2005 IEHC 220

THE HIGH COURT

[2004 No. 824 JR]

IN THE MATTER OF THE REFUGEE ACT 1996 AND THE ILLEGAL (TRAFFICKING) ACT 2000 AND THE IMMIGRATION ACT 1999

BETWEEN

VIVIANNE NGOZIKA IMOH, NKENDRIAM KEVIN OKORO (A MINOR) AND ANURIKA KAREN OKORO (A MINOR) BOTH SUING THROUGH THEIR NEXT FRIEND AND MOTHER VIVIANNE NGOZIKA IMOH

APPLICANTS

AND

REFUGEE APPEALS TRIBUNAL (TRIBUNAL MEMBER OLIVE BRENNAN) AND MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT OF Mr. Justice Clarke delivered on the 24th day of June, 2005.

In these proceedings the applicants seek leave to challenge a decision of the first named respondent Refugee Appeals Tribunal ("RAT") which affirmed a pervious recommendation of the Refugee Applications Commissioner ("RAC") to refuse refugee status. Under s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 it was necessary for this application to be made on notice to the respondents and for the applicants to satisfy the court that there are substantial grounds for such leave. The test is such that grounds are "reasonable", "arguable" and "weighty". *In the matter of Article 26 of the Constitution and s. 5 and s. 10 of the Illegal Immigrants (Trafficking) Act 2000* 2 I.R. 360 and *McNamara v. An Bord Pleanála (No. 1)* [1995] 2 I.L.R.M. 125.

In the statement grounding the intended application dated 20th September, 2004 a wide range of reliefs based upon an even wider series of grounds is urged. However in the events that have happened some of the matters that were raised in that statement of grounds have become irrelevant. Counsel for both sides conveniently grouped the remaining grounds into connected areas for the purposes of the argument before me.

Firstly it is fair to say that the most wide ranging and, arguably, most contentious of the grounds sought to be relied upon concerns a contention on the part of the applicants that the process by which the RAT came to reach findings as to their credibility (which in turn led to an adverse finding on the refugee issue) was not carried out in a manner consistent with law. I will

return to this issue and other connected issues concerned with the process by which, it is contended, the RAT should assess the applicants' claim, when I have dealt with certain other issues.
Those remaining issues are as follows:-
(a) it is contended that the RAT failed to give proper consideration to the application of the second and third named applicants who are minors;
(b) it is argued that the manner in which the RAT made findings in relation to the availability of state protection was not in accordance with law;
(c) it is argued that the RAT failed to deal with one aspect of the grounds advanced by the applicants that is to say a fear of being subjected to forced marriage; and
(d) it is said that the RAT improperly considered the possibility that the applicants might have been able to relocate within Nigeria.
I will commence by dealing with each of those issues in turn.

(a) the minor applicants

In *Moyosola v. Refugee Appeals Commissioners and Others* (Unreported, High Court, judgment of Clarke J., 23rd June, 2005) I indicated that while there may be cases where it is necessary for decision makers in the refugee process to give significant independent consideration to the position of minor applicants (that is to say consideration independent of their parents or guardians) each case depended on its own facts. In this regard the facts of *Moyosola* are similar to the facts in this case. The basis upon which the first named applicant claims to fear persecution is that she fears, she says, that her daughters will be subjected to female genital mutilation ("FGM"). For the reasons which I addressed in *Moyosola* it is clear that if she has a well founded fear in that regard (and in the absence of any of the other normal considerations which would, nonetheless, exclude her from refugee status) then such a well founded fear would necessarily give rise to both her and her children being properly regarded as refugees. Equally, as I pointed out in *Moyosola*, if a decision maker within the refugee process comes to a justified decision (that is to say a decision which is not subject to being quashed on review) to the effect that such a well founded fear did not exist then that finding would equally apply in relation to the position of any minor whose claims were based upon precisely the same grounds. While there may, therefore, be cases where the considerations that would be applicable to an application by a minor would be different to those applicable to an adult parent or guardian (even though the surrounding circumstances may be similar) I am not satisfied that this is such a case.
If the decision of the RAT that the first named applicant does not have a well founded fear of persecution is sustained, then, on the facts of this case, that decision applies to the minor applicants. I am not, therefore, satisfied that there is any independent ground for challenging the decision of the RAT in respect of the minor applicants.

