

**THE HIGH COURT
JUDICIAL REVIEW**

[2013 No. 332 J.R.]

BETWEEN

A.M. (AN INFANT SUING BY HER MOTHER AND NEXT FRIEND, T.M.)

APPLICANT

AND

**MARGARET LEVEY SITTING AS THE REFUGEE APPEALS TRIBUNAL, MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND
ATTORNEY GENERAL**

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered the 1st day of October, 2014

Background

1. The applicant is a minor, born in the State on 20th May, 2012. The applicant's mother is from Sierra Leone and her father is from Rwanda. Both parents were asylum seekers in the State.

2. An application for asylum was made on behalf of the applicant by her mother on 17th October, 2012, when she completed the "Application for Refugee Status Questionnaire". The applicant presented for interview, represented by her mother and father on 24th October, 2012, before the Office of the Refugee Applications Commissioner (hereinafter "ORAC"), pursuant to s. 11 of the Refugee Act 1996.

3. In the course of this interview, the applicant's mother alleged that if the applicant was returned to Sierra Leone, she would be at risk of having to undergo Female Genital Mutilation (hereinafter "FGM") at the hands of her family. In particular, the mother feared that her uncle would arrange for the procedure to be carried out. In the course of that interview, the mother stated as follows:-

"Q9 Who exactly do you fear would harm her in Sierra Leone?"

A. If I am sent back, I will not have the power over her as I am a single mother. It will be my family who will harm her.

Q10 You mention that you fear your child would be forced to undergo FGM in Sierra Leone. Who do you think would force her to undergo this?"

A. My family.

Q11 How could this be forced upon your child if you, the parent did not want it?"

A. I would not have power over it. My partner would not be with me and I would not be able to talk for her. The family have a say over her.

Q12 You made no mention of such fears for the applicant's sister Aaliyah. How can one daughter have these fears and not the other?"

A. I just thought of it. It happens. Those are the circumstances surrounded. I fear what the uncle would do to Aaliyah.

Q13 Why did you not mention this in Aaliyah's application?"

A. It just came to me now.

Q14 Who exactly in your family do you fear would harm your child?"

A. My uncle and the community, discriminating against her. Because she is mixed.

Q15 Does your uncle know of the birth of this child?"

A. No.

Q16 Do you know if your uncle is still alive?"

A. I don't know

Q18 In your claim you stated he was a poor man who lived in Kono, far away from Freetown. How would he be able to find the applicant anywhere in Sierra Leone?"

A. I don't know.

Q19 You have mentioned other societal discriminations you fear for your daughter in Sierra Leone, such as domestic violence and being a mixed race. What do you think they would do to her?"

A. *It's a taboo. They will hurt her. It is a taboo in my family. They will not see her as a pure Sierra Leone girl.*

Q20 COI confirms that FGM's prevalent in Sierra Leone, but it is done by Sowies on the behest of the mothers. Therefore, if you did not want your child to undergo the cutting, it does not appear she would be at risk. Comment?

A. *It is to do with the father. It is the family that decides. If I am deported without a man, it is that would decide. "*

4. The applicant's mother also submitted extensive country of origin information (hereinafter "COI") concerning the prevalence of FGM in Sierra Leone. This information stated that approximately 90% of females in Sierra Leone had undergone FGM. This is performed by "Sowies" in secret societies and is generally done at the behest of the mother. FGM is part of an initiation ritual into women's secret societies and as a right of passage into adulthood. In an extract from a publication of the Immigration and Refugee Board of Canada, published in March 2009, it was stated that a woman must be initiated into a secret society in order to be "socially accepted" and to be deemed eligible for marriage.

5. The Commissioner notified the applicant, care of her mother by letter dated 28th November, 2012, that he was refusing to make a recommendation that the applicant should be declared a refugee. At the outset of the s. 13 report, it was noted that the applicant's older sister Aaliyah Lara Mustapha, was considered to have the possibility of obtaining Rwandan nationality as her father was born in that country. The report considered the possibility that she might derive Rwandan nationality from her father and the report assessed her claim for protection under both nationalities.

