mutilation. It is clear to me

that the decision maker noted that all of the fears expressed on behalf of the minor applicant were associated with the applicant's father. The fears were not found to be credible because the applicant's mother maintained contact with the applicant's father. The decision maker, in rejecting the credibility of the applicant's mother, plainly did not accept that the mother had a *bona fide* fear in respect of any of the matters asserted on behalf of her daughter. In this sense the alleged fear of F.G.M. emanating from the applicant's father was disbelieved because it was not accepted that the mother feared harm from the applicant's father. I cannot detect an error of law/errors as to jurisdiction in the manner in which the decision maker addressed the alleged fear of F.G.M. in this case. If there is an error, it is of an evaluative nature only. Lest it be said that greater detail should have been included in the s. 13 report in respect of the alleged fear of F.G.M., my view is that an error of this order would not attract *certiorari* in view of the jurisprudence expressing the circumstances in which court intervention following first instance decision making in refugee cases is appropriate. The matter complained of may be the subject of an appeal to the Refugee Appeals Tribunal. I reject this ground of challenge.

7. Section 3.3.4 of the s. 13 report is entitled '*State Protection Including Internal Relocation'.* The authors state:-

> *"It is well established, as a matter of international refugee law and as a facet of national sovereignty, that (absent a situation of complete breakdown of state apparatus) there is a general presumption that states are capable of protecting their citizens; it is therefore incumbent upon the applicant for refugee status to provide clear and convincing evidence to rebut that presumption. In the absence of evidence a protection might not reasonably have been forthcoming, there cannot be said to be a failure of state protection where a government has not been given the opportunity to respond to a form of harm (see, among others, Canada (A.G.) V Ward [1993] 2 RSC 689; D.K. V the Minister for Justice, Equality and Law Reform [2006] 3 IR 368)."*

The applicant complains that the passage quoted from the report unlawfully places the burden of proof on an applicant to establish "*clear and convincing evidence to rebut*" the presumption which exists in international law of the availability of state protection.

8. As part of this argument the applicant submits that the Refugee Act 1996 does not establish any particular burden of proof on an applicant for refugee status. I have no difficulty rejecting this proposition.

9. In effect this Court is asked to depart from or disagree with the dicta of the learned Mr. Justice Herbert in a decision expressly mentioned by the Minister's authorised officials – *D.K. v. The Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2006] 3 I.R. 368 where the High Court held at para. 6:-

> *"6. I find the reasoning and conclusion of La Forest J. [in Ward] in the passages above cited, both persuasive and compatible with the jurisprudence of this State in considering applications for refugee status. The Supreme Court in this State has already enunciated the principle that the onus is on the applicant for refugee status to establish both a subjective fear of persecution for one, at least, of the reasons specified in s. 2 of the Refugee Act 1996 and an objective basis for that fear.*
>
> *…*
>
> *8. I agree with La Forest J., that subject to such exceptional cases, the fact that the power of the state to provide protection to its nationals is a fundamental feature of sovereignty and, the fact that the protection afforded by refugee status is "a surrogate coming into play where no alternative remains to the claimant", renders it both rational and just for a requested state to presume, unless the contrary is demonstrated by "clear and convincing proof" on the part of the applicant for refugee status, that of the state of origin is able and willing to provide protection to the applicant from persecution, even if at a lesser level then the requested state. I find therefore that the first respondent did not err in law in applying the presumption that state of origin protection is available in Georgia to someone in the position of this applicant".*

10. I am bound to follow this decision unless I am of the view that it is in error. I can find no basis for finding that the principles enunciated by Herbert J. are erroneous.