(b) State Protection

In *Idiakheua v. Minister for Justice Equality and Law Reform and Another* (Unreported, High Court, Clarke J., 5th May, 2005) I considered the appropriate manner in which country information should be considered in the context of state protection. As *Idiakheua* was a leave case the judgment is concerned with matters which are arguable to a sufficient extent to establish substantial grounds. In that context I noted the following:-

> "It would appear that the true test is as to whether the country concerned provides reasonable protection in practical terms *Noone v. Secretary of State for the Home Department* (Unreported, CA 6th December, 2000). While the existence of a law outlawing the activity which amounts to persecution is a factor the true question is as to whether that law coupled with enforcement affords 'reasonable protection' in practical terms".

Obviously different considerations apply to cases where the fear of persecution stems either directly from the State or from persons whose activity is condoned or tolerated by the State concerned. On the basis of the country of origin information before the RAT in this case it could not, in my view, be suggested that the RAT was required to hold that Nigeria condoned or tolerated FGM. However that is not the end of the matter. It is clear that fear of persecution for a convention reason by non state agents will nonetheless qualify a claimant for refugee status where the state concerned either refuses to or is unable to offer adequate protection. It was in that context that the comments quoted above from *Idiakheua* were made.

In this case the decision of the RAT comes to the following view:-

> "The applicant did not go to the police or to any human rights organisation. It is not open to the applicant to state that state protection was not available to her if she did not avail herself of the resources of the state."
>
> The above passage refers to the first named applicant at a time when she was resident in Port Harcourt. In respect of a later period when she was resident in Lagos the Tribunal found that "notwithstanding her fear she did not avail herself of police protection while living in Lagos".

It is, therefore, clear that at least in part the decision of the RAT to the effect that the applicants were excluded from qualifying for refugee status was based upon a finding that, in the view of the RAT, the first named applicant had failed to demonstrate the inadequacy of state protection by virtue of her failure to seek to avail of it.

It is also clear that the findings in relation to state protection to which I have referred formed, in general terms, part of the overall context for the decision by the Tribunal to reject the credibility of the first named applicant's account. For that reason I will return to this aspect of the applicants'

contentions in the course of giving consideration to the challenge mounted to those credibility findings.

(c) Forced Marriage

Under this heading it is contended that the determination of the RAT is legally flawed by virtue of the fact that it does not, it is said, address at all, a contention put forward on behalf of the applicant as to her fear of forced marriage. The factual position would appear to be as follows. The first named applicant filled in the usual questionnaire as part of the initiation of her application for refugee status. In the course of that questionnaire she mentioned a fear of forced marriage as been one of the matters which she contended for as justifying her entitlement to refugee status. The report of the authorised officer of the RAC under s. 13 of the Refugee Act, 1996 ("The 1996 Act") does not appear to make any specific mention of this matter. When the first named applicant came to appeal to the RAT no ground of appeal was put forward on the basis of any failure on the part of the RAC to deal with the forced marriage issue. In those circumstances it does not seem to me that it can properly be said that the forced marriage issue was, in any real sense, before the RAT. In those circumstances it is hardly surprising that it did not come up as an issue at the hearing before the RAT and was not, therefore, dealt with in the decision of the RAT.
I find it hard to see how any appropriate criticism can be made of the RAT under this heading. Where, as here, the applicant chooses not to raise the issue in the notice of appeal or to refer to the matter at the appeal hearing I do not believe that there is any basis for suggesting that there was any inappropriate failure on the part of the RAT to deal with the matter in the course of its determination.

(d) Relocation

Under this heading the applicants contend that there has been a failure on the part of the RAT as to the manner in which it considered the possibility of re-location within Nigeria. In this context the decision of the RAT notes that the first named applicant's account was to the effect that she left Port Harcourt (where she was resident at the time when the events which gave rise to her fears occurred) and moved to Lagos where she remained for a period of time. The report goes on to state the following:-

> "While in Lagos she was not located, bothered or contacted in anyway by her boyfriend's family. Lagos is a considerable distance from Port Harcourt and has a population in excess of 12 million people. It appears to the Tribunal to be highly unlikely that she would be pursued by these people in the circumstances as she outlined to the Tribunal. Notwithstanding her fears she did not avail herself of police protection while living in Lagos".

