Neutral Citation Number [2006] IEHC 241

THE HIGH COURT

[2005 No. 456 J.R.]

JUDICIAL REVIEW

BETWEEN

NOLUVOYO MSENGI

APPLICANT

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM AND THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Mr. Justice John MacMenamin dated the 26th day of May, 2006.

The applicant in these proceedings is an asylum seeker in the State. She is a native of South Africa. She seeks leave to apply for a judicial review quashing the decision of the first named respondent dated 26th November, 2004 wherein she was denied the status of asylum seeker.

The applicant comes from Capetown in South Africa. She is single. She has two children. Her eldest child is living with her sister in South Africa. She herself worked as a domestic servant.

The applicant states that in February 2003 she was in her house in Capetown with her child when a man broke into her house armed with a gun, tried to beat her with the gun and then raped her. He said that if she spoke to anybody about the rape that he would kill her. The man then left her house. A neighbour took her to the local police station. She made a formal complaint. The applicant states that she met the man who raped her the next day. He said that he knew that she had made a complaint to the police. She says that one month later she was at a bus stop when this man fired a shot at her. She said that she had been threatened many times by this man during the intervening period. She was not injured as a result of the shot having being fired at her.

The applicant says that the man who threatened assaulted and raped her was a gangster. After the incident she went to live with her sister for approximately four months. However that man came to her sister's house after two months. Her sister organised for her to leave South Africa. She alleges that she could not be safe anywhere else in South Africa.

As a result of the rape she became pregnant. Her second child was born in this country. Both herself and the child are HIV positive. If she were to return to South Africa she would be concerned for her own safety and was also concerned about the health and well being of herself and her child.

While not strictly material to these proceedings, documents before the court disclose that in an interview with a Dr. Catherine O'Connor of the Western Health Board the applicant gave a somewhat different account of what transpired. To Dr. O'Connor she stated that a *group* who were known as notorious gangsters in her region and who had contacts all over South Africa knocked on her door and gang raped her. She became pregnant as a result of this.

When the applicant came to Ireland she had not been previously tested for HIV and

had not been expecting this diagnosis. While present in this jurisdiction and expecting her second child she was treated with retroviral therapy. As a result of this her blood tests have improved but she requires continuous therapy to keep her well. She has continued to take tablets daily. It is essential to maintain a certain level of drug in the body or the virus will develop resistance to the drugs if it falls below a certain limit. This applies not only to the drug the applicant is taking but causes a resistance to others as well which narrow the choices if a different regime had to be instigated. Taking medication at exactly the same time twice daily is essential. Dr. O'Connor has stated that she considers it essential the applicant be given leave to stay in the country as going back to South Africa would soon lead to her early demise from HIV.

The applicant sought refugee status on the basis that she had been raped whilst in South Africa and had become pregnant as a result of that rape. She states that she feared that the individuals who raped her and who were involved in that attack and that they might attack her again. In the course of her affidavit she stated that "following that rape I was diagnosed as being HIV positive and I fear that I will not obtain proper medical treatment and/or services in South Africa in relation to my condition". This statement may, or may not be entirely consistent with that given to Dr. O'Connor in relation to the time when the applicant discovered that she was HIV positive.

The applicant states that at the hearing of her appeal on 23rd August, 2004 counsel on her behalf made submissions to the first named respondent that to contract HIV in South Africa was like "a death sentence". A number of documents were also submitted, including submissions to the Parliamentary Portfolio Committee, a South Africa Country Report on Human Rights Practices 2003, The Human Rights Review South Africa 2004. The applicant states that counsel on her behalf made submissions in relation to the case of *Rostas v. The Minister for Justice Equality and Law Reform* (referred to below) and also referred to the textbook Symes and Jorrow.

Medical evidence was also submitted on her behalf outlining the nature of her complaints. While an issue arose in relation to the time within which the applicant might seek leave for judicial review counsel for the respondent indicated that it was not intended to rely on that point having regard to the facts of the case. Accordingly it is unnecessary to make any finding thereon.

The applicant does not furnish any recent details of her employment history in the questionnaire for refugee status. After May 1999 the applicant states that her partner paid for her journey to South Africa by giving money to a "travelling agent" who brought her here in the sum of 7,800 Rand. She says however that she separated from her partner in 2002 but they kept in communication thereafter. When asked in the course of interview whether she knew why she had been targeted by her attacker she said she did not know.

