Neutral Citation Number: [2011] IEHC 85

THE HIGH COURT

2010 613 JR

BETWEEN

V. I. AND S. J. I.

(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND)

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Birmingham delivered on the 25th day of February 2011

The first named applicant is a national of Kenya and is the mother of the second named applicant who was born in Kenya in 2001. Following her arrival in this country, the first named applicant, on her own behalf and on behalf of her son, applied for asylum. Her application was unsuccessful before the Refugee Applications Commissioner ('ORAC') and on appeal at the Refugee Appeals Tribunal ('RAT') stage. Subsequently, a deportation order was made in respect of both applicants dated the 20th January, 2006. There followed unsuccessful attempts on behalf of the applicants to have the deportation orders revoked and to be readmitted to the asylum system. The applicants also sought subsidiary protection. Initially, the respondent was not prepared to consider the application for subsidiary protection as the deportation orders were made prior to the coming into effect of the European Communities (Eligibility for Protection) Regulations 2006, (S.I. No. 518/2006). However, that issue was readdressed in the light of decisions of this Court and in particular in the light of the decision of Feeney J. in *N.H. v. The Minister for Justice, Equality and Law Reform* [2008] 4 I.R. 452. On the 30th April, 2008, the application for subsidiary protection was renewed. This application made specific reference to the earlier application which had not been processed. This resubmission was accompanied by a considerable volume of country of origin information. Indeed, a feature of this case has been that at every opportunity volumes of country of origin information have been submitted. While at one level the diligence of the applicants' advisors is to be commended, I have noticed a growing tendency for advisors to swamp the department and its officials with vast quantities of material, by no means all of which is directly relevant. Submitting volumes of material gives rise to the risk that sections within it of real significance may be missed or overlooked. If that happens, at least a share of the responsibility will have to be borne by those who submitted masses of documentation on a non-selective basis. The observation that I make is a general one and there is no reason to believe that it has given rise to problems in the present case.

In summary, the claim advanced for asylum, which is essentially the claim advanced now for subsidiary protection, is put forward on the basis that the first named applicant is of Kikuyu ethnicity who entered into a relationship with and then married a man who was a member of the Luo tribe. She states that members of her own family associated themselves with the Mungiki sect. The Mungiki sect, or gang, is based within the Kikuyu community. It claims to be committed to upholding traditional Kikuyu values, but in fact is a feared and violent criminal organisation. The first named applicant says that she and her husband were attacked by a gang which included her brother and that in the course of the attack she herself was assaulted and raped. The first named applicant reported the incident to the police, but despite the seriousness of the complaint no action was taken in relation to it. Following this incident, which it is alleged occurred in December, 2001, the first named applicant, with her husband and son, relocated. However, her own family members discovered where they were and there was a further attack in the course of which her husband was killed. The first named applicant managed to escape, and with her son went to a new location, the village of Nazareth. However, in August, 2003, the family of her late husband discovered her whereabouts and went to the village where she was, in order to force her to marry her husband's brother in accordance with Luo tribal customs. Of note is that her brother-in-law, whom it was intended she would marry, had been diagnosed as HIV positive. It is said that in the aftermath of this, and as a result of this, the first named applicant fled Kenya and arrived in Ireland on the 19th September, 2003.

On the basis of this summary, it will be apparent that the first named applicant alleges that she is at risk both from members of her own family, following their decision to become involved with the Mungiki group, and also from the family of her husband who were intent on following the tradition of wife inheritance. The relative significance given to these two sources of threat has shifted as the application has progressed through the system and this has been the subject of critical comment by counsel on behalf of the respondent. However, notwithstanding the shifting emphasis, from the outset both elements of the claim have been present. Counsel for the first named applicant made it clear that, in the context of the present judicial review proceedings before the Court, the issue that is of greater significance is the fear of being forced into marriage with someone who is HIV positive with the consequent risks to health and welfare that would entail.

There was one new issue of significance raised in the context of the reactivation of the application for subsidiary protection to which I should refer. A presidential election was held in December, 2007, which resulted in the incumbent Mwai Kibaki being declared re-elected. However, the legitimacy of the result was challenged by the opposition. There followed very serious violence in which many hundreds of people died, some estimates put the casualty level at 1,500, and many thousands more were displaced. Talks sponsored by the United Nations were convened, resulting in a peace agreement involving the creation of a power-sharing executive. The relevance of this is that the violence that occurred post-election was to a significant extent on ethnic lines pitting members of the Kikuyu and Kisii tribes against members of the Kalenjin and Luo tribes. It may be noted that periodic ethnic violence has sadly been a feature of post-independence Kenya. The first named applicant contends that as a Kikuyu woman, and a member of a family with links to the militant Mungiki group, who went on to marry across tribal lines, marrying a member of the Luo tribe, she is particularly vulnerable and particularly threatened in a situation of widespread and indiscriminate violence.

