Neutral Citation Number: [2011] IEHC 373

THE HIGH COURT

2008 1021 JR

BETWEEN/

O. A. Y. A. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND, M. B. O.)

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 7th October, 2011

1. The practice of female genital mutilation is one which is almost beyond comprehension. It was described in *Meadows v. the Minister for Justice, Equality and Law Reform* [2010] IESC 2, [2011] 2 ILRM 157 at 193 by Fennelly J. as "abhorrent" and as one which "amounted to torture". This is the backdrop against which the present application to quash a decision of the Refugee Appeals Tribunal dated 31st July, 2008, has been made. Leave to apply for judicial review was granted by Peart J. on 29th November, 2010.

2. The applicant is a six year old girl who was born in Ireland in 2005. She is not, however, an Irish national and she was born here of Nigerian parents. As it happens, her mother, Ms. A., made a separate application for asylum which was refused. Ms. A. then unsuccessfully applied to this Court for judicial review of that decision. The respondents urged that there would be a risk of inconsistent decisions were I to find for the applicant in the present case. It is clear, however, from the decision of Abbott J. delivered on 25th September, 2010, that the application was refused because Ms. A. was out of time for the purposes of s. 5 of the Illegal Immigrants (Trafficking) Act 2000 and that the judge considered that there was no good reason whereby the time should be extended. So far as I can discern, Abbott J. said very little in his judgment about the merits of the application itself, so that it does not follow that the minor applicant cannot succeed where the mother failed given that the mother's application principally failed by reason of undue delay.

3. It is also important to stress that the case here is that if the applicant is returned to Nigeria, her mother maintains that she will be subjected to female genital mutilation at the hands of her father's family. On any view of the country of origin information, it is clear that the risk to young, defenceless girls is far greater than in the case of adult females such as Ms. A. I will presently return to deal in more detail with these circumstances, but it may first be convenient to deal with the prevalence of FGM in Nigeria.

The practice of FGM in Nigeria

4. The country of origin information all points to the fact that the prevalence of FGM in Nigeria is still very high, although its incidence varies depending on region, tribe and age of the female in question. While the UNICEF country report for Nigeria for 2005 found that the practice was in decline, it confirmed that there were significant regional and ethnic differences across the country, so that, for example, the prevalence of FGM reached 60% in the case of the Yoruba. The UNICEF study also found that 90% of Yoruba girls were circumcised during early infancy (*i.e.,* between the ages of one and four). The practice of FGM was more pronounced in the (Christian) South than in the (Muslim) North.

5. The country of origin information also attests to the fact that while the practice is banned in some regional Nigerian states, it is not prohibited at federal level. It is also clear from the British-Danish Fact-Finding Mission Report (2007) that the federal police "do not become involved in FGM matters as they consider FGM to be a family matter." While it is possible that females who do not wish to be subjected to this practice could appeal to the Nigerian Human Rights Commission ("NHRC") or to the courts, this could not be regarded as a realistic option in the majority of cases.

6. As the British-Danish Report observed:-

> "The NHRC confirmed that it is possible to avoid FGM but added that the 'traditional attitude' of a police officer or village council would normally determine their level of concern and intervention. NHRC emphasised that cultural attitudes would still be prevalent and some victims would probably never have the courage to take their case to court."

7. Pausing at this point, therefore, it is clear that in some instances, at least, it would seem that from the country of origin information that in respect of some classes of females and in some regions of Nigeria at least, state protection against FGM is either ineffective in practice or unavailable. While it is true that the applicant's family are from (an unspecified part of) northern Nigeria (where the incidence is less than the South), this must be weighed against the stark fact that some 60% of Yoruba females have been subjected to FGM and that this principally occurs in early childhood.

The applicant's case

8. The applicant's mother, Ms. A., maintains that while she was raised as a Christian, her husband came from a strong Muslim background. She contends that her father in law was a radical Imam who strongly objected to his son's decision to convert to Christianity. She maintains that he has threatened the couple since they first decided to marry in 1990 because, as she put it, "we were going to bring shame upon him and Islam." She further contends - in admittedly somewhat vague and generic terms - that her father-in-law and his followers have detained her and her husband illegally. She also says that they have threatened to kidnap her and subject her and the young girl to genital mutilation. She also claims that in order to escape the wrath of the father in law, her other three children live on an isolated farm with their grand-aunt and that she has not seen her husband or had any contact with him since she arrived in Ireland in 2005.

9. Ms. A. rejects the argument that internal relocation to another part of Nigeria, such as Abuja or Benin City, saying that her father in law "can find everyone everywhere, they communicate, they phone them and give them the money to trace me".

The Tribunal's conclusions
10. The Tribunal's decision dealt with two separate matters, first, the incidence of FGM in Nigeria and the availability of State protection and, second, the risk presented to the applicant by the alleged threats issued by her grandfather.