The tribunal member found that there were two issues to be considered. The first issue was whether or not the rape had ever occurred and whether or not the applicant was credible. There was one incident of sexual violence coupled with what transpired in evidence in regard to a number of serious threats following the

assault wherein the alleged perpetrator threatened the applicant. Added to this was the attempt made to shoot her. Although the shot missed the applicant it is alleged that the person beside her was wounded.

The essential case made on behalf of the applicant is that what had occurred amounted to persecution and that it should further be taken into account that the consequences of the rape were horrific for the applicant. Both herself and her second child were now HIV positive. Proper state protection was not available to the applicant. The applicant could not be sure that she will receive proper medical treatment if she were to return to South Africa. She should therefore be given the benefit of the doubt.

Before the Tribunal it was submitted on behalf of the Commissioner that rape in itself was not a Convention ground. Also the fact that the applicant was HIV positive was a matter for another forum. The applicant did not meet the Convention criteria for definition as a refugee.

The Tribunal member found that he was not satisfied the applicant was a refugee within the meaning of s. 2 of the Refugee Act 1996. The finding was based on the following considerations. First it was found that the applicant was the alleged victim of a crime in South Africa. She had made a complaint to the police concerning the rape. However she did not make any complaint concerning the attempt to murder her. Secondly, insofar as the rape was concerned, the Tribunal member noted from an article in a publication submitted called Women's News dated 24th February, 2003 that "South Africa prosecutors are adopting a hard line stance against rape, instituting special courts to address the crime and studying the reasons behind the outstanding breath of the problems". In this instance the Tribunal member stated the applicant had made a complaint to the police concerning the rape and the police were investigating it. Therefore he found that State protection was available to the applicant concerning the rape. In so finding the Tribunal member cited paragraph 100 of the UNHCR Handbook which states "whenever the protection of the country of nationalities is available (*sic*) and there are no grounds based on well founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee". Insofar as the shooting was concerned the Tribunal member stated that he could see no reason why the applicant could not have made a complaint to the police concerning that crime therefore State protection should have been available to her insofar as that crime was concerned.

It was contended on behalf of the applicant that she was a member of a particular social group. Neither the s. 13 report nor the Tribunal member actually cites the particular group referred to. The question of membership of a particular group was followed by a statement that the attack on the applicant appeared to have been a random attack. Thereafter there is a consideration of case law authorities wherein it was stated that a particular social group offering persecution should be seen and interpreted as the membership of a group of persons all of whom share a common immutable characteristic. The Tribunal member took the view that the applicant was not targeted on account of her being a member of any particular social group. He concluded that the applicant was targeted as an individual and was the subject

of a number of specific criminal acts of violence. Upon this basis he affirmed the recommendation made by the Refugee Applications Commissioner declining to determine that the applicant was a refugee.

The respondents contend that the decision of the second named respondent made on 26th November, 2004 is valid and good in law, *intra vires* and made in accordance with fair procedures. It is further submitted that the grounds advanced by the applicant do not reach the required statutory threshold of "substantiality" in order for leave to apply for judicial review to be granted. It is said that the second named respondent considered all relevant matters, in particular the evidence of the applicant that she had been raped and was HIV positive.

It is contended that the second named respondent considered the country of origin information, whether the applicant was the member of a particular social group, whether the applicant was a refugee within the meaning of s. 2 of the Refugee Act 1996 and the issue of State protection. It is now necessary to consider the legal principles which are applicable in the instant case.

The first issue is that this is an application for leave to bring judicial review. A determination on this issue is by no means a conclusion on the ultimate validity of the arguments which are put forward by the applicant. The test that must be applied in the instant case is whether the grounds are both substantial and arguable. The principles which are applicable in such a determination have been identified in a number of cases and it is unnecessary to repeat them for the purposes of this judgment in a leave application.

The statement of grounds filed on behalf of the applicant sets out a number of grounds upon which relief is sought. The first of these identifies the Tribunal's treatment of the applicant's evidence that she was HIV positive. The second raises the issue that the Tribunal erred in law in the manner in which it defined "particular social group". The applicant also alleges that the Tribunal member erred in law in the manner in which he satisfied himself that state protection was available to the applicant.

The essential case made by the applicant is that the Tribunal member did not deal with her claim that she was entitled to refugee status on the basis that she (the applicant) was HIV positive.

