2005 IEHC 363

THE HIGH COURT

JUDICIAL REVIEW
[2005 No. 251 J.R.]

BETWEEN

VICTOR MUIA

APPLICANT

AND

MICHELLE O'GORMAN SITTING AS THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Clarke delivered the 11th November, 2005.

1. Introduction

1.1 In these proceedings the applicant seeks leave to challenge, by way of juridical review, a decision of the first named respondent in her capacity as the
Refugee Appeals Tribunal ("RAT") member concerned, recommending a refusal of refugee status. The third and fourth named respondents are named because of the possible constitutional issues which were addressed in the course of the hearing before me. The applicant must show substantial grounds for his challenge in order to obtain leave. The test is now so well established that it is unnecessary to repeat it here.

2.1 Background Facts

2.1 The applicant is a Kenyan national who was born on 27th March, 1986. It would appear that he arrived in the State on 25th April, 2003 and applied for asylum. The procedures by which his application for asylum were considered were in accordance with normal practice in that the applicant completed the standard questionnaire and was subsequently interviewed by an officer of the Refugee Applications Commissioner ("RAC") on 21st July, 2004.

2.2 As appears from the questionnaire and the notes of that interview the substance of the claim to refugee status put forward by the applicant was his fear of the Mungiki group in Kenya. In the course of both the questionnaire and the interview the applicant gave details of events which had occurred in Kenya which, he contended, established a well founded fear of persecution for a convention reason by virtue of his concerns about the Mungiki group.

2.3 The RAC prepared the report required by s. 13(1) of the Refugee Act 1996 (as amended) which recommended that the applicant not be declared to be a refugee. That report was forwarded to the applicant under cover of a letter of 2nd November, 2004 informing him of that decision.

2.4 It should also be noted that the report contained a finding or conclusion to the effect that s. 13(6)(a) of the Refugee Act 1996 as amended applied. Such a finding involves a determination by the RAC that the relevant

application had “no basis or a minimal basis”. As a consequence of such a finding the applicant was not entitled to an oral hearing before the RAT.
2.5 A notice of appeal was, however, filed on behalf of the applicant to the RAT on 17th November, 2004. Because of the finding of the RAC under s. 13 to the effect that s. 13(6)(a) applied the submissions and representations made on behalf of the applicant to the RAT were in writing. On foot of a consideration of the case the RAT informed the applicant by letter dated 21st February, 2005 that “the Tribunal has affirmed the recommendation of the Refugee Applications Commissioner given under s. 13 of the above Act”. There was enclosed a copy of the written decision of the first named respondent dated 10th February.

3. <u>The Decision of the RAT (Facts and Credibility)</u>

3.1 That decision, which is the subject of the challenge in these proceedings, commences by specifying the manner in which the appeal came before the RAT and setting out certain statutory and other legal principles applicable. Nothing turns on this aspect of the decision. There follows under the heading “background information” a brief account of the position of the applicant which I should set out. It reads:-

> “The applicant is a Kenyan national and was born on 27th March, 1986. The applicant is a Catholic and is a member of the Kikuyu ethnic group. The applicant lived with his father at Dandora, Nairobi before fleeing to a pastor’s house at Kibera Nairobi. The applicant lived with his father and brother. His mother and two sisters had earlier fled the family home as they feared female genital mutilation (FGM). The applicant’s case is based on a stated fear of persecution in Kenya by members of the Mungiki sect. The applicant’s father and brother were ardent members of the sect. Before the applicant could take the Mungiki oath the applicant fled his home and lived with a protestant pastor for six months. The pastor organised the applicant’s travel to Ireland.
>
> The applicant applied for a declaration of refugee status in Ireland on 29th May, 2003. The applicant’s claim is set out in the questionnaire, interview, s. 13 report and the form 2 notice of appeal and need not be repeated here”.

3.2 There follows under the heading “assessment of the applicant’s claim” an analysis of certain aspects of the applicant’s evidence which, in the view of the decision maker, gave rise to credibility issues.
3.3 It is unfortunate that, while raising credibility issues and indicating those aspects of the applicant’s account which gave rise to those credibility issues, the decision maker does not appear to have specified in any clear terms those aspects of the applicant’s account which, at the end of the day, she was not prepared to accept.
3.4 In *Manzi -v- The Refugee Appeals Tribunal and Another* (Unreported

High Court, Clarke J., 8th November, 2005) (at para. 3.4) I indicated that the view expressed by the US Appeals Court in *Khup -v- Ashcroft* [2004] U.S.A. pp. LEXIS represented the law in this jurisdiction. It, therefore, seems to me that in the absence of a clear finding of lack of credibility on the part of the applicant concerned, a Court exercising a review role must do so on the basis that the applicant's evidence is correct.