It should be noted that the basis for the first named applicant's concerns stemmed from her stated fear that her boyfriend's family would force a situation where her daughters were subjected to FGM.
I am satisfied that it is arguable for the purposes of an application requiring substantial grounds such as this, that a decision maker within the refugee process contemplating whether it might be appropriate to recommend refusal of refugee status on the basis of the so called "internal flight or relocation alternative" must, in order to properly reach such a conclusion, comply with the guidelines in that regard issued by the United Nations High Commissioner on Refugees. As those guidelines point out the concept of internal flight or relocation alternative is not explicitly referred to in the criteria set out in Article 1 A(2) of the 1951 Convention. It is, however, the case that the question of whether a claimant has an internal flight or relocation alternative may arise as part of the holistic determination of refugee status. Amongst other things the guidelines require that a decision maker who is contemplating the possibility that internal flight or relocation might be considered in the assessment of refugee status must apply what is called "the reasonableness test". That is to say the decision maker must consider whether it would be reasonable in all the circumstances of the case for the claimant to relocate in a manner suggested. I did not understand counsel for the respondent to contend that for the purposes of a leave application it was not arguable that there was an obligation upon the RAT, in an appropriate case, to comply with the process specified in those guidelines. Nor do I understand counsel for the respondents to have suggested that those guidelines were in fact complied with in this case. The issue between the parties, in this case, turns on whether on a true reading of the decision of the RAT it may be said that reliance was placed on internal flight or relocation. Counsel for the respondent argues that the reference referred to above was simply a consideration that was taken into account by the RAT in assessing whether the applicant had a well founded fear of persecution in the first place.
I agree with that submission. In those circumstances it does not appear to me that the RAT in fact considered internal flight or relocation on the facts of this case. On that basis it does not seem to me that the question as to the appropriate process that should be followed in the event that internal flight or relocation is considered arises. In the circumstances I am not satisfied that the applicants have made out substantial grounds under this heading.

Credibility

It is now necessary to turn to the range of issues which arise under the question of credibility and allied areas. In a series of cases this Court has held that it is arguable for the purposes of leave that credibility must be assessed, *inter alia*, by reference to objective country of origin information. *Kramarenko v. Refugee Appeals Tribunal and Others* (Unreported, High Court, Finlay Geoghegan J., 2nd April, 2004) *Camara v. The Minister for*

Justice Equality and Law Reform (Unreported, High Court, Kelly J., 26th July, 2000*), Imafu v. Minister for Justice Equality and Law Reform and Another* (Unreported, High Court, 27th May, 2005, Clarke J.).
Furthermore it is also clear from a number of authorities that in assessing such country of origin information the appropriate process in a refugee application is, it is at least arguable, such that it is necessary for the decision maker to have regard to all relevant country of origin information giving an appropriate weight to all such information. In other words it is not appropriate, it is arguable, for the decision maker to "accept" one set of country of origin information and, expressly or by necessary implication, "reject" another conflicting account. *Da Silveria v. Refugee Appeals Tribunal and Another* (Unreported, High Court, Peart J., 9th July, 2004). In granting leave in that case Peart J. said as follows:-

> "It is arguable in my view that in choosing to accept the version of facts contained in the Canadian report concerning treatment of UFC members as the correct one, and thereby implicitly excluding the state department report and the Amnesty International Report from his consideration of the applicants credibility, the Tribunal member erred in the manner in which he assessed credibility, and that maybe he ought to have kept all the reports under consideration, and conducting a weighing exercise. If he had done so, he might still have come to a conclusion that there was the ten per cent, or a real chance that the applicant had a well founded fear. That is another possible error which is in my view arguable".