Arguments

6. In further grounds of appeal and submissions submitted on 4th February, 2013, the applicant claimed that she was not in fact eligible to acquire Rwandan nationality as her father had lost his Rwandan citizenship. In its decision, the RAT concurred: *"the applicant's representative maintains that the father states that he has not retained his nationality. That being so on the fact that there is no issue surrounding the mother's nationality, this claim is assessed in terms of Sierra Leone only"*. In evidence before the RAT, the applicant's mother stated that she had a fear that the applicant would be seriously harmed by her family and by her maternal uncle in Sierra Leone. Her daughter would be subjected to FGM and would be forced to become an underage bride. In this regard, the applicant relied on COI which showed that 90% of women in Sierra Leone had undergone FGM and that 56% of women had become underage brides.

7. On behalf of the applicant, it was claimed that the source of her fear was not limited to her maternal uncle in a sense that the community would still discriminate against her daughter. In further submissions made on 4th February, 2013, to the effect that the social group which the applicant alleged to be a member of, constituted children who refused to consent to FGM. The respondent submitted that on this basis, the case is not about the risk of FGM but about the risk to those who refuse to undergo it. It therefore appears to be accepted that the applicant's mother can and will refuse to permit the applicant to undergo FGM in Sierra Leone, and will be at risk there by reason of that refusal.

8. The first ground of complaint by the applicant is that the first named respondent failed to properly consider the applicant's independent claim for asylum relating to the risks of FGM. The applicant claimed not only that she was at risk of FGM, forced marriage and/or domestic or sexual violence but expressly claimed asylum on the grounds that she would be subject to persecution as one of the small percentage of girls in Sierra Leone who refuse to be subjected to FGM. The applicant relied on Article 4(3) of the Qualification Directive (Council Directive 2004/83/EC) which stipulates as follows:-

"3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account: ...

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm. "

9. The applicant also noted Article 8.2(a) of the Procedures Directive (Council Directive 2005/85/EC) which stipulates that Member States shall ensure that applications are examined and decisions taken individually, objectively and impartially.

10. In the applicant's written submissions, the applicant argued that the first named respondent did not consider the applicant's application individually, in an objective and impartial manner, having regard to the best interests of the child, but rather made a determination primarily based on the outcome of the failed asylum claims of the applicant's mother and sister. It was submitted that the first named respondent did not properly consider the individual position and personal circumstances of the applicant, including her gender and age, in arriving at an assessment of whether the acts to which the applicant could be exposed, including that limited to FGM and/or refusal to participate in the practice, would amount to persecution or serious harm. The applicant pointed out that at the analysis section of the RAT decision in relation to the practice of FGM, the first named respondent found that FGM was predominantly performed by women in secret societies, generally at the behest of mothers who have undergone the procedure themselves. The first named respondent found that *"given the applicant's mother is not in favour of this, it is reasonable to assume that it would not be an issue"*.

11. The applicant submitted that it was a reviewable error for the first named defendant to rely on assumptions contrary to the weight of objective evidence. The first named respondent did not consider either:-

(1) the societal pressures on mothers to subject their daughters to mutilation; or

(2) address the applicant's distinct claim of risk of persecution on the grounds that she would be a child in Sierra Leone who refuses to submit to FGM, given that the practice of FGM is the prevailing norm in that country.

12. The applicant stated that the decision in *H (A.H.E.) (A Minor) & H (M.H.E.) (A Minor) (Sudan) v. Refugee Appeals Tribunal & Anor* [2013] IEHC 163, was on all fours with this case. The *H.* case concerned the question of a child in Sudan having to undergo FGM. There was evidence that girls who did not undergo this procedure would be seen as unclean and not fit for marriage. There was intense societal pressure to have the girls circumcised, even against the wishes of their parents. The applicants cited the following extract from the judgment of Clark J. to the effect that the Tribunal was found to have erred in finding that the parents could readily refuse to subject their daughter to FGM:-

"In those circumstances, it is not at all clear how or why the Tribunal Member considered that this couple were of such phlegm and fortitude that they could and would stand up to parental and societal pressure to prevent the occurrence of FGM with or without their approval. Further, the Tribunal Member does not appear to have countenanced the other possibility or indeed the probability highlighted in written submissions at the appeal stage that intense societal pressure might weaken their resolve. Therefore, the finding that they as a couple could ensure their daughter's safety is unreasonable and in error of law. "

