

**THE HIGH COURT
JUDICIAL REVIEW**

[2010 No. 700 J.R.]

BETWEEN

J.K. (KENYA)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Eagar delivered on the 16th day of January 2015

1. This is a telescoped application for an order of *certiorari* quashing the decision of the first named respondent and seeking an order remitting the appeal of the applicant for determination *de novo* by a separate member of the Refugee Appeals Tribunal.

2. The applicant is a national of Kenya and was born on the 14th October 1963. She is a Kikuyu and was born in the Rift Valley in Kenya. She got married to her husband in 1990 and they have a daughter, M, who was born on the 31st July 1994. She left Kenya on the 23rd March 2009 and arrived in Ireland on the 24th March 2009 and applied for refugee status. She completed an application for refugee status questionnaire on the 31st March 2009 and was interviewed by the Refugee Applications Commissioner on the 21st May 2009. The Refugee Applications Commissioner recommended that she should not be declared to be a refugee in a report pursuant to s.13 (1) of the Refugee Act 1996 dated the 8th June 2009. She appealed that decision to the Refugee Appeals Tribunal and the hearing before the Refugee Appeals Tribunal took place on the 7th December 2009. The Refugee Appeals Tribunal signed the report on the 26th April 2010.

3. The applicant gave evidence at the appeal heard by the first named respondent. The applicant said that her problems began in 1994 when she gave birth to her daughter. Her husband had wanted a boy and she states that he insulted her. In 1996 her husband became a member of the Mungiki. It is generally accepted that from 2002 that the Mungiki were a political religious sect in Kenya established in the 1980's. The group's members were mainly from the Kikuyu, Kenya's largest ethnic group. Mungiki were said to reject western values and support the values of traditional tribal customs and beliefs. The sect advocates female circumcision (otherwise female genital mutilation). They reject westernisation in all things that they believe to be trappings of colonialism including Christianity. Her husband wanted the applicant to join the Mungiki and dress according to Mungiki traditions. The applicant said that she refused to join the Mungiki as she was a Christian. She also indicated she did not know what position her husband held in the Mungiki as he did not reveal any information about the Mungiki. She said that she saw him with other Mungiki members and that sometimes Mungiki members came to their home. From 1996 onwards the applicant said that her husband beat her and threatened to kill her if she left their home. She stated that she was hospitalised in 1988 due to depression and that in 2000 she miscarried and was in hospital for three weeks.

4. The applicant said that in 2007 her husband came to their home with five people and attempted to circumcise her. She said that these people were not successful. She screamed and neighbours came to her rescue. Later that year the applicant states that her husband brought two Mungiki men to their home and that these men raped her. The police were unable to identify these Mungiki men as they changed their appearance. The applicant said that she had reported the matter to Rongai police station and they said they would look into the matter. She said that she had gone then subsequently to a more senior police officer (the chief police officer) in Rongai. She stated that she received no help as she said that the police are corrupt.

5. In 2008 she said that she moved out but her husband came with the Mungiki and brought her back. In March 2008 she states she again left the family home but her husband again brought her back. In May 2008 the applicant moved to a friend in Kasarani with her daughter. The applicant said she was not located in Kasarani by her husband but that she had to stop working. She said that she was not safe in Kasarani as she said her husband would find her through informers. The applicant said that she had no other problem before she left Kenya in March 2009 and she said that she was unable to return to Kenya as she would fear her husband and the Mungiki. She said she would be found as the Mungiki has a network everywhere. She herself had various jobs but she said that her husband did not have a job and he did a lot of activities with the Mungiki. She described that the police would come to search for her husband but the applicant said that he would bribe the police and would be let go. In answer to the presenting officer she said that she was able to escape from her husband and fight people that came to circumcise her as she screamed and she was rescued. She said that her husband later brought men to rape her as he was tired of her and he wanted to punish her. The applicant confirmed that her daughter remains in Kasarani and the applicant said she could stay in Kasarani but if she had to go to town she would have to take a taxi as she feared her husband would come. She confirmed to the Tribunal that after she had fled from the attempted circumcision she ran to the church and she remained there until midnight. She then returned home and said her husband was not there. He returned to the house later and the applicant said that her husband never tried to arrange her circumcision again.

The Decision of the Refugee Appeals Tribunal

6. In the analysis of the applicant's claim the first named respondent found the following issues of credibility against the applicant.

- 1) She held that the applicant said that her husband wanted her to become a member of the Mungiki since 1996. Her husband tried to force her to become a Mungiki member but she was able to resist. She said she was able to avoid becoming a member as she was a strong Christian. It was not easy for her husband to change her mind. The first named respondent said that it was difficult to believe that the applicant was able to resist her husband's attempts to make her join the Mungiki while she lived with them over a period of eleven to twelve years.

