Neutral Citation Number: [2007] IEHC 169

THE HIGH COURT

[2005/961 JR]

BETWEEN

O. A. A.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Feeney delivered on the 9th day of February, 2007.

1.1 The Applicant in this case is a national of N. who arrived in Ireland on the 2nd February, 2005 and immediately sought asylum in this country. In her application for refugee status, filled out on the 9th February, 2005, it was stated that she had left her country of origin because she did not want her daughter to be circumcised. The plaintiff has two children namely a girl A. J. and a son A. S. Those children came to Ireland with the Applicant and asylum was also sought for them.

1.2 The fear of the Applicant's daughter being circumcised was based on a claim that she would be obliged, for cultural reasons, at the age of eight to undergo a circumcision which would more accurately be described as female genital mutilation (FGM). The Applicant's husband remained in N. with another wife who is identified as having no children. In the questionnaire the Applicant claimed that the fear of her daughter being circumcised arose from the fact that it was the custom of her husbands ethnic group and that it was not a matter of choice or consent but of tradition. She also indicated that neither herself nor her husband wanted her daughter circumcised or subject to FGM.

1.3 An interview was conducted on behalf of the Refugee Applications Commissioner on the 17th February, 2005. During that interview the Applicant claimed that her fear of her daughter being subject to FGM was based upon custom or tradition and that whilst no actions had been taken towards carrying out such mutilation that there had been discussion concerning the proposed FGM. The parents had said no but that it had been indicated that there was no choice. The issue as to whether or not the Applicant had considered going to the police was dealt with by her indicating that it was nothing to do with the police as it was a cultural or traditional matter and she confirmed that she had not gone to the police. The Applicant also confirmed that she lived and had always lived in L.

1.4 Following the interview the Commissioner considered the matter and decided to recommend that the Applicant should not be declared a refugee. That recommendation also applied to the Applicant's two children.

1.5 The decision to refuse the Applicant's request to be declared a refugee was made on the basis that she had failed to establish a well founded fear of persecution as defined under s. 2 of the Refugee Act 1996 (as amended). That decision was appealed to the

Refugee Appeals Tribunal on the 21st March, 2005. The notice of appeal was accompanied by detailed written submissions from the Applicant's solicitors James Watters and Co. As part of those submissions it was contended that in considering the Applicant's claim for asylum the Refugee Applications Commissioner had relied on a number of country of origin reports on N. but that due regard had not been given to the contents of those reports and in particular the U.K. Home Office Country Assessment Report of October, 2004, which had confirmed that whilst circumcision in N. was declining that it was still widely practiced and that young children are often at risk. It was also submitted:

> "… that the Applicant's belief in that the police would not assist her was reasonable. The country of origin information on N. (Canadian Immigration & Refugee Board Report, 27/11/2003-Appendix A) says that there is no federal law criminalising the practice of FGM. In this regard, it is submitted that it is not reasonable to expect the Applicant to produce evidence of her seeking protection of her state, i.e. the police, from the practice which is not criminalised."

1.6 The refugee Appeals Tribunal conducted an oral hearing and having considered the matter arrived at a decision dated the 20th June, 2005. That decision was to the effect that the appellant did not suffer from a well founded fear of persecution and the recommendation of the Refugee Applications Commissioner was affirmed. The Applicant was informed of that decision, which covered both herself and her two dependant children, by a letter of the 30th June, 2005.

1.7 The Refugee Applications Commissioner had not only determined that the Applicant had not disclosed a well founded fear of persecution but also found that the Applicant's claim was not credible. The decision of the Tribunal did not make any adverse finding in relation to credibility but preceded on the basis of accepting the Applicant's evidence. The effect of such an approach was that the Applicant's evidence was accepted at its height and that her stated fear was accepted as genuine and subjectively true. What was expressly considered by the Tribunal member was whether or not such subjective fear was objectively a "well founded fear". The Tribunal member made a determination that the alleged risk or fear identified by the Applicant was not sufficiently real or well founded as to amount to persecution.