11. As a further part of this argument the applicant relies on the decision of the Court of Justice of the European Union in *M.M. v. The Minister for Justice, Equality and Law Reform Case* (C-277/11) and in particular paras. 63 to 68 of that judgment. That passage is as follows:-

> *"63 As it is clear from its title, Article 4 of Directive 2004/83 relates to the 'assessment of facts and circumstances'.*
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> *64 In actual fact, that 'assessment' takes place in two separate stages. The first stage concerns the establishment of factual circumstances which may constitute evidence that supports the application, while the second stage relates to the legal appraisal of that evidence, which entails deciding whether, in the light of the specific facts of a given case, the substantive conditions laid down by Article 9 and 10 or Article 15 of Directive 2004/83 for the grant of international protection are met.*
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> *65 Under Article 4(1) of Directive 2004/83, although it is generally for the applicant to submit all elements needed to substantiate the application, the fact remains that it is the duty of the Member State to cooperate with the applicant at the stage of determining the relevant elements of that application.*
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> *66 This requirement that the Member State cooperate therefore means, in practical terms, that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled. A Member State may also be better placed than an applicant to gain access to certain types of documents.*
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> *67 Moreover, the interpretation set out in the previous paragraph finds support in Article 8(2)(b) of Directive 2005/85, pursuant to which Member States are to ensure that precise and up-to-date information is obtained on the general situation prevailing in the countries of origin of applicants for asylum, and where necessary, in countries through which they have transited.*
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> *68 It is thus clear that Article 4(1) of Directive 2004/83 relates only to the first stage mentioned in paragraph 64 of this judgment, concerning the determination of the facts and circumstances qua evidence which may substantiate the*

asylum application."

12. Insofar as the applicant relies on this passage to state that the separate stages for assessment of a claim mentioned by the Court of Justice refer, in an Irish context, to O.R.A.C. being the first stage and the R.A.T. being the second stage, I reject that interpretation of the relevant directives and the clear language of the decision of the Court of Justice in *M.M..* The two separate stages of assessment described in para. 64 must be performed at first instance

13. Finally, the applicant invites the Court to follow the reasoning in an Australian case entitled *A v. Minister for Immigration and Multicultural Affairs* [1999] F.C.A. 116 where the final High Court of Australia said at para. 41:-

> *"The fact finding and evaluation to be undertaken by decision-makers in relation to applications for protection visas and by the Refugee Review Tribunal on review of their decisions is administrative in character. In consequence it is not appropriate for those decision-makers to draw too closely upon the rules of evidence applied in the civil proceedings… It is equally inappropriate for the Tribunal to apply curial devices such as presumptions of law or fact. In Canada (Attorney General) v Ward (1993) 103 DLR I at 23 it was said, in relation to an application for convention protection that: "Nations should be presumed capable of protecting their citizens". But such a presumption, that is a presumption without a basic fact, is a rule of law relating to the existence of a burden of proof and such a rule has not part to play in administrative proceedings which are inquisitorial in their nature. Accordingly, the trial judge's conclusion that "there is no foundation in authority or principle which should lead this Court to accept the [Minister's] submission for the existence of presumption in terms of Ward" is plainly correct."*

14. A careful reading of the s. 13 report reveals that the decision maker found that protection would be available for the applicant in Nigeria. This question was not determined by a simple application of a presumption that state protection exists in the absence of clear and convincing proof that it does not. Thus, even if the presumption as expressed by the Minister's officials and as endorsed by Herbert J. in *D.K.* is erroneous; in my view that principle did not determine the question of the existence of state protection. That matter was determined by reference to detailed and relevant country of origin information which set out the availability of protection from government agencies and private organisations for persons expressing the fears advanced as the basis for the claim of refugee status in this case. The presumption - be it correct or incorrect - was not used to determine the issue of state protection. Thus, even if I were persuaded to follow the decision of the Australian Court quoted above, it would not avail the applicant. In these circumstances, I reject the second ground for judicial review.

15. The third basis of complaint is the allegation that the decision maker unlawfully conflated the issues of state protection and internal relocation and effectively treated these separate matters as a single issue.

16. The applicant correctly, in my view, states that if this happened it would be "heresy". However, as a matter of fact it did not happen. There is no evidence, other than the use of a joint heading in the decision referring both to internal relocation and state protection, that these matters have been considered through a prism of a search for "clear and convincing" evidence of the absence of state protection. The availability of protection from private organisations and from the State for the matters in respect of which fear is expressed is clearly identified. Separately, the possibility of internal relocation is clearly addressed. I find as a fact that these matters have not been unlawfully conflated and I therefore reject the third basis of complaint in this judicial review.

