Case No: C/2000/0025/IATRF

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 12 October 2000

B e f o r e :

LORD JUSTICE SIMON BROWN
LORD JUSTICE WALLER
and
MR JUSTICE FORBES

- -

OMORUYI	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Mr N Blake QC and Mr J Collins (instructed by Michael Reason of 4 Helmet Row, London EC1V 3QJ, solicitors) for the Appellant
Mr A Underwood (instructed by David Jones, Treasury Solicitor of London SW1J 9HS) for the Respondent

Judgment
As Approved by the Court

LORD JUSTICE SIMON BROWN: The appellant is a 32 year old asylum seeker from Nigeria. He arrived in this country on 14 May 1996 claiming to be at risk of death for having defied the Ogboni mafia, a Nigerian secret cult, in connection with his father's burial. He had fled his home in Benin, leaving his wife and children behind. His claim to refugee status was rejected by the Secretary of State on 29 August 1996 and thereafter on appeal successively by the Special Adjudicator on 19 May 1998 and by the IAT on 12 March 1999. The IAT gave the appellant leave to appeal to this court. The grounds upon which it did so - essentially a failure to grapple properly with the issues and a four month delay between the appeal hearing and the promulgation of the Tribunal's written determination despite the requirement under the 1996 Procedure Rules that such determination shall be sent within ten days - have now been conceded by the Secretary of State and, subject to a single reservation, would clearly justify allowing the appeal and remitting the matter for rehearing by a differently constituted Tribunal.

The reservation, however, is critical and it is this: the Crown contend that even were the IAT to accept everything that the appellant says, his claim for asylum must nevertheless fail. His persecution, the respondent argues, would not be for a Convention reason - here the reason of religion. That, therefore, is the issue raised on this appeal. With that brief introduction let me at once set out the appellant's essential case on the facts, both as to the precise nature of the Ogboni cult and as to how it was that he came to defy them. At interview on arrival he described the Ogboni variously as a "secret cult ... associated with idol worshipping to the extent of drinking blood", "a mafia organisation involving criminal acts", and a "devil cult",

and he spoke of their carrying out "rituals", namely "the sacrificing of animals to a graven image [and the] worshipping of idols". His father had been a member of the cult and had wanted him, as the first son, also to be a member, but he had "refused to join because I was a Christian because the bible says I cannot drink from the cup of the devil and from the cup of the Lord". When his father died, the Ogboni demanded that he surrender up the body for ritual burial, a rite involving mutilation. When he refused and instead buried his father in the family compound, he was told that he had "violated the laws of the society and the penalty for this is death".

Let me next quote from an undated letter which he subsequently sent to the Home Office in connection with his asylum claim:

> "Secret cults in Nigeria (Africa) is a network of evil organisation involved in the use of various human organs (organs from those they decide to kill or dead members) for the preparation of satanic concoctions, ritual killing of innocent people, elimination of perceived enemies/rivals, persecution of defenceless people, use of the youth wing members (students) of the cults to destroy college/university education and commit murders, frustration of those who refused to become members (ruin their business and career), promotion and protection of their members' interest, perpetuation of their hiding agenda, rape and abuse of women who refuse their advances, and harrassment/persecution of those who refused to be recruited into the cult. Its members comprises businessmen, politicians, civil servants, students, police and Armed Forces officers, doctors, diplomats, members of the legal profession etc. ... and membership is secret.
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> ... I became a target of murder after denying secret cult members the right to bury my late father chief Dr H.O.D. Omoruyi who unfortunately was their member, I was violently threatened on several occasions by them and was given a written ultimatum - threat to exhume my late father's body within fortyeight hours and hand it over to them or get killed ...
>
> My life has been torn apart, my business and particularly that of my family by secret cult members for no reason other than the fact that I hold a different religious belief and did not allow them to perform their cult's rites on the body of my late father. ... None has dared the secret cult and survived it, they are very determined to see that they kill

> and destroy me for refusing them the right to perform their cult's rites on the body of my late father and the secret cult members are very vindictive."

There are certain further facts which I should mention. First, that on 3 January 1996, some few weeks after his father's burial, the cult brutally murdered his brother (in mistake for him) and mutilated the body, removing the genitals, left ear and left breast. He further says that on 13 May 1997, after his arrival in this country, his three year old son was killed and his body later found mutilated, this being, he suggests, in revenge for the cult having got the wrong target when initially they killed his brother. Overall he claims that the Ogboni have killed more than twenty people in Nigeria.

