THE HIGH COURT

JUDICIAL REVIEW

Rec. No. 2003/136 JR

BETWEEN

MOSEBATHO JUSTINA LELIMO

APPLICANT

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of O'Sullivan J. delivered 12th November, 2003

Introduction

This is an application for leave to challenge the Minister's Deportation Order made pursuant to s. 3 of the Immigration Act 1999 and communicated to the applicant on 3rd February, 2003. These proceedings were initiated on 26th February and were accordingly nine days out of time.

An initial application has been made not only to extend the time for the filing of the statement grounding the application for Judicial Review which is nine days late but also for a further amended statement dated 29th October, 2003 which is therefore dated some eight months later. No evidence was before me as to why the time should be extended for the later amended statement other than to say that counsel had shortly before that date advised the applicant to amend by expanding her original Statement of Grounds.

Extension of time

Having regard to the observations of Ms. Justice Finlay Geoghegan in her judgment of 8th October, 2003 in *Muresan v. Minister for Justice Equality and Law Reform and Ors*. to the effect that the mere change of Counsel would not of itself provide good and sufficient reason for extending this period, with which conclusion I concur, and also to the fact that no other reason was advanced as to why the period should be extended and also to the fact that the period is some eight months or more out of time I refused to extend the period for the later Statement of Grounds. I further indicated and ruled that the phraseology in the earlier statement grounding the application for Judicial Review was sufficiently wide at paragraph 7 thereof to include a challenge based on the submission that in reaching a decision to make a Deportation Order the Minister failed to give any consideration to the provisions of s. 4 of the Criminal Justice (United Nations Convention Against Torture) Act 2000 which prohibits *refoulement* where he is of opinion that there are substantial grounds for believing that the deportee would be in danger of being subjected to torture.

With regard to the extension of time (by nine days) to enable the filing of the first Statement of Grounds there is clear evidence not only that the applicant formed an intention well within the 14 day time limit to take whatever legal action was available to her but that she contacted the Refugee Legal Service immediately on the same day, was advised to call back, did so, and was then further advised that they could be of no assistance to her and that she then subsequently despite having no money engaged the services of her present solicitors and went to their officers on 17th February, 2003 following which a consultation was arranged on the 19th when the merits of initiating Judicial Review proceedings were discussed; she attended their

offices to swear the appropriate affidavits on 26th February and the proceedings were initiated on the same day.

It seems to me that having regard to this evidence, and in particular to the observations of Finnegan J. (as he then was) in *G.K. v. Minister for Justice Equality and Law Reform* (2002: 1: I.L.R.M. 81 at page 86) to the effect that delay which is the responsibility of the Refugee Legal Service should not be held against an applicant, and subject to an assessment as to whether any arguable ground has been made out, there is *prima facie* good and sufficient reason to extent the period of fourteen days by the appropriate nine days. In reaching this conclusion, of course, I have had regard to the extent of that period which is relatively short.

I must now, accordingly, consider the submissions made on the applicant's behalf by her counsel Mr. Christle S.C. Before doing so, however, I shall set out in summary form the basis of her application for asylum in this country.

The asylum application

The applicant comes from Welkom town in South Africa and arrived in this country on 29th March, 2001 then aged 32. She sought asylum at Dublin Airport on arrival and subsequently applied for refugee status, was refused, appealed the refusal unsuccessfully and on 9th February, 2002 was notified of this and the Minister's intention to make the challenged Deportation Order and of her entitlements to make representations. This she did and these were received on 31st July, 2002 but notwithstanding this the Minister make such an order and communicated this to the applicant on 3rd February, 2003.

The applicant's history

The applicant fled South Africa on 28th March, 2001 fearing for her life. On 4th August, 1997 she was raped by a famous footballer Eric September in her hometown. He was arrested at the scene and detained by the South African police and charged with rape. She was interviewed and two police officers informed her that Mr. September had asked them to offer her money to withdraw the charge. She refused. They also told her that Mr. September warned her of severe consequences if she refused. Mr. September was released on bail paid by his then fiancée while the matter was being investigated. While out on bail he sent friends and family members to harass, intimidate, bully, oppress and on several occasions beat up the applicant. They threatened that unless she dropped the rape charge they would kill her. This was reported to the police who took her reports but were unable to do anything. They said they were mere threats and they had no resources in any event. As a result she fled Welkom and went to another town to stay with relatives until the trial.