The alleged threats by the grandfather
11. So far as the second point is concerned, the Tribunal member found that:-

> "The problem for the applicant's parents began as far back as 1990…For 15 years before her departure from Nigeria the applicant's mother would have spent approximately 15 years trying to avoid her partner's father. It is not clear from the papers if she was kidnapped on one or on two occasions…the applicant's mother maintained that she and all of her children would face death if the Imam were to detain her again. There is an element of implausibility about this claim. [Ms. A.] managed to stay alive for 15 years without ever seeking State protection."

12. It is, frankly, hard to disagree with this analysis. While the depth of animosity between adherents of different religious traditions is, regrettably, an all too prevalent feature of contemporary life, it is difficult to accept that the Imam in question could have the all pervasive powers attributed to him by Ms. A. This is especially true given the generic and unspecific nature of the allegations made by Ms. A. Thus, for example, the Imam is not even identified by name, nor have any particulars been given of the alleged kidnappings. Ms. A does not, for example, specify how she was kidnapped or how she came to be released or where and when these alleged events took place. Furthermore, it might reasonably be expected that an actual kidnapping would have been reported to the authorities, even if the general conduct and effectiveness of the Nigerian policing system did not otherwise inspire confidence. Here again the absence of such detail fundamentally detracts from the general credibility of the claim and the Tribunal member was plainly entitled to reject Ms. A.'s evidence and, hence, by extension, this part of this applicant's claim.

The risk of FGM
13. There remains the question of the risk of FGM. So far as this issue is concerned, the Tribunal member concluded:-

> "The British-Danish Report states that the federal police do not concern themselves with f.g.m. matters as they consider them to be family matters but also that there are groups that are against the practice of f.g.m. Should a girl desire to avoid it, in spite of pressure from her family to do otherwise, she has the option to complain to the Nigerian police force or to the Nigerian Human Rights Commission and she may also seek protection from women lawyers or NGOs. BAOBAB, a women's aid organisation, the Government and other NGOs in Nigeria provide protection for women escaping f.g.m. There is apparently a successful shelter run by [a women's organisation] in Enugu and that office assists many adult women seeking protection."

14. The issue here is the gravity of the threat that this young girl might be subjected to FGM if she were to be returned to Nigeria. Even if the allegations made by Ms. A. in relation to the Imam are entirely discounted as implausible, the stark and uncomfortable fact remains that this young applicant is from the Yoruba tribe. While she is no longer in her very early infancy, she would nonetheless be still distinctly vulnerable - all other matters being equal - to the risk of FGM given that, as we have already noted, the country of origin information shows that the risk posed to young Yoruba females is, in practice, extremely high, even if it is acknowledged that the fact that her mother is opposed to the practice would mitigate the risk somewhat.

15. The applicant is plainly entitled to be protected against a serious threat to her constitutional rights which would undoubtedly occur were she to be subjected to FGM following deportation to Nigeria: see, *e.g.,* by analogy the comments of McCarthy J. in *Finucane v. McMahon* [1990] 1 I.R. 165, 226 and those of Gilligan J. in *OO. v. Minister for Justice, Equality and Law Reform* [2004] 4 I.R. 426, 432. The subjection of any female to FGM is an open assault on her person, the very right which by Article 40.3.2 of the Constitution the State expressly undertakes to defend and vindicate in so far as it is practicable to do so. By the same token FGM can be regarded as a form of torture and inhuman and degrading treatment, contrary to Article 3 ECHR.

16. Given the nature of these risks and the potential grave impact on the constitutional rights (and, for that matter, the Convention rights) which the subjection of the applicant to FGM would entail, it behoves any decision-maker clearly to identify and assess the nature of such risks and to weigh them fairly and properly. As Murray C.J. observed in *Meadows* [2010] 2 I.R. 701, 724:-

> "It is inherent in the principle of proportionality that where there are grave or serious limitations on the rights and, in particular, the fundamental rights of individuals as a consequence of an administrative decision the more substantial must be the countervailing considerations that justify it."

17. While these comments were made in the context of a challenge to the validity of an administrative decision which impinges on constitutional rights, they are certainly applicable by analogy to the present case.

18. Can it therefore be said that the Tribunal member has sufficiently identified the risk to this young female in view of her vulnerable age and tribal membership? With great respect, I do not think that one can. The country of origin information clearly shows that young Yoruba females constitute a very high risk group. Nor can it realistically be said that such young girls enjoy any effective police protection in this regard given that, as the British-Danish report clearly found, the Nigerian federal police rarely intervene in these types of cases.

19. It likewise cannot be said that the Tribunal member acknowledged the existence of the risk that the applicant would be subjected to FGM independently of the threats allegedly posed by the Imam. The very fact that the applicant is a young vulnerable girl from the Yoruba tribe in itself poses a very serious risk which the Tribunal member is clearly obliged to assess and consider.

Conclusions
20. In the absence of such a balanced assessment of these risks, it cannot be said that the Tribunal member, as an agent of the State, has sufficiently discharged the State's obligations under Article 40.3.2 to protect and vindicate the applicant's constitutional right to the protection of her person. On this basis, therefore, I would propose to quash the decision of the Tribunal and to remit the application for fresh consideration in the light of this judgment.