While reliance is placed by the applicant on my judgment at the leave stage in *Zhuckova v. The Minister for Justice and Another* (High Court, Unreported, Clarke J., 26th November, 2004) it should be noted that at the full hearing stage in that case Butler J. does not appear to have found for the applicant on that aspect of the case (although finding for the applicant on other aspects sufficient to grant the relief sought). In the circumstances it does not appear to me that particular reliance should be placed on that aspect of *Zhuckova* at this stage. However that does not take away from the fact that there is authority for the proposition that a decision maker in the refugee process should have regard, with appropriate weighting to all reputable country of origin information. It therefore follows that the assessment of the credibility of an applicant (which for the reasons set out above must include an assessment by reference to such information) should be conducted on the basis of all relevant country of origin information. I should emphasise that the Court should not second guess a reasonable view by the decision maker as to the weight to be attached to conflicting country of origin information. A similar approach appears to have been taken in the United Kingdom in, for example, *R. v. Immigration Appeals Tribunal Ex Parte Demisa* Unreported judgment of Laws J., 17th July, 1996 and the determination of

the UK Immigration Appeals Tribunal in *Hassen* (15558 3rd October, 1987) where the Tribunal having been referred to the judgment of Laws J. in *Demisa* specified the test as follows:-

> "We must weigh the whole of the evidence and assess the risk to the respondent taking into account any conflict there may be as to the objective situation in a country. We observe in passing that in many asylum cases asserted conflicts between different reports are sometimes more apparent than real in that reports such as those of the United States State Department tend to the general while those, for example, of Amnesty International and other human rights organisations will often focus on the particular."

Having stated the above general principles it is necessary to turn to the facts of this case. It is clear that the relevant country of origin information before the RAT established that there was no federal law outlawing female genital mutilation in Nigeria, that there were state laws so outlawing in a relatively small number of Nigerian states but that even in those cases it was very difficult to secure from the authorities any action for enforcement. The country of origin information quoted by the RAT in its decision states as follows:-

> "The Nigerian government publicly opposes female genital mutilation. The Ministry of Health and other non governmental organisations have sponsored public awareness and educational projects informing communities of the health hazards associated with FGM. Numerous states in Nigeria have outlawed the practice and whilst all tribal and religious groups appear to practice FGM adherence to the practice is neither universal or nationwide. It is usual that the decision to circumcise a female child is made between both husband and wife, however it is common practice that the final decision comes mainly from the husband. It is difficult in this instance to see how the applicant partner's family could have overruled the wishes of both parties in respect of this matter. The applicant did not go to the police or to any human rights organisation. It is not open to the applicant to state that state protection was not available to her if she did not avail herself of the resources of the state".

Subsequently the decision goes on to note that the applicant did not avail herself of police protection while living in Lagos.

It is difficult to understand the references on both occasions by the RAT to police protection. The evidence suggests that female genital mutilation is not unlawful in Lagos. In those circumstances it is difficult to see how there could have been expected to be any protection available from the police of which, it might be suggested, the applicant could have availed. In those

circumstances it seems to me to be at least arguable that the decision maker was in error in concluding that there would have been any point in police protection on the basis of the evidence before her. In *Traore v. The Refugee Appeals Tribunal & Another* [unreported, High Court, Finlay Geoghegan J., 14th May, 2004], the question of a demonstrable error in the assessment of the credibility of an applicant was dealt with in the following way:-

> "When one considers the legal principles applicable to the assessment of credibility in claims for refugee status or the principles of constitutional justice I have concluded that the obligation of the Tribunal member is to assess the credibility of the applicant in relation to the story as told or evidence given by him/her. This did not happen in this case. In assessing the credibility of the applicant, the Tribunal member has included as part of his story a fact for which she had no relevant material and, further, placed reliance upon such fact in a manner adverse to the applicant in reaching a conclusion against the credibility of his story. Such error renders the decision invalid."

It is at least arguable that a similar situation applies where there is an error in relation to country of origin information which appears, on the face of the decision of the RAT, to have been of some significance in reaching conclusions adverse to the applicant. There would be no logic in regarding a credibility decision which was based on a clear error of fact in respect of the account of an applicant as being invalid and in not regarding a similar credibility finding which was based upon an error in relation to country of origin information as being valid.