1.8 A second matter considered by the member of the Tribunal proceeded on the basis that the Applicant's fear was well founded. In dealing with this matter the Tribunal member identified that the issue as to whether an individual faces a risk of persecution requires identification of the serious harm faced in the country of origin and an assessment of the State's ability and willingness to respond effectively to that risk. The decision correctly identified that persecution is the construct of two separate but essential elements, namely risk of serious harm and failure of protection. The Tribunal member ultimately determined that she could find no clear and convincing evidence to support the Applicant's claim that the authorities would do nothing to help or that the unwillingness of certain police officers to discharge their duties could be considered to be a practice which is carried out systematically or with the overt or covert concurrence of the State. The Tribunal member found that the Applicant had failed to provide clear and convincing evidence of a failure of State protection and that therefore the Applicant had failed to meet the persecution definition.

2.1 The judicial review challenge before this court relates to both of the above findings. Whilst a number of other matters, including a claim in relation to *audi alteram partem* were raised in the written grounds these were not pursued at hearing.

2.2 It was contended on behalf of the Applicant, in respect of the first finding, that there was no valid basis, and in particular no valid basis identified within the decision, to

support the finding of no genuine risk of serious harm. It was contended that a correct reading of the decision demonstrated that such claim had been evaluated on the basis of the past persecution alone and that it followed that an incorrect procedure had been adopted. In breach of the principles of fair procedures and of natural and constitutional justice. It was also contended that the finding that the Applicant's evidence did not disclose a genuine risk of serious harm was made without any reasons being identified whether supported by evidence or otherwise.

2.3 In relation to the second finding it was contended on behalf of the Applicant that the second named Respondent erred in law and fact and acted irrationally and unreasonable in finding that State protection existed in respect of the Applicant. It was also contended that having made a finding that the Applicant had not disclosed a genuine risk of serious harm that thereafter the Tribunal member could not properly or fairly consider the issue of State protection. In effect it was contended that the finding of an absence of a genuine risk of serious harm resulted in the issue of State protection being considered in a limited manner resulting in a failure to take into account material considerations.

3.1 The decision of the member of the Refugee Appeals Tribunal is a detailed and considered decision. Part of the analysis therein is consideration of what amounts to a well founded fear of persecution. The decision correctly identifies that it is for the adjudicator to identify whether or not an Applicant for asylum has a well founded fear of persecution for a convention reason. That fear of persecution must be well founded and the Tribunal member correctly identified that there is an objective element as well as a subjective element in considering the issue of fear. The test identified in the decision was that:

> "A person will have a well founded fear of persecution if he or she has a genuine fear that is founded upon a reasonable likelihood of persecution for one or more of the convention reasons. A fear will not be well founded if it is merely assumed or if it is speculative. A reasonable likelihood is one that is not remote or insubstantial or a far fetched possibility."

This court is satisfied that the Tribunal member adopted the correct approach. The fear must be well founded and not just subjective.

3.2 It was not contended on behalf of the Applicant that the Tribunal member had identified an incorrect test and it was acknowledged that there was a subjective and objective element in whether or not there was a well founded fear of persecution. What was contended was that the evaluation of same was made on the basis of past persecution alone and was therefore incorrect and further that the finding that the evidence did not disclose a genuine risk of serious harm was made without reasons being given whether supported by evidence or otherwise.

3.3 The Tribunal member as adjudicator identified the correct test to apply in determining whether or not there was a genuine risk of serious harm. The Tribunal member also set out in some detail the legal principles relating to burden of proof and standard of proof and no issue is taken in relation to same.