Finally I should note how the Secretary of State characterises this cult in the light of his own inquiries:

> "... a networking organisation for the elite and aspirants to the elite which has spread throughout Nigeria, especially in the south and into Benin. It comprises businessmen, members of the legal profession, civil servants, politicians and diplomats. The Secretary of State understands that it contains elements of freemasonry and that whilst some clergy are members of the Ogboni others have condemned it."

I should perhaps put on record that the Secretary of State rejects the claim that the Ogboni are associated with sinister killings and that those like this appellant whom they are said to be intent upon harming are beyond the effective protection of the Nigerian authorities. For the purposes of this appeal, however, we must assume that the appellant is right both in his description of the cult's violent reprisals and in his assertion that the police and other state authorities are unwilling to act against them.

The same assumptions in favour of the appellant must, of course, be made with regard to his credibility although again it is appropriate to record the Special Adjudicator's

doubts because “the stories seem so incredible”, and the IAT’s express finding “that the cult as described by the appellant is not credible”.

This brings me to two final comments before I turn to the central issue. First, that even if we decide this issue in the appellant’s favour, he may well fail in his asylum claim upon the facts. Second, that even if the issue is resolved against the appellant, he may nevertheless be entitled to exceptional leave to remain under Article 3 of ECHR, the Secretary of State having long since undertaken not to expel those whom there are good grounds to believe would on return home be at real risk of serious harm - see R v Secretary of State for the Home Department ex parte Turgut [2000] UKHRR 403.

I come now to the critical question for decision which is whether on the basis of the assumed facts the appellant can properly be said to be a refugee as defined by article 1A(2) of the Convention:

> "For the purposes of the present Convention, the term ‘refugee’ shall apply to any person who ... (2) ... owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ..."

The appellant’s case is that he has a well founded fear of being persecuted for reasons of religion. His fear is of serious, indeed fatal, harm at the hands of the Ogboni. So much, on the assumed facts, is clear. It is clear too that on the assumed facts he cannot look for protection of the authorities in Nigeria: they are either unable or, more probably, unwilling to protect him. The real question is whether such harm as

may befall him on return home should properly be characterised as "persecution for reasons of religion".

In submitting that it should, Mr Blake QC, on his behalf, accepts that a causal nexus must be established between the harm and the Convention reason (religion), and contends for such a nexus here by reference to the underlying cause of the appellant's fear. The reason he is now at risk of reprisal, Mr Blake submits, is because of the religious differences between the appellant and the Ogboni: the cult's rites demanded that he surrendered his father's body for ritual mutilation and burial; his Christian beliefs prevented him from doing so.

Mr Underwood's argument in reply is that discrimination is an essential feature of persecution for a Convention reason and that this requires the persecutor to be motivated by the reason in question, here religion. In the present case, submits Mr Underwood, even assuming that the appellant's refusal to cooperate with the cult in burying his father was because of his Christian beliefs, that is not a sufficient nexus to qualify him as a refugee within the Convention definition. Rather he must establish that the Ogboni are intent on harming him because he is a Christian and not merely because he crossed them. And this, Mr Underwood submits, the appellant cannot do even on the assumed facts. There is no reason to suppose that the Ogboni would not be equally intent upon harming anyone else who crossed them: they would be quite indifferent to whether that person's defiance was because of religious beliefs or for any other reason.

In examining these arguments it is necessary first to consider what in this context is meant by "religion". For this it is convenient to turn to Professor Hathaway's book, The Law of Refugee Status, at paragraph 5.3:

> "Religion as defined in international law consists of two elements. First, individuals have the right to hold or not to hold any form of theistic, non-theistic or atheistic belief. This decision is entirely personal: neither the state nor its official or unofficial agents may interfere with an individual's right to adhere to or to refuse a belief system, nor with a decision to change one's beliefs. Second, an individual's right to religion implies the ability to live in accordance with a chosen belief, including participation in or abstention from formal worship and other religious acts, expression of views, and the ordering of personal behaviour.
>
> Because religion encompasses both the beliefs that one may choose to hold and behaviour which stems from those beliefs, religion as a ground for refugee status similarly includes two dimensions. First is the protection of persons who are in serious jeopardy because they are identified as adherents of a particular religion ...
>
> Alternatively, because religion includes also behaviour which flows from belief, it is appropriate to recognise as refugees persons at risk for choosing to live their convictions"

It is, therefore, plain (and hardly surprising) that, whether the harm is perpetrated by the religious upon the non-religious or vice versa (or indeed by one religious body upon another), and whether because of adherence (or a refusal to adhere) to a belief or because of behaviour, there will be persecution for reasons of religion provided always that the other ingredients of the definition are satisfied.