She had to come back to Welkom however for the trial to give evidence which she did. Meanwhile, apparently, Mr. September had lied to his fiancée about his arrest saying that he had been involved in a fight. When his fiancée discovered that the true reason was an allegation of rape there was a row and in his rage Mr. September killed his fiancée on the 1st October, 1997. He was tried for both murder and rape and was convicted getting fifteen years for murder and twelve years for rape. There was a lot of public interest in this case and newspaper reports were presented to the Refugee Appeal Commissioner.

After the trial the applicant's situation got worse: she got more threatening phone calls from friends and family members of Mr. September who on several occasions threatened to kill her. They blamed her for the death of Mr. September's

fiancée saying that if she had not accused him of rape there would never have been an argument followed by her murder. They said she was paid to ruin Mr. September's career and he had never raped her. They demanded that she drop the charge and she would not. They followed her and she said she was no longer safe.

Because of this she went to Johannesburg but they traced her there and one day a man came to the saloon where she was working asking for her. She became very afraid and a few days later two men whom she knew from the trial followed her from work. They said Mr. September had not raped her and they would show her what rape is. They grabbed her by the neck and she screamed and was only rescued by passers-by. After this she got really sacred, complained to the police but they said that they could not offer her 24 hours protection and advised her to be more careful. She knew then she was no longer safe in South Africa and a friend offered to buy her a ticket to Ireland and that is why she came here. She said if she is sent back she will be killed. The South African police did not offer any protection. As a result of her ordeal she is emotionally and psychologically traumatised and if she goes back to South Africa her health is so bad that she would die in no time.

The asylum process

The reason why the Refugee Appeals Tribunal refused to recommend that she be accorded refugee status was not because she was not believed - she was - but because as was stated in the report

> "Unfortunately the assault carried out on the applicant does not amount to persecution for any reason contemplated by s. 2 of the Refugee Act 1996 (as amended)".

This decision had been reached only after the member of the Tribunal had noted that undoubtedly she suffered greatly as a result of her traumatic experience but also that the police had investigated the matter thoroughly and indeed that her assailant had been arrested, brought to trial, convicted and sentenced. The file was examined by the respondent for the purpose of s. 3 of the Immigration Act 1999 having regard to s. 5 of the Refugee Act 1996. It is clear from the exhibits to the respondent's affidavit that the s. 3 examination included an item by item consideration of the matters referred to *seriatim* in s. 3 (6) (a) of the Immigration Act 1999 with the exception of any reference to humanitarian considerations by the person who prepared a first report on 17th December, 2002 but that subsequently these were considered by an executive officer who prepared a second report dated 14th January, 2003. Reference was made also to the fact that the applicant was receiving counselling from the Rape Crisis Centre.

It is also clear that on file there is country of origin information indicating that the South African Police Service has primary responsibility for internal security, is undergoing major restructuring and transformation and is being changed from a primarily public order security force to a more accountable service oriented police force however that it remains ill equipped, overworked and undertrained. There was also information that the Government finances 25 shelters for abused women. This number is inadequate particularly in rural areas. The police operate 12 family violent child protection and sexual offences units which deal with issues intended to increase victims' confidence in the police and thereby lead to increased reporting of such crimes. Rape is illegal and there is an extremely high incidence of rape for reasons including a poor general security climate and societal attitudes condoning sexual

violence against women. In the large majority of rape cases the perpetrator goes unpunished.

Nowhere in these documents in there an explicit reference to s. 4 of the Criminal Justice (United Nations Convention Against Torture) Act 2000 prohibiting *refoulement* where the deportee would be in danger of being subjected to torture. Torture is not something which is linked with a convention reason as would be (or at least arguably so) an assault (including a sexual assault) which falls for consideration under s. 5 (2) of the Refugee Act 1996.