In those particular circumstances I am, therefore, satisfied that the applicant has made out substantial grounds for contending that the decision of the RAT is invalid by virtue of the fact that the decision as to the first named applicant's credibility was based, at least in material part, on an error on the part of the decision maker. The error concerned the apparent view of the decision maker that police protection would have been available to the applicant in Lagos in circumstances where there was no evidence to that effect and indeed the obvious inference from the evidence was to the contrary.

Before leaving the question of credibility it is necessary to address the more general complaint made by the applicants to the effect that the basis upon which the RAT did not accept the credibility of the first named applicant [independent of the error already referred to] was not in accordance with law.

In *Imatu*, having reviewed the authorities an credibility and having reiterated my findings in *Gashi and Others v. Minister for Justice, Equality and Law Reform and Others* (Unreported, High Court, 3rd December, 2004, Clarke J.) as to the arguability of the case for higher scrutiny I indicated that a court

is entitled to (at least as an arguable proposition sufficient for leave) and indeed may be obliged to analyse a finding of lack of credibility to ascertain whether:-

> "(a) the determination on its face sets forth a rational and substantive basis for a finding of lack of credibility; and
> (b) whether on the evidence before the court it appears that there were materials properly before the Tribunal which would have allowed it to come to the conclusions which grounded such rational basis."

I did, however, go on to note that even on the basis of an obligation of additional scrutiny the court could not supplant its own judgment in the assessment of those materials for that of the decision maker.

If one leaves the error referred to above out of the question I am satisfied that counsel for the respondents is correct when she draws attention to the fact that, properly analysed, the decision of the RAT on credibility is based on a range of factors which taken cumulatively have the potential to justify the decision reached. As it is not possible to say that the same decision would necessarily have been reached were it not for the error, this is not sufficient to justify a refusal to grant leave. However I am not satisfied that the applicants have met the necessary threshold for leave for any credibility argument wider than that based on the error referred to above. Finally I should add that having regard to the clear terms of s. 11B of the 1996 Act (to which I will refer again later) a Tribunal cannot be criticised for giving due weight to the factors set out in that section. The appropriate weight to be attached to such factors, on the facts of any given case, is primarily a matter for the decision maker although there may be circumstances when the court may have to consider whether the decision maker could reasonably has taken a certain view as to weight having regard to law.

I indicated earlier in this judgment that I would return to the question of state protection. I now do so. Insofar as it may be inferred from the decision of the RAT that an independent ground for rejecting the applicants' claim to refugee status was that it had not been demonstrated that there was no adequate State protection it seems to me that this aspect of the case is also tainted by the error concerning the availability of police protection referred to above. I am therefore satisfied that the applicant has made out a substantive arguable case under this ground as well.

I should deal with a number of additional or supplementary issues raised in the course of the argument. Complaint is made in relation to certain specific aspects of the findings contained in the decision of the Tribunal in relation to credibility and in particular to:-

> (a) The views expressed by the RAT in relation to evidence of identity and other similar documentation; and
> (b) The views expressed by the RAT in relation to

> the evidence of the first named applicant concerning her arrival in the jurisdiction.

In relation to the former the RAT decision says the following:-

> "The applicant has no evidence of her identity. She has no passport, no drivers licence, no birth certificate in relation to herself or her children. She has no death certificate in relation to the death of her first born. She has no travel documentation to substantiate her claim as to how she travelled and from where. The applicant has made no efforts or attempts to procure all or any such documentation since her arrival here in Ireland."

In this regard it is contended that the RAT did not put any such concerns (or at least did not put such concerns in a sufficient manner) to the applicant and that, thus, the procedures followed were arguably unfair for similar reasons to those which I identified in *Idiakheua v. The Minister for Justice, Equality and Law Reform & Another* [unreported, High Court, Clarke J., 10th May, 2005]. As I indicated in that judgment compliance with the principles of constitutional justice requires that a person conducting an inquisitorial process such as that involved in refugee applications may be required to bring to the attention of any person whose rights may be effected by a decision of such a body any matter of substance or importance which that inquisitorial body may regard as having the potential to effect its judgment. However, it is clear from p. 9 of that judgment that the underlying principle is "that whatever process or procedures may be engaged in by an inquisitorial body, they must be such as afford any person who may be affected by the decision of such body a reasonable opportunity to know the matters which may be likely to effect the judgment of that body against their interests".