Let me at this stage deal with Mr Blake's argument that the Ogboni mafia itself is properly to be considered a religion for these purposes. There are, he suggests, clear religious elements to their practices which merit such a characterisation: the worship of idols, sacrifice of animals and the like. This argument I would utterly

reject. The notion that a "devil cult" practising pagan rituals of the sort here described is in any true sense a religion I find deeply offensive. Assume opposition to such practices on the part of a secular state; is that to be regarded as a religious difference? I hardly think so. It seems to me rather that these rites and rituals of the Ogboni are merely the trappings of what can only realistically be recognised as an intrinsically criminal organisation - akin perhaps to the voodoo element of the Ton-Ton Macoute in Papa Doc Duvalier's Haiti.

I pass next to the core dispute between the parties, the question whether discrimination on the part of the persecutor is indeed, as the respondent contends, an essential feature of persecution for a Convention reason. Let me in this regard first cite various passages from their Lordships' speeches in R v IAT ex parte Shah [1999] 2 AC 629, passages upon which Mr Underwood not surprisingly places considerable reliance. Shah, of course, was concerned principally with the meaning of "particular social group" within article 1A(2), but its importance goes wider than that. Lord Steyn, having set out the first preamble to the Convention with its reference to "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination", stated that the preambles show amongst other things "that counteracting discrimination ... was a fundamental purpose of the Convention" (p.639). Later in his speech, at p.643, he said this:

> "In 1951 the draftsmen of article 1A(2) of the Convention explicitly listed the most apparent forms of discrimination then known, namely the large groups covered by race, religion and political opinion. It would have been remarkable if the draftsmen had overlooked other forms of discrimination."

Lord Hoffmann similarly quoted the first preamble and continued, at p.651:

"In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect. ...

The notion that the Convention is concerned with discrimination on grounds inconsistent with principles of human rights is reflected in the influential decision of the US Board of Immigration Appeals in In Re Acosta ..."

Lord Hoffmann later, at p.654, turned to causation, an issue arising there too:

"Mr Blake, in supporting this argument, suggested that the requirement of causation could be satisfied by applying a 'but for' test. If they would not have feared persecution but for the fact that they were women, then they feared persecution for reason of being women. I think that this goes from overcomplication to oversimplification. Once one has established the context in which a causal question is being asked, the answer involves the application of common sense notions rather than mechanical rules. I can think of cases in which a 'but for' test would be satisfied but common sense would reject the conclusion that the persecution was for reasons of sex. Assume that during a time of civil unrest, women are particularly vulnerable to attack by marauding men, because the attacks are sexually motivated or because they are thought weaker and less able to defend themselves. The government is unable to protect them, not because of any discrimination but simply because its writ does not run in that part of the country. It is unable to protect men either. It may be true to say women would not fear attack but for the fact that they were women. But I do not think that they would be regarded as subject to persecution within the meaning of the Convention. The necessary element of discrimination is lacking: compare Gomez v Immigration and Naturalization Service, 947 F.2d 660.

I am conscious, as the example which I have just given will suggest, that there are much more difficult cases in which the officers of the state neither act as the agents of discriminatory persecution nor, on the basis of a discriminatory policy, allow individuals to inflict persecution with impunity. In countries in which the power of the state is weak, there may be intermediate cases in which groups of people have power in particular areas to persecute others on a discriminatory basis and the state, on account of lack of resources or political will and without its

> agents applying any discriminatory policy of their own, is unable or unwilling to protect them. I do not intend to lay down any rule for such cases. They have to be considered by adjudicators on a case by case basis as they arise. The distinguishing feature of the present case is the evidence of institutionalised discrimination against women by the police, the courts and the legal system, the central organs of the state."