3.4 The Tribunal member's determination and finding that the appellant's evidence did not disclose a genuine risk of serious harm is in issue in this judicial review. The High Court has on many occasions in relation to judicial reviews concerning the Refugee Appeals Tribunal warned that the court must not fall into the trap of substituting its own view for that of the Tribunal member. This was done in relation to credibility by Mr. Justice Peart in *Imafu v. The Minister for Justice, Equality and Law Reform and Others* (judgment delivered on the 9th December, 2005) where he stated (at p. 11):

> "This court must not fall into the trap of substituting its own view on credibility for that of the Tribunal member. The latter, just as a trial judge is at trial rather than the appellant court, is in the best position to assess credibility based on the observation and demeanour of the Applicant when she gives her evidence. These are essential tools in the assessment of credibility, and it is always essential to remember that what appears as the spoken word in a transcript or in a summary of evidence contained in any written decision cannot possibly convey the necessary elements for the assessment of credibility. That is why a court will be reluctant to interfere in a credibility finding by an inferior Tribunal, other than for the reason that the process by which the assessment of credibility has been made is legally flawed."

That quotation deals with the issue of credibility but is demonstrative of the significant and important position of the Tribunal member as adjudicator. The courts must pay due deference and regard to an adjudicator. Part of that is a recognition that it is not the courts function to dissect, parse or disassemble the written decision but rather to look at it in the round. Excessive concentration on a particular phrase or word can lead to an incorrect approach at variance with the requirement to consider the full context and meaning of the written decision.

3.5 In this case it is suggested on behalf of the Applicant that the finding that the appellant's evidence did not disclose a genuine risk of serious harm was made solely on the basis of the absence of past persecution and that such finding was made without reasons being given and without there being evidence to support same. A full analysis of the entire written decision demonstrates that such argument is incorrect. Among the facts identified in the written decision are:

> (a) That the Applicant's husband did not agree with circumcision:
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> (b) That the Applicant came from a State (O.) which does not practice circumcision:
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> (c) That the Applicant had always been based in L.:
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> (d) That the husband's family, who were the party seeking to pressurise the Applicant into having her child circumcised, lived three and a half hours away from L.:
>
> (e) That the Applicant thought of many things to do when subject to the pressure to have her child circumcised but as "she was not really herself and that there was nothing they could do":
>
> (f) That the Applicant chose to leave the country on the suggestion that she might do so from a sister, who is the sister now living in Ireland:
>
> (g) That the Applicant never went to the police:
>
> (h) That the pressure to have a child circumcised was a tradition and not a matter of law:
>
> (i) That no physical threat had been made:
>
> (j) That the pressure to have her child circumcised was not in the form of a threat that was "in the air":

(k) That the Applicant was never approached by any member of her husband's family to suggest circumcision:

(l) That no effort had been made to remove the Applicant's child by force:

(m) That the Applicant had a belief that her husband's family would come and take her child.

When one takes all of those matters into account there is a factual and rational basis for concluding that on an objective test basis that the evidence did not disclose a genuine risk of serious harm. That finding was made notwithstanding the acceptance of the credibility of the Applicant. It was based upon a determination and finding by the Tribunal member that such evidence, looked at in the round, did not disclose on an objective basis a genuine risk of serious harm. It would be an improper approach for this court to seek to impose or transplant its view in relation to such finding and once the court is satisfied, as it is so in this case, that there was no defect in the process leading to such finding then this court cannot interfere with such a finding. This court is satisfied that the finding in relation to their being no genuine risk of serious harm was not made on the sole basis of the lack of past persecution and was not made in the absence of evidence to support same or without reasons being identified. It follows that this court is satisfied that there is no basis for the first contention raised on behalf of the Applicant.

4.1 The second matter raised by the Applicant is a claim that the second named respondent erred in law and fact and acted irrationally and unreasonably in finding that State protection existed in respect of the Applicant. This issue was considered by the Tribunal member as a separate and distinct matter from whether or not the Applicant was in genuine risk of serious harm. For the purposes of considering the issue of State protection the Tribunal member proceeded on the basis of accepting the "fear" identified by the Applicant, and stated:

> "Whether an individual faces a risk of persecution requires identification of the serious harm faced in the country of origin and an assessment of the State's ability and willingness to respond effectively to that risk."

The "the serious harm faced" as claimed was accepted for the purpose of considering State protection. This court is satisfied that such approach and analysis was appropriate. The Tribunal member correctly identified that persecution is the construct of two separate but essential elements, namely risk of serious harm and failure of protection.