So far as the challenge to the decision to refuse subsidiary protection is concerned, three main grounds of challenge have been formulated by the applicants. In summary these are:

(1) that the Minister applied the wrong test to the changed political situation – this relates to the consideration given to the post election situation;

(2) an alleged failure to consider adequately or at all the risk of HIV infection; and

(3) an allegation that the Minister misdirected himself on questions of credibility.

Insofar as the issue in relation to post-election violence is concerned, this was dealt with in the course of the submission of the 30th April, 2008, in these terms:-

(4) Finally, you will no doubt be aware of the recent developments in Kenya, following the elections of December, 2007. As you know, the disputed election results triggered a series of politically motivated and/or ethnically related killings of civilians, resulting in hundreds of deaths and hundreds of thousands internally displaced people and refugees.

(5) Our client has instructed us that the recent developments are an additional factor related to, and increasing, her fear of return to Kenya, for both her and her son's sake. As previous submissions make clear, V. I. is a Kikuyu woman who was married to a Luo man. That these two main tribes or peoples who started fighting against each other following the disputed 2007 election results. We refer you in this regard to V. I.'s handwritten personal statement enclosed herein, in which she states:-

"I am writing to ask the Minister if please he can consider my application because of the present tribal clashes that have been going on [as they] will affect me if [I am] deported because I was married by a Luo. He was killed in 2002 by my family and Mugiki group because [of whom] they were follower[s] and they believe we have to be circumcised and they attacked [us] and I managed to escape but they killed my husband. The other reason of my fear is that when my husband died the brother of my husband wanted to marry me as the culture of Luos and he was sick for a long time suffering from HIV, so I managed to move to another town in Kenya and finally here in Ireland. So if [I am] deported my life and my son's own will be in [ ] and we may be killed as well".

The first named applicant, through her advisors, says that in a situation where it was clear that there was widespread indiscriminate violence, it was not open to the decision maker to conclude that there had been a change merely because a peace agreement was negotiated. It is said that the fact that an agreement was signed did not provide any evidence to support a view that there had been a cessation or even a significant decline in intercommunal violence. The first named applicant relies in particular on the decision of the High Court of Australia in *Chan v. Minister for Immigration and Ethnic Affairs* [1989] 169 C.L.R. 379 (*'Chan'*), as well as decisions from other common law jurisdictions, and also a recent decision of Cooke J. in the case *of L.M. v. Refugee Appeals Tribunal and Others* [2010] I.E.H.C. 132 (Unreported, High Court, Cooke J., 16th February, 2010) *('L.M.')*, a case involving an assessment of the situation in Zimbabwe.

For my part, I accept that a decision maker must be concerned with the actual situation on the ground, and must look forward to see whether one can be confident that progress achieved will be maintained. The enactment of reforming legislation or the signing of a peace treaty is of little comfort if the measure in question is not implemented and its implementation not sustained. However, having acknowledged that, it must also be said that the factual background against which the decision maker in the present case made her observations is very different indeed from that which faced the decision makers in the cases which were referred to. Here, the official who prepared the submission, whom I have been referring to and will continue to refer to as the decision maker, was dealing with a situation where there had been an outbreak of intercommunal violence and where there had been an agreement arrived at to bring that violence to an end. The question requiring resolution by the official was whether there was an ongoing situation of widespread and indiscriminate violence, or whether normality was restored. In *Chan* on the other hand, the appellant had left the Peoples Republic of China because he had suffered mistreatment and oppression at the hands of the authorities linked to the fact that the Chan family was an anti-revolutionary one. The "delegate" or decision maker did not point to any change in the attitude of the Chinese authority, but, on this aspect, simply took the view that these matters were well in the past. It was in these circumstances that Mason C.J. commented:-

"16. …There was simply no material before the Federal Court which entitled it to conclude or assume that the regime in China was different from that in power when Mr. Chan escaped in 1974 or that the regime would not be likely to take adverse action against him. It was the same regime as was in power when Mr. Chan was subjected to interrogation, exile, detention and imprisonment.