The challenge

The applicant's challenge is to the respondent's Deportation Order on the basis that:

1. It is in breach of s. 5 (2) of the Refugee Act 1996,
2. In breach of s. 3 (6) of the Immigration Act 1999,
3. In breach of the European Convention of Human Rights articles 2 and 3 and
4. In breach of s. 4 of the Criminal Justice (United Nations Convention Against Torture) Act 2000.

Applicant's arguments

The submissions of the applicant can be summarised as follows:

1. The applicant is a member of a "particular social group" for the purposes of articles 1 A (2) of the Convention and Protocol relating to the Status of Refugees by reason of which membership she has a well founded fear of being persecuted and is therefore entitled to refugee status.

The group in question is a group comprising all women who are raped in South Africa in circumstances where this group lacks protection from the State and public authorities not indeed because they were perceived as not being entitled to the same human rights as men (as appears to have been the case in *R v. Immigration Appeal Tribunal ex parte Shah* [1999]: 2 A.C.:) but simply because the police were under equipped and therefore unable to provide such protection. Reliance is placed on this context on the decision of Gilligan J. in *Rostas v. Refugee Appeals Tribunal, (John Hayes a member) and Anor*. [31st July, 2003], where he said adopting a succinct formula approved of by Lord Hoffman in the *Shah* case that "persecution equals serious harm plus the failure of State protection." The serious harm as noted by Gilligan J. could be 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 with such failure of State protection.

Mr. O'Reilly for the respondent said that there was ample evidence supporting the conclusion that the applicant was not a refugee. She was believed but her fear did not stem from a fear of harm for a convention reason. Insofar as she was the victim of rape the State supported her and indeed her case was brought to court and the victim convicted and punished. Hers is an isolated incident arising not because she was a victim of rape but because the friends and relatives of the rapist have adopted a particular violent attitude to her. This is not the characteristic of any class of which she is a member but is simply her unique situation. Insofar, therefore, as there is a challenge to a decision that she should not be afforded refugee status this can only be seen as a challenge on irrationality grounds which could not be argued because there is clearly evidence upon which that decision could have been made.

2. A second submission made on behalf of the applicant was that the respondent in deciding to make a Deportation Order weighed in the balance against her rights protected under articles 2 and 3 of the Convention of Human Rights the public policy and common good of maintaining the integrity of the asylum and immigration system, and took the view that the latter outweighed such features of her case as might tend to support her being granted leave to remain in the State.

The applicant relied on the decision of the Court of Appeal in *R. v. Secretary of State for the Home Department ex parte Turgat* [2001]: 1: A.E.R.: 719 and in particular at page 729 where it was stated (per Simon Brown L.J.)

> "*In the first place, the human right involved here – the right not to be exposed to a real risk of Article 3 ill treatment - is both absolute and fundamental: it is not a qualified right requiring a balance to be struck with some competing social need."*

The applicant submitted that the Minister in striking such a balance offended the applicant's right under article 3 of the Convention.

In response counsel for the respondent submitted that the article has not yet been brought into Irish domestic law and therefore the Minister in making such a balancing judgment was in breach of no right of the applicant.

3. A third submission made was that there was no consideration of the risk of being subjected to torture which the applicant would be exposed to if returned to South Africa.

It was further submitted (in reliance, inter alia, on the decision of *A v. Secretary of State for the Home Department* [2003]: I.L.N.R. 249) that degrading treatment was such as aroused in the victim a feeling and a fear of anguish and

inferiority capable of humiliating and degrading the victim and possibly breaking their physical or moral resistance.

It was submitted that the definition of "torture" in s. 1 of the 2000 Act clearly covered the type of violence likely to be meted out to the applicant by the friends and relatives of Mr. September should she return to South Africa. This would clearly include severe pain or suffering whether physical or mental intentionally inflicted for the purpose of punishing that person or intimidating her or obtaining from her information or a confession – all clearly contemplated by the Act. In those circumstances it was submitted that the Minister is under an obligation to form an opinion as to whether or not there was substantial evidence for believing that the applicant would be in such danger if deported. There is no indication direct or indirect in the documents in this case that any advertence was made to s. 4. This was clearly, it was submitted, in breach of the respondent's obligations under that section.