My final citation from Shah is from Lord Hope's speech at p.656. He too referred to the first preamble and continued:

> "If one is looking for a *genus*, in order to apply the *eiusdem generis* rule of construction to the phrase 'particular social group,' it is to be found in the fact that the other Convention reasons are all grounds on which a person may be discriminated against by society.
>
> ... while the risk of discrimination by society is common to all five of the Convention reasons, the persecution which is feared cannot be used to define a particular social group. The rule is that the Convention reasons must exist independently of, and not be defined by, the persecution. To define the social group by reference to the fear of being persecuted would be to resort to circular reasoning ... but persecution is not the same thing as discrimination. Discrimination involves the making of unfair or unjust distinctions to the disadvantage of one group or class of people as compared with others. It may lead to persecution or it may not. And persons may be persecuted who have not been discriminated against. If so, they are simply persons who are being persecuted. So it would be wrong to extend the rule that the Convention reasons must exist independently of, and not be defined by, the persecution so as to exclude discrimination as a means of defining the social group where people with common characteristics are being discriminated against. That would conflict with the application of the *eiusdem generis* rule, and it would ignore the statement of principle which is set out in the first preamble to the Convention."

In support of his arguement that discrimination is not a necessary ingredient of an asylum claim, Mr Blake fixes enthusiastically upon a single sentence in that last citation, Lord Hope's observation: "And persons may be persecuted who have not been discriminated against."

Taken in context, however, I have no doubt that the sentence was intended to denote the exact opposite, namely that if persons are persecuted (harmed) on a non-discriminatory basis, then, from the Convention standpoint, they are simply harmed and are not entitled to refugee status.

The decision in Shah, I should note, recognises that the harm and discrimination may emanate from different sources. Such, indeed, was the position there: it was the appellants' husbands who were threatening to harm them for their supposed adultery, the state itself which practised institutional discrimination against women. The women's position under the Convention was comparable to that instanced by Lord Hoffmann of the Jewish shopkeeper in Nazi Germany at risk of harm by Aryan competitors enjoying immunity from punishment under the discriminatory regime there in force.

Before finally passing from Shah, I should say a word about Applicant A's case, the Australian decision to which several of their Lordships referred. It was that case which had pointed out that, to avoid circularity of reasoning, a relevant social group had to be found to exist independently of the persecution complained of. More pertinently for present purposes, however, that case had denied asylum to parents who contravened China's "one child policy" and who feared enforced sterilisation for having produced what are known as "black children". As Lord Steyn observed in Shah at p.642:

> "... In ... Applicant A ... a significant difficulty in the way of claimants to refugee status is the fact that the one child policy is apparently applied uniformly in China. There is no obvious element of discrimination. That may be the true basis of the decision of the Australian High Court."

Importantly, however, the High Court of Australia in their more recent decision in Chen Shi Hai v Minister for Immigration and Multicultural Affairs 2000 HCA 19 upheld the claim for asylum where the applicant was himself a "black child". As the majority said in paragraph 18 of their judgment:

> "... notwithstanding that China's 'one child policy' may be reflected in laws of general application which limit the number of children which a couple may have, that does not mean that the laws or practices applied to children born in contravention of that policy are laws or practices of general application. Such children are ... persecuted for what they are (the circumstances of their parentage, birth and status) and not by reason of anything they themselves have done by engaging in certain behaviour or placing themselves in a particular situation. The sins of the parents, if they be such, are being visited upon the children."

Two further paragraphs of that judgment are also illuminating with regard to the present appeal:

> "21. To say that, ordinarily, a law of general application is not discriminatory, is not to deny that general laws, which are apparently non-discriminatory, may impact differently on different people and, thus, operate discriminatorily. Nor is it to overlook the possibility that selective enforcement of a law of general application may result in discrimination. As a general rule, however, a law of general application is not discriminatory. And Applicant A held that, merely because some people disagree with a law of that kind and fear the consequences of their failure to abide by that law, they do not, on that account, constitute a social group for the purposes of the Convention."

> "33. ... Where discriminatory conduct is motivated by 'enmity' or 'malignity' towards people of a particular race, religion, nationality, political opinion or people of a particular social group, that will usually facilitate its identification as persecution for a Convention reason. But that does not mean that, in the absence of 'enmity' or 'malignity', that conduct does not amount to persecution for a Convention reason. It is enough that the reason for the persecution is found in one or more of the five attributes listed in the Convention."