2) The applicant stated that her husband came to their home in 2007 with five other people and they wanted to forcibly circumcise her. The applicant states that she escaped by "Gods Grace" and that she ran to hide in the church. The first named respondent said it was not credible that the applicant was able to escape six people who had come to her home to forcibly circumcise her.

3) The third finding related to the country she travelled to en route to Ireland. She believes it was either Switzerland or Holland. Considering the persecution the applicant states it would be reasonable to expect that she should have sought asylum as soon as effectible after leaving Kenya rather than travel onward illegally to another foreign country using false documentation.

7. The first named respondent then dealt with state protection. She identified that forcible genital mutilation is illegal in Kenya and while the practice still exists in Kenya there are numerous examples of the state authorities arresting and prosecuting those accused of performing female genital mutilation.

8. The first named respondent then quoted the 2007 Country of Origin Information from the Immigration and Refugee Board of Canada and cites several examples of prosecutions in 2005 and 2006. It was also noted that some older men were seeking girls out of school to take them away for FGM. In the context of dealing with state protection the first named respondent appeared to suggest that the applicant's fear of FGM emanates from her husband who is a member of the Mungiki organisation. She then cites that the Mungiki have been banned in Kenya since 2002. She also indicates that while Mungiki criminal activity was rampant during the recent elections in Kenya, since the cessation of the post election conflict and the advent of the power sharing coalition, the authorities have renewed their efforts to combat the Mungiki criminal activity which resurfaced. She then indicates that the police appear to use excessive force in their attempts to combat the Mungiki.

9. In dealing with the issue of internal relocation she indicates that this would be a viable alternative for the applicant. She quoted a number of Canadian decisions in relation to the nature of internal relocation having regard to the 1951 Convention. She stated that the applicant had relocated to Kasarani for 10 months without any contact from her husband and her daughter continues to live in Kasarani and she is fine and attending school. She indicated that Kenya had a population of 38 million people and that the applicant had ten years experience working in a post office and also had experience of selling farm products. Kasarani was therefore a safe place for the applicant.

10. The first named respondent had considered redacted decisions which had been submitted in support of the applicant's claim by previous Refugee Appeals Tribunals. At one she indicated doubt had occurred in 2003 and stated that more up to date information in the current claim would suggest that the police would be interested in arresting a person who is a member of the Mungiki. At a second case she indicated that the redacted decision could be distinguished from the current claim apart from the paragraph in relation to state protection from Mungiki and for FGM. In all the circumstances she said that she affirmed the recommendation of the Refugee Applications Commissioner to refuse to refuse refugee status.

11. I received very helpful submissions on behalf of the applicant and on behalf of the respondents which in my view dealt with the issues raised by the decision of the first named respondent. It is often the experience of this court that many submissions do not deal with the actual decision of the respondent but are more general in their nature and of course of little assistance to the court in deciding the issues which need to be addressed by the court. In particular the applicant's submissions quoted from the Country of Origin Information and referred to the relevant pages in the booklet of documents which of course was of great assistance.

12. Counsel for the applicant submitted that the adverse credibility findings made by the first named respondent were made without affording any reasons for the findings and cited a number of recent decisions of this court. A further submission was made in relation to failing to make any clear finding on the core issue of whether or not it was accepted that the applicant was a married woman whose husband was a member of the Mungiki and that she suffered ill treatment amounting to persecution as a result of the actions and activities of her husband and the Mungiki. In making the finding that state protection was available the Tribunal failed to consider the adequacy and practical terms of such protection in the light of the Country of Origin Information. He quoted a number of cases dealing with irrational findings in respect of state protection and further the finding in respect of internal location was made without any assessment of the internal relocation alternative in accordance with the requisite legal principals. The final issue was submitted that the basis for the rejection of the applicant's claim is unclear.

13. Counsel on behalf of the respondent highlighted the fact that the applicant was found to lack credibility by both the Commissioner and the first named respondent. It was indicated that sufficient reasons were given by the first named respondent to explain the adverse credibility findings. She further indicated that the Tribunal was obliged to have regard to the applicants account of her travels to the State in assessing her credibility by virtue of s. 11 (B) of the Refugee Act 1996. She cited a number of decisions of this court.

The Legal Principals

Credibility

14. One of the most frequently pleaded grounds in asylum cases is that there is no statutory obligation on a decision maker to assess an applicant's credibility but as James Hathaway states in *"The Law of Refugee Status"* :- "

"The heart of the refugee determination is the careful consideration of the claimants own evidence, whether provided orally or in documentation form."