In response Mr. O'Reilly submitted that the observations of the Chief Justice in *Baby O v. Minister for Justice* [2002] 2:I.R.:169) to the effect that

> "Consideration by the first respondent of *refoulement* in this case necessarily involved the consideration by him of whether there were substantial grounds for believing that the second applicant would be in danger of being subjected to torture within the meaning of s. 4 (1) of the Criminal Justice (United Nations Convention Against Torture) Act 2000."

applied equally in the present case where there was clearly, as deposed to on an affidavit, a consideration by the respondent of *refoulement* as required by s. 5 of the Refugee Act 1996. Accordingly, it was submitted, such consideration automatically included a consideration under s. 4 of the 2000 Act.

Conclusions

1. I have carefully considered the submission that the applicant is a member of a particular social group for the purposes of article 1 A (2) of the Convention relating to the Status of Refugees (1951). Her fear in this case arises not because she is a member of a group of women who are raped or in respect of whom it might be said that there is insufficient or defective protection from the State authorities in South Africa. It is, rather, because she is in the peculiar situation of a rape victim against whom in the past violence has been perpetrated and is threatened in future against her by the friends and relatives of the man who raped her and was convicted for it. Furthermore I do not understand the *Shah* case to go as far as saying that a group of women who are raped and in respect of whom there is insufficient *de facto* State protection, can, without more, comprise a social group for the purpose of article 1 A. In that case the group were not protected because they were perceived as not being entitled to the same human rights as men – something quite different.

> To quote from the judgment of Lord Hoffman
>
> "What is the reason for the persecution of which the appellants fear? Here it is important to notice that it is made up of two elements. First, there is a threat of violence to Mrs. Islam by her husband and his political friends and to Mrs. Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or the unwillingness of the State to do anything to protect them. There is nothing personal about this. The evidence was that the State would not assist them *because they were women*. It denied them protection against violence which it would have given to men. These two elements have to be combined to constitute persecution within the

meaning of the convention. As the "gender guidelines for the determination of asylum claims in the U.K." published by the Refugee Women's Legal Group in July 1998 succinctly puts it (at p. 5):

> 'persecution equals serious harm plus the failure of State protection'."
>
> (emphasis added by me.)

From the foregoing it is clear that the succinct formula was adopted from the gender guidelines by Hoffman L.J. in the context of his clarifying immediately preceding it that not only must there be serious harm (it may well be on a personal and individual i.e. non-State basis) coupled with an inability or unwillingness of the State to do anything to protect the victim but this inability or unwillingness must be *because they were women*. That is crucial. Without the latter element the violence offered could not be said to be persecution for a convention reason or protected by statutes implementing the convention.

Since hearing counsel's submissions in the present case my attention has been drawn, in another case, to the decision of *Horvath v. Secretary of State for the Home Department* [2000] :3:A.E.R.:577 at page 585 where Lord Hope said (page 586)

> "The primary duty to provide the protection lies with the Home State. It is its duty to establish and to operate a system of protection against the persecution of its own nationals. If that system is lacking the protection of the international community is available as a substitute. But the application of the surrogacy principle rests upon the assumption that, just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected of the Home State. The standard to be applied is therefore not that which would eliminate

> all risks and would thus amount to a guarantee of protection in 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. As Ward L.J. (2002) I.N.L.R. 15 at p. 44) said, under reference to Professor Hathaway's observations in his book at p. 105, "It is axiomatic that we 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."

I do not understand the decision in *Rostas* in any way as constituting a departure from the foregoing principles.

In the present case the applicant's admirable courage in resisting threats and offers of money and giving evidence in her home town against the man who raped her has resulted, with the assistance of the prosecution and police authorities, in the conviction of that rapist and his sentencing to twelve years for that crime. The subsequent threats and violence offered to her by his family and friends has resulted in what is accepted by the State to be a genuine and real fear of personal violence likely to be offered to her if she is found by them upon her return to South Africa. But this is not persecution for a convention reason and in my opinion there is not an arguable case to say that the failure of the police to offer her 24 hours round the clock protection is any the more persecution in that country than it would be in this. It is simply and solely a reflection that we live in an imperfect world as was pointed out in by Lord Hope of Craighead. I do not think it is arguable that the applicants sincere and real fear of Mr. September's friends and relations entitles her to refugee status.