If, as I believe, these are correct statements of Convention law, it plainly follows that discrimination, at least in the sense that the substantive law or its enforcement in practice bears unequally upon different people or different groups, is essential to the concept of persecution under the Convention. Only those who for one or another Convention reason are singled out, whether malevolently or not, qualify for asylum.

Mr Blake's contrary argument, so far as I understand it (and I confess to some difficulty in following certain of its more intricate passages), founded in part upon the writings of Professor Guy Goodwin-Gill, is that surrogate protection is provided by the Convention for all save those affected indiscriminately by natural disasters, civil wars or casual criminal violence. Once some nexus exists between the harm feared and a Convention reason, it becomes, he submits, contrary to the humanitarian purposes of the Convention to require anything more in the way of discriminatory intention, effect or motivation. In the present case, he argues, the appellant's refusal to cooperate with the Ogboni was because of his Christian beliefs. The fact that others, for non-religious reasons, might similarly have defied the Ogboni with regard to some other area of their activities and been placed equally at risk of retaliation is, he submits, nothing to the point.

Professor Goodwin Gill's most recent contribution on the subject is to be found in volume 11 of the International Journal of Refugee Law for 1999 where, commenting upon the House of Lords' decision in Shah, these passages appear:

> "It was not, and is not, the business of the 1951 Convention generally to promote non-discrimination or to protect the human rights of those who *might*, become refugees ... nothing in the *travaux préparatoires* suggests that the drafters had specifically in mind any notion of 'discriminatory denial of human rights', or equivalent formulation.

> That discourse lay in the future, and while it may be, and often is, possible to interpret prosecution as some form of discriminatory denial of human rights, to think exclusively in these terms may fail to reflect the social reality of oppression. Approaching persecution as ineluctably linked to discrimination can work to advantage, of course, and has been adopted in various courts in various jurisdictions; but it remains a gloss on the original words, of which advocates need to be aware"

Nothing in those comments to my mind provides a sufficient basis for holding that some element of conscious discrimination against the victim based on a Convention reason is not a necessary ingredient of Convention persecution. And nothing short of such a holding would, I believe, be sufficient for the success of the present appeal. Let it be accepted that, as a Christian, the appellant would be more likely than most to defy the Ogboni in the particular circumstances which arose here: their desire to control his father's burial. As a Christian, indeed, he would surely have been readier than most to defy them in other respects too. He might, for example, more readily have gone to the aid of a woman they were intent upon raping. But the mere fact that as a Christian he was more at risk than most of being harmed by the Ogboni does not qualify him for asylum any more than (in Lord Hoffmann's above illustration in Shah) women who during civil unrest were assumed to be "particularly vunerable to attack by marauding men, because the attacks are sexually motivated or because they are thought weaker and less able to defend themselves."

The Nigerian State Authorities in the present case were not unable or unwilling to protect the appellant because of his being a Christian but rather because he was at risk for having crossed this particular cult. (It is not suggested that he became on that account a member of a "particular social group"; such an argument, indeed, would

have failed here as it did in the Russian mafia case, Secretary of State for the Home Department v Savchenkov [1996] Imm.A.R. 28.) And he was not being discriminated against by the Ogboni because of his Christian beliefs but rather because he had dared to defy them; the cult would have been wholly indifferent to his underlying reasoning or beliefs.

In short, this case fails not for want of enmity or malignity on the part of the Ogboni (these feelings, we must assume, were present in abundance), but rather because that motivation (that hostility and intent to harm) was in no realistic sense discriminatory against the appellant on account of his Christianity but rather stemmed from his refusal to comply with their demands.

I do not regard this as one of those "much more difficult cases" to which Lord Hoffmann referred in his speech in Shah which needs to be decided by an adjudicator. I would hold rather that even on the (improbable) facts asserted by the appellant, his claim to asylum must necessarily fail. The risk of being harmed by the Ogboni to which he is subject is not truly one resulting from any religious difference between them: he is simply at risk for having crossed a ruthless criminal gang.

I would accordingly dismiss this appeal.

Lord Justice Waller: I agree.

Mr Justice Forbes: I also agree.