15. The UNHCR Handbook on criteria and procedures for determining refugee status states:-

"41. Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation and his personal experiences – i.e. everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well founded if in all the circumstances of the case such a state of mind can be regarded as justified."

42. As regards the objective element it is necessary to evaluate the statements made by the applicant. The combative authorities that are called upon to determine refugee status are not required to pass judgment and conditions in the applicant's country of origin. The applicants statements cannot, however, be considered in the abstract and must be viewed in the context of relevant background situation. A knowledge of the conditions in the applicant's country of origin

– while not a primary objective – is an objective element in assessing the applicant's credibility. In general the applicants fear should be considered well founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for reasons stated in the definition or would be for the same reasons be intolerable if he returned there."

16. In the case of *I.R. v. The Refugee Appeals Tribunal* [2009] IEHC 353 Cooke J found the following nine principals which emerged from the case law as the guide to the manner evidence going to credibility ought to be treated. The fifth principal is as follows:-

"A finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation and the reasons drawn from such facts must be cogent and bear a legitimate connection to the adverse finding."

Conclusion

17. I find that the conclusion of the first named respondent in respect of the first finding of lack of credibility appears to depend on the applicant being a strong Christian and that it was not easy for her husband to change her mind. This in my view ignores the applicant's evidence to the Appeals Tribunal in circumstances where the Country of Origin Information make it clear that the Mungiki have remained active in the country, that the group mainly operated in Kenya's central province the Rift Valley and Nairobi, that the Mungiki are involved in a number of violent criminal activities including extortion and execution style killing. The decision of the Refugee Appeals Tribunal in these circumstances appears not to be cogent and without reference to the Country of Origin Information.

18. The finding of the Refugee Appeals Tribunal by way of the second issue of credibility appears to be the heart of the finding of credibility. This relates to the applicant being able to escape from six people who had come to her home to forcibly circumcise her. This finding of lack of credibility appears to me to be an unreasonable one. Forcible genital circumcision is not generally carried out by men and the first named respondent failed to give any reason as to why she did not believe the applicant when she said that she had screamed and neighbours came to her rescue. This is also taking into account what was likely to be involved in a forcible circumcision of the applicant. In fact the first named respondent did not refer to the evidence which had been given by the applicant in relation to this incident. The applicant gave evidence that she screamed and her neighbours had come to her rescue. The first named respondent merely quoted that the applicant stated that she escaped by "Gods Grace" and she had run to hide in the church.

19. The finding of an expectation that the applicant being an adult should apply whilst in transit in either Switzerland or Holland is in my view not a core issue but a peripheral one. It is clear that when a person pays an agent for a ticket it is natural to assume that the person would in those circumstances rely on the agent who accompanied the applicant to Ireland and I find that this decision on credibility appears to avoid the perfectly simple explanation that if a person pays an agent they will rely on the agent who accompanies them to the country which the agent has decided is the country of destination.

State Protection

20. Country of Origin Information in the information provided by the Home Office Border and Immigration Agency at p. 80 of the documents supplied states:- *"sources indicate that the police in Kenya have been cracking down on the Mungiki...In June 2007 following the beheadings of six alleged Mungiki 'defectors', the police arrested over 2,400 suspected members of the sect...despite police crackdowns on the Mungiki killings by its members continue to occur. This cites Reuters, BBC, Africa Research Bulletin, all June 2007. The coordinator of the Kenya Human Rights Networks stated to the Washington Post that 'the government does not have a clue how to stop the Mungiki because they are dealing with an amorphous group with few known leaders'."*

21. The first named respondent despite receiving a UK Home Office Report does not take into account that 86% of citizens in Kenya consider the police the most corrupt government institution. A US State Department Report quoted therein says:-*"Police, in collusion with prosecutors resorted to unexplained illegal confinements, extortion, torture and highly questionable and fabricated charges as a cover up for malpractice."*

22. Having regard to the continuing and widespread activities of the Mungiki, it appears that there would be state protection for the applicant is not bourn out by the evidence.

Internal Location

23. The applicant was able to live in Kasarani without her husband or any other Mungiki members contacting her but she was forced to give up her employment and she feared travelling on her own to a town. The applicant had been involved working for her living up to her move to Kasarani.

24. It is possible that there may be evidence that Kasarani would be safe for the applicant to stay without further persecution by the Mungikis. However having regard to the findings of the first named respondent on credibility and state protection the decision of this court is to grant an order of *certiorari* quashing the decision of the first named respondent and remitting the matter for consideration by another tribunal member.