17. The Full Court placed insufficient weight upon the circumstances as they existed at the time of departure which grounded Mr. Chan's fear of persecution. In the absence of compelling evidence to the contrary the Full Court should not have had inferred that the grounds for such fear had dissipated. While the question remains one for determination at the time of the application for refugee status, in the absence of facts indicating a material change in the state of affairs in the country of nationally, an applicant should not be compelled to provide justification for his continuing to possess a fear which he has established was well-founded at the time when he left the country of his nationality. This is especially the case when the applicant cannot, any more than a court can, be expected to be acquainted with all the changes in political circumstances which may have occurred since his departure…"

Again, in the case of *Ali Ahmed v. Canada (Minister of Employment and Immigration* (1993) 156 N.R. 221 (F.C.A.), a decision of the Canadian Federal Court of Appeal of the 14th July, 1993, which was included in the book of authorities, the Federal Court did no more than observe "the mere fact that there has been a change of government is clearly not in itself sufficient to meet the requirements of a change of circumstances which have rendered the genuine fear of the claimant unreasonable and hence without foundation". This was the observation that the Court made in a context where the decision making tribunal had accepted, without hesitation, the testimony of the first named applicant, that he had been subjected to sustained ill-treatment arising from his political activities. Few, if any, would argue with the observations of the Canadian Court.

In *L.M.* Cooke J. was dealing with an asylum seeker who was claiming to have suffered harassment and mistreatment as a supporter of the opposition Movement for Democratic Change ('MDC') in Zimbabwe. The tribunal member in the course of the decision had commented:-

"The situation has changed dramatically in recent times; elections have taken place in Zimbabwe."

In referring to dramatic change, the tribunal member appeared to have in mind that a political cooperation agreement was arrived at by the MDC and the Mugabe regime. Given the well documented history of the Mugabe regime, it is entirely understandable that

Cooke J. would comment as he did.

Again, the contrast with the present situation will be noted. In *L.M.,* the tribunal member was in effect expressing confidence that a notoriously oppressive and dictatorial regime would change its way, because it said it would, whereas here, the decision maker was considering whether a violent outbreak in the aftermath of a disputed election result had come to an end when the competing candidates agreed to work together or whether the widespread violence continued.

While the treatment of the post-election situation was not a particularly detailed one, and in my view the decision maker could and indeed should have sought to update the situation as of the date of making the submission, the 9th February, 2010, it has to be said that there was certainly material available to the official which could have led to the official taking an optimistic view. The Human Rights Watch Publication *Ballots To Bullets – Organised Political Violence and Kenya's Crisis of Governance*, Volume 20, No. 1(A), March 2008, one of the few post-agreement documents submitted by the applicant, strikes a decidedly upbeat tone and appears to operate on the basis that the parties have committed to the power-sharing arrangement and that it will continue, stressing the future responsibilities of all involved. It also appears from that document, and from its appendices, that the agreement that was arrived at following the intervention of Kofi Annan and others was a very serious document indeed; as evidenced by the detailed provisions for a truth, justice and reconciliation commission and for a commission of inquiry into post-election violence. The material exhibited and quoted by the decision maker also provides some grounds for believing that the claimed progress is real. So, while the BBC News of the 8th April, 2008, is quoted as reporting that power-sharing talks were suspended and that violent clashes had resumed, the BBC is also quoted as reporting on the 24th April, 2008, that President Kibaki and the Prime Minister [and defeated presidential election candidate] Odinga were working together and were conducting a joint tour of the Rift Valley trouble spots.

There is a further aspect to all this. The decision now challenged is dated February, 2010. If as of that time there was credible evidence that the power-sharing coalition had broken up and that widespread intercommunal violence was once more the order of the day, it is inconceivable that this information would not have been put before the Court on affidavit with a view to establishing that the official who had prepared the submission had acted improperly in making highly selective use of country of origin information and failing to access a document or disclose a document that contained highly relevant up to date information.

In all the circumstances, I do not believe that the way in which the treatment of the post-election situation was dealt with provides any basis for challenging the decision.

I turn then to the issues raised in relation to the consideration given to the concerns relating to the likelihood of being forced to marry her brother-in-law, to the issues of state protection and the manner in which the question of the first named applicant's credibility was dealt with.

The submission quotes the U.S. State Department - Human Rights Report on Kenya as follows:-

> "Certain communities commonly practice wife inheritance, in which a man inherits the widow of his brother or other close relatives. Other forced marriages were also common."