In that context it is impossible to ignore the provision of s. 11B of the 1996 Act (as inserted by s. 7 of the Immigration Act, 2003). Under that section the RAC or the RAT is required, when assessing the credibility of an applicant for the purposes of a refugee application, to have regard to various matters including, under subs. (a),

"whether the applicant possesses identity documents, and if not, whether he or she has provided a reasonable explanation for the absence of such documents;"

Every applicant is, therefore, on notice, in advance, that the absence of identity documents and any explanation for such absence is a matter which the Tribunal is required to have regard to. Every applicant is, therefore, on notice of the fact that some degree of adverse inference may be drawn from the absence of such documents where no reasonable explanation for their absence is tendered. If an explanation is tendered and if the Tribunal is minded to regard that explanation as unreasonable there may well be an obligation on the Tribunal to put the basis for regarding the explanation as

unreasonable to the applicant so as to afford the applicant an opportunity to deal with the Tribunal's concerns. However it is not, in my view, necessary for the Tribunal to indicate to any applicant that in the absence of any explanation an adverse inference as to credibility may be made. Such a consideration is mandated by the statute. I would only add that in a case where an applicant did not have the benefit of legal representation there might be an obligation upon the authorities to ensure that the attention of the applicant concerned was drawn to the provisions of s. 11B.

In relation to the second matter the Tribunal in its decision had this to say:-

> "The applicant's account of her reception at Dublin Airport runs contrary to well known facts in relation to immigration procedures. The applicant told the Tribunal she travelled with an agent and that she had a red passport. Her photograph and name were on this passport, however, the agent took this passport back and she exited immigration. That the applicant was not stopped, questioned or queried, given her heavily pregnant state and that she was allowed pass through passport control without enquiries being made, does not appear to this Tribunal to be a credible account".

In this regard two alternative complaints are made. It is stated that the adverse finding is based either on conjecture (which it is contended is not permissible) or is based upon information available to the Tribunal which was not put to the applicant. There may well be merit, in theory, in the proposition that a conclusion in a refugee matter cannot be based on conjecture. Furthermore for the reasons indicated above I was satisfied in *Idiakheua* that failure to put can, in an appropriate case, supply arguable grounds for questioning a determination. However before embarking on an analysis of the relevant legal principles it is necessary to determine whether properly considered, the decision in this case is based upon either conjecture or matters not put.

Firstly it should be noted that s. 11B of the 1996 Act referred to above includes an obligation under subs. (c) to have regard, in the assessment of credibility, to "whether the applicant has provided a full and true explanation of how he or she travelled to and arrived in the State". It is of course the case that here, unlike the issue in relation to the absence of identifying documents, the applicant provided an explanation. It appears to me that the decision of the Tribunal is, as has been argued by counsel for the respondent, based on a common sense approach as to the procedures which any person travelling through Dublin Airport would be aware of. Such matters are therefore such as may be taken as common knowledge rather than matters that would require evidence. In those circumstances it does not seem to me to be appropriate to characterise the decision as been one based on conjecture. The very interesting authorities on that topic are not,

therefore, in my view relevant. Similarly it seems to me that the questioning of the first named applicant concerning her arrival in Dublin Airport was sufficient to give her an opportunity to deal with any of the matters raised. In all the circumstances I am not satisfied that the applicants have made out an arguable case under this heading. On the same basis I am not satisfied that the applicants have made out an arguable case for a breach of s. 16(8) of the 1996 Act which imposes an obligation on the RAT to furnish all relevant materials to an applicant.

As will be seen from the above I am therefore satisfied that the applicant have made out an arguable case but only in respect of two general matters that is to say whether

(a) the decision of the RAT in relation to the credibility of the first named applicant; and

(b) the decision of the RAT concerning the availability of state protection

were tainted by an error of fact.

I propose granting leave within those parameters and would invite the parties to attempt to agree an amended statement of grounds which is confined both as to relief and the grounds to be relied upon by the terms of this judgment.