4.2 In considering the issue of State protection the Tribunal member relied on a number of quotations from Professor Hathaway's The Law of Refugee Status and extensively on the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Ward* [1993] 2 SCR 689. These same authorities were considered and approved in the decision of Mr. Justice Herbert in *Kvaratskhelia v. The Refugee Appeals Tribunal and Another* [2006] IEHC 132. In that case Mr. Justice Herbert identified that the reasoning and conclusions of La Forest J. in the Supreme Court of Canada in the *Ward* case were both persuasive and compatible with the jurisdiction of this State in considering applications for refugee status. Mr. Justice Herbert identified 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. Mr. Justice Herbert stated (at p. 134), as follows:

> "I agree with La Forest J., that subject to 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 forwarded 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 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."

4.3 In the *Kvaratskhelia* case Mr. Justice Herbert went on to conclude that the Refugee Appeals Tribunal had misdirected itself in law in concluding wrongly, that the failure of the Applicant in that case to seek protection from the State authorities of Georgia was sufficient in itself to defeat his claim for refugee status (At p. 136). The judgment demonstrated that it was necessary to look beyond a failure to seek State protection and to consider whether the evidence of the Applicant and the country of origin information furnished was sufficient to rebut the presumption of State protection. On the facts of this case it is clear that the Tribunal member recognised such requirement. The Tribunal member stated in her decision, as follows:

> "However in this case the appellant did not even seek the protection of the authorities. Her explanation for failing to do so is that she believed that they would not intervene. I must consider whether that explanation is objectively reasonable."

In considering whether the explanation of failure to seek State protection was objectively reasonable the Tribunal member considered the facts of the case and referred to country of origin information. The Applicant did not seek State protection even though both parents opposed FGM and therefore it would have to be carried out by the child being taken contrary to the parent's wishes. It was against that factual background that a failure to seek police protection required to be considered. The Tribunal had to consider whether the explanation of failure to seek such police protection was objectively reasonable. The Tribunal member concluded that the appellant had not provided clear and convincing evidence of the State's inability to protect not only because she had not sought the protection but also because she had failed to provide any other evidence that the authorities would be unwilling or unable to protect not only where both parents opposed such practice but also where it was banned in a number of States within the country. The finding made by the Tribunal member that protection might reasonably have been forthcoming and that accordingly that the claimant before her would have been required to approach the State for protection is consistent with and not at variance with the country of origin information.

4.4 There was a complete failure to provide any evidence that the authorities in N. would be unwilling or unable to protect. The protection sought would have been in relation to the forcible removal of a child, against the wishes of both parents. The country of origin information indicated that mothers of young daughters were able to veto FGM if they were opposed to it and all the more so if their husbands were against it.

4.5 As pointed out by Herbert J. in the *Kvaratskhelia* case it is the function of the Refugee Appeals Tribunal and, not this court in a judicial review application to determine the weight, (if any) to be attached to country of origin information and other evidence proffered by and on behalf of an Applicant. The Tribunal member correctly identified that the obligation was on the Applicant to provide clear and convincing evidence of the State's inability to protect. This was not a situation of a complete breakdown of law and order and therefore the correct approach was that it must be presumed that the State was capable of protecting its citizens. It was recognised that such presumption could be rebutted but that such rebuttal required clear and convincing evidence.

4.6 On the facts of this case the Tribunal member applied the correct legal test and concluded that the Applicant had failed to provide any evidence that the authorities would be unwilling or unable to provide protection. That determination was not, as in the *Kvaratskhelia* case based upon an approach or analysis that the failure to seek protection was of itself sufficient to defeat a claim of lack of State protection.

4.7 The second issue under this heading, identified at para. 2.3 above, to the effect that it was also contended that having made a finding that the Applicant had not disclosed a genuine risk of serious harm that thereafter the Tribunal member could not properly or fairly consider the issue of State protection does not arise on the facts of this case.

4.8 In the light of the above findings this court is satisfied that the application for judicial review must fail and the court therefore refuses to grant the relief sought herein.