2. It may well be that from the 1st January, 2004 when the European Convention on European rights becomes domestic law in this country that the Minister in such a

case as this will not be able to balance against the applicants rights under article 3 thereof not to be exposed to degrading or inhuman treatment the public interest in preserving the integrity of the asylum system in this country, as he has done in this case in his letter of 31st January, 2003. That does not mean, however, that he was not entitled to engage in such an assessment at the time when he did it. On the contrary the Supreme Court in *P., L., and B. v. The Minister for Justice Equality and Law Reform* (Unreported: 30th July, 2001) and *Osayande, Lobe and Ors. v. Minister for Justice, Equality and Law Reform* (23rd January, 2003) held that the Minister in making such a decision is entitled to take into account the policy of the State in relation to the control or admission of non nationals. In light of this it is not in my submission arguable that in balancing, the integrity of the asylum system of this country against such features of the applicants case as might tend to support her application to be granted leave to remain in the State, acted ultra vires.

3. The final ground upon which leave is sought is on the basis that there was no consideration of s. 4 of the Criminal Justice (United Nations Convention Against Torture) Act 2000.

Whilst it is true that the citation from the judgment of the Chief Justice in *Baby O v. Minister for Justice, Equality and Law Reform* relied upon by Mr. O'Reilly to the effect that

> "Consideration by the first respondent of a *refoulement* in this case necessarily involved the consideration by him of whether there were substantial grounds for believing that the second applicant would be in danger of being subjected to torture within the meaning of s. 4 (1) …"

might, on a superficial reading, lead one to conclude that it was his opinion that a conclusion by the Minister that deportation would not offend against the principles of s. 5 of the Refugee Act 1996 must in and of itself necessarily include an opinion that she would not also thereby be exposed to torture as identified in the 2000 Act, on closer examination I believe that this impression would be false.

Not only does the Chief Justice in the Baby O judgment emphasise that a s. 5 consideration by the Minister would involve a consideration in relation to torture *in this case* (my emphasis), but he also goes on immediately to observe "

> "That the consideration of the issue of *refoulement* under s. 5 of the Refugee Act, 1996, extended to considerations arising under s. 4 of the former Act was made clear in the affidavit of Mr. Terry Lonergan in these proceedings."

Accordingly the *necessity* of the greater including the less, so to speak, in the *Baby O* case arises from the evidence adduced on affidavit in that case. Indeed it was so submitted by the second applicant in the *Baby O* case as appears from the passage slightly earlier in the judgment of the Chief Justice.

Furthermore it would be surprising, at least, if this short passage from the judgment of the Chief Justice were intended, without further elaboration, to conclude the issue as to whether the serious assault (including a serious assault of a sexual nature) identified at s. 5 (2) of The Refugee Act 1996 is or is not an assault *for a section (5) reason*. The view that the assault referred to in s. 5 (2) means only an assault for *section 5 (1)* reasons is surely respectable if not the preferable view and in the absence, as I understand it, of authority on this point, I feel that Mr. O'Reilly is seeking to extract too much from the words of the Chief Justice in the *Baby O* case notwithstanding the authority with which he speaks.

In my view it is therefore arguable that the failure of the respondent to implement the provisions of s. 4 of the Criminal Justice (United Nations Convention Against Torture) Act, 2002, in reaching his decision to deport the applicant renders that decision invalid. For that reason I propose to grant liberty to the applicant to apply for Judicial Review seeking to challenge the validity of the respondent's deportation order served on 3rd February, 2003 on the ground set out at paragraph (e) (7) insofar as this paragraph comprises, as I have held it does, an allegation that the Minister's decision to deport is in breach of the provisions of s. 4, and to extend the time to enable this challenge to be made.