Here, on behalf of the applicant Mr. Conor Power B.L. referred the court to the case of *EMS v. The Minister for Justice Equality and Law Reform* (Unreported, High Court, Clarke J., 21st December, 2004) where the applicant sought to review the Minister's negative decision to refuse consent under s. 17(7) of the Refugee Act 1996 on the ground, *inter alia*, that the Minister had failed to take into account appropriate matters on the basis of an erroneous view of the law. The applicant claimed that the Minister should properly have considered new evidence to the effect that the applicant, as an AIDS sufferer, would be discriminated against should she be returned to South Africa.

Clarke J. held that where there is an inappropriately low level of health care given within South Africa to a group who form a social group for the purposes of refugee law, and where, having regard to the level of health care provided within that country, the treatment of that group from a health perspective may be regarded as

discriminatory to a significant degree, it was therefore arguable that this would amount to a sufficient level of discrimination to give rise to a claim for persecution:

> "I am satisfied that there is at the least an arguable case that materials […] show a possible basis for arguing that the level of health care is such that it is sufficient to establish the following matters:
>
> (a) that AIDS sufferers, having regard to the level of resources available in South Africa treated in a discriminatory manner; and
>
> (b) that the above is at least in part due to a policy view in relation to AIDS taken by the South African authorities.
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> The Tribunal in its recitals of the submissions made by the applicant noted
>
> (a) that the applicant and her child were HIV positive
>
> (b) that she claimed that proper state protection was not available to her, and
>
> (c) that she claimed she could not be assured of proper medical treatment in South Africa".

On behalf of the applicant it is submitted that in the light of
(a) the applicant's statement that to contract HIV in South Africa was tantamount to a death sentence, and
(b) the country of origin information before the Tribunal objectively grounding this claim, the Tribunal was obliged to consider the applicant's claim vis-à-vis a particular social group and women in South Africa who are HIV positive. The applicant's submits that the issue of the applicant's concern regarding her HIV positive status was before the Tribunal. Although it is accepted that the issue was not put explicitly to the Tribunal in Convention terms it is submitted that it is an obvious point of Convention law favourable to the applicant that does not appear in the Tribunal's decision and has a strong prospect of success.
The applicant relies on two English authorities. The first of these is *R. v. Home Secretary ex parte Robinson* [1997] Imm Ar 568 where Brooke L.J. held that Immigration Appeals Tribunal has a purposive of obligation to consider Convention law whether or not the specific Convention point was advanced by the applicant. The applicant further relied on the authority of *Ravichandaran v. Secretary of State for the Home Department* [1996] Imm Ar 97 to the effect that a decision making body has a general obligation to determine an appeal on the basis of the facts placed before it. Further reliance was placed on a decision of Peart J.: *A.O. v. Refugee Appeals Tribunal* (Unreported, High Court, Peart J., 26th May, 2004) where one of the applicants sought asylum explicitly on the grounds of religion and also stated in her questionnaire that she was HIV positive and that HIV patients "are seen as something else in Nigeria and are deserted". Peart J. held that as it was beyond doubt that the applicant had been diagnosed as HIV positive it therefore became a possibility, once she articulated this in a limited way, that there might be discrimination against the group of HIV sufferers and that the burden of proof was then initiated whereby it was necessary to pass to a further degree of investigation of the application "perhaps by obtaining any available country of origin information about the condition or plight of HIV sufferers in Nigeria". Relying on these authorities it is submitted that in the instant case the applicant's

evidence, *coupled with the corroborating country of origin information, together with the submissions made and the case law opened, obliged the Tribunal to consider whether the applicant had a well founded fear of persecution for reason of her membership of a particular social group of women with HIV in South Africa, and as distinct from the category of a particular social group who are victims of rape in South Africa.*

In assessing this issue it is important to fully consider the submissions made by Ms. Siobhan Stack B.L. on behalf of the respondents. She contends that on the face of the documentation before the court the applicant never made a case that she was at risk of persecution by reason of the facts that she was a person in South Africa who was HIV positive. Nor was such a claim made in the notice of appeal to the Tribunal. It is pointed out that in her evidence to the Tribunal the applicant said she was concerned about the health and well being of herself and her child. She does not appear to have given any evidence to the effect that she feared persecution from the State or non-state agents by reason of her status as a person who was HIV positive. Counsel submits out that the applicant's submissions to the Tribunal would appear tantamount to a contention that the applicant could not be sure that she would receive proper medical treatment if she was to return to South Africa. The onus is on the applicant to show she was a refugee (s. 11(a)(3)) of the Refugee Act as amended). This onus existed even when the applicant was before the Commissioner, as she was a national of a country standing designated by order under s. 12(4) as a safe country of origin (see the Refugee Act 1996 Safe Countries of Origin) S.I. No. 714/2004). Therefore the onus was on the applicant to make it clear that her claim was based on a fear of persecution for reasons of her status as being a person who was HIV positive.