17. For these reasons I reject this application.

I note that this failed application has taken five years to be determined. I also note that an appeal was notified to the Refugee Appeals Tribunal within the period specified by statute, with a request that the appeal not be processed until the determination of these proceedings. The Tribunal agreed to this request.

18. Each point sought to be litigated in these proceedings could have been argued at the R.A.T.(see *M.A.R.A. v. Refugee Applications Commissioner* [2014] I.E.S.C. 71). If the applicant is entitled to refugee status, her entitlement to the status has been delayed by five years by the maintenance of these proceedings. At no point did the applicant seek priority or an early hearing date for these proceedings.

19. A person with a *bona fide* claim for refugee status would be unlikely to embark on protracted litigation challenging a first instance decision (where there is no legal aid available), instead of pursuing an appeal to the R.A.T. (where state funded legal aid is available). A consequence of litigating rather than appealing is that the litigants are permitted to remain in Ireland for as long as the litigation takes. If the proceedings fail, the R.A.T. permits applicants to continue the stayed appeal if they have commenced the appeal and requested that it be stayed. Prosecuting judicial review proceedings to delay an appeal to the R.A.T. is an abuse of process.

20. In view of my concerns I joined the R.A.T. to these proceedings as a notice party and asked it to explain why it acceded to the applicant's request that the applicant's appeal be stayed until after the determination of these proceedings. Very helpfully, the chairman of the R.A.T. swore an affidavit to explain matters and Mr. Oisín Quinn S.C. addressed the court on behalf of the R.A.T.. The chairman averred as follows:-

> *"…the policy of the Tribunal in respect of appeals entered with the Tribunal where judicial review proceedings are extant against the decision at first instance is that such proceedings do not operate as a bar to the appeals being determined, but that in the normal course the appeals will not be so determined until the judicial review proceedings have been determined.*
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> *I say that this policy is influenced by the fact that if the Tribunal proceeded with the determination of an appeal where the ORAC decision was then successfully challenged, the Tribunal decision would become a nullity and substantial resources, not least in the form of time, would have been wasted in that event.*
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> *I say that should the Tribunal attempt to proceed with the determination of such an appeal it would be likely that an injunction would be sought preventing such appeal proceeding while the judicial review as pending."*

21. In my view, a decision of the R.A.T. on an appeal will render proceedings challenging a decision of O.R.A.C. moot, except perhaps in very unusual circumstances. (See my decision in *P.D.O. v. M.J.E.* [2015] I.E.H.C. 145 where I so found and noted that a decision of the R.A.T. replaces a decision of O.R.A.C.). Thus, the chairman's concern that it would be wasteful of the R.A.T.'s resources to process an appeal where there are proceedings challenging the decision of O.R.A.C. is misplaced.

22. No legal basis was advanced to justify postponing an appeal at the request of an applicant/appellant. No time limit is set for the

determination of appeals to the R.A.T. but appellants are entitled to decisions within a reasonable period. Once an appeal is made, the R.A.T. should determine the matter as soon as is reasonably possible having regard to its resources and any features of the appeal which may require more than the usual amount of time. In this regard, the Chairman of the R.A.T. has averred:-

> *"…the Tribunal is charged with a duty to dispose of appeals as expeditiously as may be…"*

I agree with this statement.

23. In my view, the R.A.T. may only stay an appeal if so ordered by the High Court. Appeals must be processed notwithstanding a judicial review challenging the decision of the Commissioner unless an applicant obtains an injunction staying the appeal. Such application must of course be made on notice to the R.A.T. but I cannot imagine that the Tribunal would appear, much less participate at the injunction hearing.

24. Lest there be any doubt about the appeal in this case, and notwithstanding my view that the Tribunal may not postpone appeals, the Tribunal, having agreed in 2010 to postpone the applicant's appeal pending the outcome of these proceedings should now process the appeal in this case.