3.5 While it may be inferred from the decision of the RAT in this case that at least certain aspects of the account given by the applicant were not, in the view of the decision maker, credible, it nonetheless must also be inferred by virtue of the conclusions (to which I will refer) that the decision maker appears to have been satisfied that the applicant had a well founded fear of the Mungiki but that such fear was not for a convention reason. On that basis it would seem that it might be inferred that at least some of the more significant aspects of the applicant's account were regarded as credible. In those circumstances it is difficult to ascertain from the decision, with any sufficient precision, precisely what aspects of the account were regarded as being established and what aspects were not regarded as credible.

3.6 In those circumstances it seems to me to be at least arguable, sufficient for the purposes of leave, that the applicant is entitled to have a court (such as this Court) exercising a judicial review function, treat his account as credible save to the extent that the decision makes clear that the decision maker did not treat any relevant aspect of the account as being credible. In coming to that view I would wish to make clear that it is not necessary for the decision maker to indicate a view in respect of each and every issue of fact. It is, however, arguable that in the absence of the decision making clear what the conclusions of the decision maker are in relation to credibility (to a sufficient extent to enable a Court to ascertain which facts the decision maker regarded as credible and which he or she did not), the Court may arguably have to assume credibility in respect of facts which were not dealt with as to their credibility either expressly or by necessary inference.

3.7 Therefore, if it be the case that a decision maker forms the view that the entire account of a particular applicant lacks sufficient credibility to be relied on for the purposes of making a decision then that should be said in sufficiently clear terms that it can be understood by all concerned. Provided such a finding is sustainable having regard to the jurisprudence of this Court, then it is not appropriate to seek to go behind such a finding. As I pointed out in *Manzi* a finding of lack of credibility may, however, relate to some but not all of an account. In those circumstances it seems to me to be important that the decision maker specifies those aspects which are accepted and those aspects which are not. Where the decision maker does this (and again subject to the finding of lack of credibility, insofar as it goes, being sustainable on the basis of the jurisprudence of this Court) it would again not be appropriate to seek to go behind that determination.

3.8 For the purposes of this leave application I am prepared to accept that

where there is ambiguity as to the extent of a finding of lack of credibility then the applicant is entitled to the benefit of any such ambiguity.

3.9 I must, therefore, for the purposes of leave, treat the applicant's account as fact save to the extent that there may be a necessary inference from what is found in the decision which leads to a sustainable conclusion that a certain aspect or aspects of that account were found not to be credible.

4. <u>The Decision (State Protection)</u>

4.1 In any event having expressed certain views about credibility, the decision goes on to refer to country of origin information detailing actions taken by the Kenyan authorities against the Mungiki. There follows reference to passages from the judgment of Finnegan J. in this Court in *Zgnatef -v- The Minister for Justice Equality and Law Reform* (Unreported, High Court, Finnegan J., 29th March, 2001) and the authorities referred to in those passages concerning the test that should to be applied where it might be suggested that there is adequate State protection available in the country concerned in relation to the form of persecution feared.

4.2 Having concluded a review of the legal materials by reference to para. 100 of the United Nations High Commissioner on Refugees handbook (which relates again to State protection) the decision maker goes on to reach conclusions in the following terms:-

> "There is no evidence of persecution on the grounds of race, religion, nationality or political opinion. While the Mungiki could be classified as a criminal group, the applicant did not wish to join this illegal organisation and country of origin information would suggest that State protection would be available to him. In the absence of a Convention Nexis Section 13(6)(a) of the Refugee Act (as amended) applies to the applicant."

4.3 It is of course the case that it is inappropriate to demand that a decision of a tribunal such as the RAT should be in any particular form. It is therefore necessary, in any review, to look at the decision as a whole. Even on that basis it is difficult to determine the extent to which any concerns which the decision maker may have had as to the applicant's credibility actually influence the final decision.

4.4 For the purposes of a leave application I am satisfied that it is at least arguable that a fair reading of the decision as a whole leads to the conclusion that the reason the decision maker was not prepared to recommend refugee status was that the decision maker took the view that:-

(a) The applicant had a fear of the Mungiki, though not perhaps to the extent which he claimed. It is, unfortunately, difficult, for the reasons set out above, to say precisely how far short of the amount claimed;

(b) That fear might, arguably, amount to a fear of persecution but not, by reason of the criminal nature of the Mungiki, to persecution for a convention reason (I will return to this issue at para 5.); and