The respondent relies on the actual statements of the applicant in her grounding affidavit where she expresses fears that she would not be able to obtain proper medical treatment or services in South Africa in relation to her medical condition. It is contended therefore

1. That the applicant failed to make any allegation that she was at risk of persecution as a result of her HIV status although she does allude to the fact that she contracted HIV as the result of an alleged rape and will not get medical treatment
2. That the alleged absence of medical treatment in South Africa does not form an independent basis of a claim for refugee status.
3. Unlike the situation described in *A.O. v. The Refugee Appeals Tribunal* there is no indication that there would be social discrimination, recrimination or persecution of the applicant as a person with HIV.
4. Similarly in the case of *EMS v. The Minister for Justice Equality and Law Reform* it was submitted that there was evidence that AIDS sufferers in South Africa were treated in a discriminatory manner and this was at least in part due to a policy view in relation to AIDS taken by the South African authorities.
5. The respondent submits that the applicant cannot rely on the fact that the *EMS* decision related to an AIDS sufferer from South Africa which is the same country as the applicant and each case must be decided upon its own facts and evidence.

In this context it will be noted that in the case of *Kuthyar v. Minister for Immigration and Multi Cultural Affairs* (2000) FCA 110 the Federal Court of Australia found that a differing level of health care could not be said to constitute persecution for Convention reasons. However it was found that it would be relevant to a refugee claim that the State authorities were not in a position or were not trying to protect HIV sufferers from the persecutory discrimination which admittedly did occur. Counsel submitted that as no allegation of persecution or discrimination has been made by the applicant either by the State or non-state agents in South Africa there was no obligation on the Tribunal to consider any potential refugee claim as that claim was never made.

The essential question for determination at this stage is whether the applicant has established arguable and substantial grounds. The essence of the case made by the applicant is that there were *materials before the Tribunal* that placed the Tribunal itself on inquiry as to whether the applicant would be the victim of discrimination as a HIV positive woman in South Africa which the South African authorities would not only be unwilling to counteract but be instrumental in perpetuating. I go no further to say it is arguable that there were such materials before the Tribunal and that an onus devolved on the Tribunal itself to investigate and consider these issues as a consequence. In the circumstances I am of the view that for the purposes of this leave application the applicant has crossed the necessary threshold in establishing grounds for seeking leave though I wish to reiterate that the finding of this court goes no further.

The next issue for consideration relates to the question of discrimination and persecution of a particular and social group. The applicant relies on the case of *Rostas v. Refugee Appeals Tribunal* (Unreported, High Court, 31st July, 2003) wherein Gilligan J. identified and adopted the principles put forward by Lord Hoffman in *R. v. Immigration Appeals Tribunal ex parte Shah* and *Islam v. Secretary of State for the Home Department* [1999] 2 AC 629:

> "Persecution consists in serious and sustained or systematic violation of fundamental human rights, civil, political, social or economic, together with an absence or failure of state protection. This includes circumstances where there may be specific hostile acts, or such a situation may result from the cumulative effects of various measures of discrimination where they may have serious prejudicial consequences, thus giving rise to a fear of persecution". With regard to persecution by non-state actors Lord Hoffman in *R. v. Immigration Appeals Tribunal ex parte Shah* and *Islam v. Secretary of State for the Home Department* [1999] 2 A.C. 269 approved the succinct formula: Persecution equals Serious Harm plus Failure of State Protection".

Gilligan J. continued

> "Apart from the risk of persecution from non-state actors, there may be a separate issue of whether there is a risk of persecution from other sources, including agents of the State, having regard [to] evidence of discrimination, human rights violations and abuses by the police and

other state organs against members of the Roma community. If this is so it may give rise to a risk of persecution on the Convention ground of membership of the Roma race from either or both state and non-state actors".

The applicant points out that this case was put before the RAT and therefore it ought to have been clear to that Tribunal that a claim for persecution as extreme discrimination was being made and was not considered.

The applicant submits that the applicant belonged, arguably, to a potential social group of relevance. This social group was

(a) women in general and/or vulnerable women in respect of rape;

(b) a woman who has been the subject of sexual violence in the past in respect of a subsequent gun attack, and

(c) women with HIV.