Having referred to this extract the decision maker then commented:-

> "The above extract would suggest that wife inheritance does exist in Kenya. However, the fact that it does exist does not establish that V. I., in particular, would be at risk of such a practice, nor does it establish that she would be barred from seeking protection against the same. The issue of state protection will be examined in detail below".

This analysis is a somewhat limited one, in that no specific reference is made in this section to the fact that on the first named applicant's account there had already been an attempt to force her to marry her brother-in-law, though that is a matter that is referred to elsewhere in the submission. Human experience suggests that what has happened in the past is usually a good indication of what will happen in the future. That general observation is of particular relevance in the area of asylum/international protection, as is reflected in the provisions of Article 4(4) of Council Directive 2004/83/E.C. of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, O.J. L 304/12 30.9.2004 ('The Qualifications Directive').

The analysis is, as I have indicated, a limited one and taken in isolation might well be regarded as inadequate. However, the decision in relation to subsidiary protection does not stand alone. The application comes at the end of a long process, and the claim for subsidiary protection is advanced on the same basis as was the failed claim for asylum. The account put forward by the first named applicant had been regarded as incredible, implausible and incoherent by the RAC officer who had interviewed her. A number of specific reasons for forming that view are set out. The relevance of conclusions in relation to credibility taken at an earlier stage of the process to the decision on subsidiary protection has been considered in a number of decisions of the High Court. *In Obusch v. Minister for Justice, Equality and Law Reform* [2010] I.E.H.C. 93, (Unreported, High Court, Clark J., 14th January, 2010) commented:-

> "This is a case where the second legal argument advanced on behalf of the applicant [an allegation that the Minister failed to consider whether there existed a serious and individual threat to the applicant's life or person] is, at first glance, interesting but on further examination it becomes apparent that the argument is flawed. This is because the argument ignores that there is no escaping the fact that the applicant's narrative of the events which brought her to Ireland was found not credible. The Court finds it difficult to envisage any circumstances where an asylum applicant is found not credible in his/her claim as to the existence of a well-founded fear of persecution will be granted subsidiary protection on the same basis. One has to ask oneself how, if a person's assertion relating to a fear of persecution is not believed, it can logically be possible that he/she might be eligible for protection on the basis of the same story, under the Qualification Directive and Protection Regulations. Subsidiary protection is exactly what it says it is – it provides complementary protection to those applicants who do not meet Convention requirements to establish persecution but who nevertheless require protection."

In this case the approach to credibility by the official preparing the submission has been the subject of severe criticism on behalf of the first named applicant. In the section of the submission headed "applicant's credibility and whether benefit of the doubt should be given (Regulation 5(3))" the official referred to the fact that the RAT member had raised the following issues concerning credibility; an ability to relocate safely in Nazareth, apart from one incident involving her in-laws, an incident which was not reported by the first named applicant; the submission also referred to the fact that the RAT member had noted that the applicant had never been mistreated or threatened by the authorities in Kenya, or by any group controlled by the Government. Finally, the observation was made that the failure to claim asylum in Amsterdam undermined her credibility. It must be said that of the matters referred to, only the failure to seek asylum in the first safe country goes to the personal credibility of the first named applicant. The other matters

listed have an obvious relevance to the need for international protection but do not go directly to the question of credibility. However, while that is so, it is indisputably the case that the first named applicant's account was explicitly found not to be credible at the ORAC stage and implicitly found not to be credible again at the RAT stage. In these circumstances, the conclusions arrived at in the course of the subsidiary protection application are not at all surprising.

So far as the question of state protection is concerned, the first named applicant does not claim to be under threat from the State, but from non-state actors. She does state that she reported the initial incident when she was raped by her brother to the police, but she did not report her difficulties with her in-laws as she felt that the police would regard that as a family problem.

Country of origin information establishes that there is a functioning police force and also establishes that the authorities have acted against the Mungiki group. The applicants are particularly dismissive of the reference in the decision to the existence of a police complaints procedure. This is seen as naïve and complacent in the extreme. However, in a situation where the first named applicant is claiming that the threat to her comes from two separate groups of relatives, it is entirely understandable that the view would be taken that it was incumbent on the first named applicant to seek state protection and to persist in pursuing that application. The conclusion that state protection would be available is one that is well justified by the available country of origin information.

In all the circumstances, I am of the view that the decision reached by the respondent to refuse subsidiary protection was one that was open to him and in these circumstances I must refuse the relief sought.