(c) There was adequate State protection in relation to the Mungiki.
Those decisions need to be seen in the light of the detailed submissions submitted on 15th December, 2004, on behalf of the applicant to the RAT.
4.5 On the question of State protection those submissions referred to a significant volume of country of origin information which tends to suggest that former members (or "defectors" as they are referred to) of the Mungiki are being subjected to a regime of murder, revenge and terror. It is, of course, the case that in reaching a decision on the adequacy of State protection it is unnecessary to be satisfied that the State in question is in a position (which no State is) to provide absolute protection to its citizens. It is equally the case that it is necessary, in each case, to form a judgment on the basis of relevant country of origin information as to whether the degree of protection provided by the State is, in all the circumstances, sufficient to warrant a finding that the applicant concerned does not qualify for refugee status. However, it seems to me that it is at least arguable that in coming to such a conclusion the decision maker is obliged at least to address the substance of the case on that issue made by or on behalf of the applicant. While the decision does state that the decision maker has taken into account the submissions made on behalf of the applicant there is nothing in the body of the decision that shows that the decision maker addressed, to any extent, the country of origin information put forward on behalf of and favourable to the applicant. If the decision demonstrated that due consideration had been given to that information but that, in the light of the alternative information available (which, in fact, is referred to in the decision), and following a rational analysis of the totality of the evidence, a conclusion was reached that State protection was adequate then it might very well be difficult to seek to go behind that.
4.6 Where, however, as here, there is no evidence to be found in the decision that the country of origin information favourable to the applicant's case was considered and, equally, as a consequence, no rational explanation as to why it was rejected, it seems to me that there are at least arguable grounds for the applicant's contention that the decision maker did not take into account relevant considerations.

5. The Decision (Criminal Status of the Mungiki)

5.1 On the question of whether the status of the Mungiki, having regard to their criminal activities, was such that a well founded fear of persecution by them could not amount to such a fear for a convention reason, I have also come to the view that the applicant has also established substantial grounds for challenge. There can be little doubt that there was ample evidence to support the view that the Mungiki have, particularly in recent times, engaged in significant criminal activity. However, there was also ample evidence before the decision maker from which it might at least be inferred that the Mungiki were either a quasi religious or political grouping. Again it does not appear to me to be the case that a decision maker was necessarily

constrained to reach any particular view on the totality of that evidence. It is, however, at least arguable sufficient for the purposes of leave, that the decision maker was required to address the substance of the applicant's case to the effect that the Mungiki were a religious or political group and that he (the applicant), as a defector, or more accurately a person who declined to join despite familial expectations that he would, should, therefore, be properly treated as being analogous to a conscientious objector to a political or religious group. Again it does not appear to me that the decision addresses the substance of the applicant's case in this regard.

5.2 It is, of course, again the case that the relevant evidence does not lead, necessarily, to any one conclusion. However, there is again no evidence to be found in the decision that the decision maker engaged in a rational analysis of the country of origin information concerning the nature and status of the Mungiki in a sufficient way to reject that aspect of the country of origin information which suggests that the grouping may have a quasi religious or political status. In expressing that view I am mindful of the fact that there is at least some evidence to suggest that the grouping may have changed in their nature over time. However the decision, other than stating that the Mungiki could be classified as a criminal group, does not engage in any express analysis of the evidence to the contrary or any reasoning as to why that evidence should be rejected.

6. <u>Constitutional issues</u>

6.1 It became clear in the course of the hearing that the reason for the inclusion of constitutional issues in the statement of grounds concerned an issue which might have arisen, (but which did not), if it were suggested that the decision maker had had regard to materials which had not been, at the time of the decision of the RAT, available to the applicant either as a result of the process before the RAC or by virtue of those materials having been submitted by the applicant himself to the RAT. However it does not appear that that issue now arises and therefore those constitutional issues do not need to be pursued further.

7. <u>Conclusions</u>

7.1 As is clear from the above I am satisfied that the applicant has made out arguable grounds sufficient for the grant of leave to seek each of the reliefs sought in these proceedings which are an order of certiorari directed to the decision of the RAT and ancillary declaratory relief. While I am satisfied that the grounds upon which I have indicated that I am prepared to grant leave are encompassed within the totality of the grounds set out in the intended statement grounding the application for judicial review, it seems to me that it would be more appropriate if the grounds were somewhat recast to reflect the basis upon which I have indicated leave should be granted.

7.2 For the avoidance of doubt I should say that it does not appear to me that the aspects of the decision sought to be challenged are irrational in that there is, in my view, evidence which could lead a reasonable decision maker to

form the views taken. However, certain aspects of the decision which I have identified in the course of this judgment are, arguably, made on the basis of a failure to take into account all relevant considerations. This comment applies to the determination that the Mungiki was a purely criminal organisation and thus, also to the consequences which flowed from that conclusion concerning the absence of a Convention Nexus between any well founded fear of persecution and such reason. The comment also applies to the issue of State protection. Insofar as the decision maker reached individual conclusions as to the credibility of specific aspects of the applicant's evidence I am not satisfied that there are arguable grounds to go behind those aspect of the decision. However, it does seem to me that there are arguable grounds for suggesting that the applicant is entitled, in the circumstances of this case, to have any aspect of his account which was not the subject of a clear finding of lack of credibility treated as credible for the purposes of review.

7.3 Finally it should be noted that the application seeking leave was, by a short period, out of time. However, no point is taken in this regard and I would, therefore, also propose making an order extending time.