It is submitted that HIV positive women in South Africa constitute a particular social group and that the Tribunal neither considered this nor whether this was a particular social group.

The applicant relies on a number of authorities including *Shah* and *Islam* regarding the proper approach to a particular social group wherein discrimination is isolated as the key factor.

In the case of *Skenderai v. Home Secretary* [2002] 4 All ER 555 Auld L.J. summarised the authorities as concluding that membership of a particular social group included:

1. some common characteristic either innate or which by reason of conviction or relief cannot readily be changed
2. shared or internal defining characteristics giving particularity though not necessarily cohesion to the group
3. (subject to possible qualification) a characteristic other than a shared fear of persecution, and
4. (subject to possible qualification) in non-state persecution cases, a perception by society of the particularity of the social group.

It is submitted that this rationale is incorporated into the Irish statutory scheme by virtue of s. 1 of the Refugee Act 1996 which explicitly states that membership of a particular social group includes *inter alia* membership of a group of persons whose defining characteristic is their belonging to the female or the male sex. It is also submitted that a particular social group can be a large group of persons in a country. If an *ejusdem generius* approach is taken then it is to be taken as been akin to a group holding a religious belief or political opinion or race or nationality.

On behalf of the respondent it is submitted that the proposition advanced by the applicant herein is misconceived and contrary to the accepted view as expressed in *Shah* that it is a general principle that there can only be a "particular social group" if the group exists *independently* of the persecution. Ms. Stack B.L. puts the position succinctly where she states that while persecution cannot *define* the social group it may serve to identify it. However the social group must exist independently of the persecution.

In this case because the group is defined by reference to rape it is submitted that the

applicant is engaged in circular reasoning which was rejected by the House of Lords in *Shah*. The necessary element or litmus test is that there must be discrimination. Counsel adds that while it is true that women are more likely to be the victims of sexual violence, that does not mean that women in South Africa are more likely to the victims of sexual violence *because they are women*. The respondent points out that in this case the applicant was asked at interview if she was targeted and she said that she did not know.

Even more fundamentally however, it is submitted on behalf of the respondent that this issue has been litigated previously in the case of *Lelimo v. The Minister for Justice Equality and Law Reform* (Unreported, O'Sullivan J., November 12th, 2003. In that case it was submitted that the applicant had been raped in South Africa, that there was insufficient *de facto* state protection and that without more she was thereby a member of a social group for the purposes of the Convention. However this argument was explicitly rejected. It is clear then that this court cannot, and must not, grant leave on grounds which have been previously litigated and determined. By definition therefore there are no "substantial grounds" for challenging the decision on this point (see the decision of Carroll J., in *McNamara v. An Bord Pleanála* [1995] 2 ILRM 125).

It is established that protection afforded by a State needs neither to be perfect or absolute (see *Horvath v. Home Secretary* [2001] 1 AC 489) as stated by Lord Hope:

> "The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection on the Home State. Rather it is a practical standard which takes proper account of the duty which the State owes to all its own nationals … it is axiomatic that if you live in an imperfect world. Certain levels of ill treatment may still occur even if steps to prevent this are taken by the State to which we look for our protection".

Counsel states that the evidence before the Tribunal was that the authorities in South Africa were investigating the rape of the applicant and that she had complained of the matter to the police. It was further stated that the police had told her that they would call her for court and they would send her a letter.

All of these points are undoubtedly issues which must form a very significant part of the considerations of this court at the full hearing. The test to be applied at this stage is arguability and sustainability is to consider whether there is sufficient material, at this stage, to justify a conclusion that the applicant has and crossed the threshold?

It is clear that the applicant is not entitled to establish "a composite case" part of which concerns an issue which has already been determined by this court in *Lelimo*.

It seems to me that there is one issue only which is arguable and substantial, and that is whether HIV positive women in South Africa constitute a particular social group and receive State protection. It would be inappropriate in a leave application to go further or to trespass on the issues which arise for full hearing.

I consider that the grounds upon which leave should be granted should be considerably narrowed to read

> "The first named respondent failed to take into account adequately or at all the fact or significance of the applicant's status as an HIV positive person in the consideration of persecution in the future and as to her membership of a particular social group in the consideration of whether State protection was available to her."

The applicant has not established substantial or sufficient grounds to permit leave to be granted in respect of her status as a woman in South Africa in respect of the rape alleged or in respect of women who have been victims of sexual violence in the past as there are matters previously determined by this court.