13. The applicant also made reference to the report of the IRB in Canada dated 27th March, 2009, which noted that FGM was prevalent with up to 90% of females having to undergo the procedure. It was noted to be a "deeply rooted" cultural tradition that is practiced across all socio-economic classes and ethnic groups with the exception of the Krios. The report outlines the influence of FGM practitioners and the risk of persecution of those who might oppose the practice:-

"FGM practitioners in Sierra Leone are 'very powerful and influential' both politically and socially (IAC June 2008, 18; see also Women's eNews 7 Sept. 2007). According to the 2007 Writenet report, people who speak out against the societies risk violent confrontation and forced initiation' (Fanthorpe Aug. 2007, 16). Other sources consulted similarly indicate that those who oppose the practice may face 'hostility' (IPS 19 Apr. 2005), and be subjected to 'harassment and threats' (Women's eNews 7 Sept. 2007)."

14. The respondent points out that the applicant's mother clearly stated that she would refuse to allow FGM. This is possible, since a minority (10% of women) elect not to undergo the procedure. They argue that the section of the IRB report detailing the 90% of women who undergo the procedure, was not relevant since the applicant clearly placed herself within the minority in Sierra Leone by refusing to have her daughter undergo the procedure.

15. The respondents further argue that the COI which states that those who speak out against secret societies who perform the practice may risk violent confrontation and forced initiation, but the applicant's mother never stated that she proposed to campaign publicly against the practice or to speak out against these societies. By contrast, this country of origin information indicates that those who oppose the practice may face "hostility" or be subjected to "harassment and threats". The respondent submitted that these risks do not amount to a risk of persecution.

16. The applicant also complains that rather than make a determination based on the objective facts highlighting the dangers of FGM, including the dangers arising from a refusal to participate in the practice, the first named respondent instead relied upon the failure of the applicant's mother to raise the issue in relation to the applicant's sister in her application for asylum in 2010. In its decision, the RAT had stated:-

"The applicant's mother made no mention of domestic abuse, forced labour and more importantly, FGM in relation to her other daughter's application in 2010. "

The first named respondent held *"the fact that she stated that she didn't realise until she came here that it was such a 'big thing' but she now realises it, is simply not credible in the context of a person who was allegedly circumcised herself"* The applicant states that in so finding, the first named respondent gave no consideration to the objective risk of FGM to the applicant, including the risk of refusing to undergo the practice, but made a determination principally on the subject of failure of the applicant's mother to raise the issue in the course of another application.

17. The respondent argues that this is not what the Tribunal decided. It decided the credibility of the risk of the applicant turned on the applicant's mother's evidence. The respondent accepted that FGM was very prevalent in Sierra Leone. However, it is also clear that a minority of women refused to undergo the practice. The fact that the applicant's mother did not raise the risk in relation to her other infant daughter, goes to the credibility of her claim to be at risk for refusing to undergo the practice now. The respondent submitted that this was an issue of credibility. They submit that the decision of the RAT did not stand or fall on this, but rests principally on the consideration of the COI to the effect that it is the mothers who request that FGM would be performed on their daughters, as it is a cultural issue for most (but not all) women in Sierra Leone.

18. The applicant also complained that the first named respondent, in effect, dismissed the claims of the applicant's mother regarding her own experience of mutilation. There does not appear to be any finding to this effect in the RAT decision.

19. The applicant cited the decision of the English Court of Appeal in *Karanakaran v. Homes Secretary* [2000] 3 All E.R. 449, where it was stated as follows:-

"[The decision-maker] must not exclude any matters from its consideration when it is assessing the future unless it feels that it can safely discard them because it has no real doubt that they did not in fact occur (or, indeed, that they are not occurring at present). Similarly, if an applicant contends that relevant matters did not happen, the decision-maker should not exclude the possibility that they did not happen (although believing that they probably did) unless it has no real doubt that they did in fact happen. (per Brooke L.J)"

20. This principle has been followed in this jurisdiction in *M.A.M.A. v. Refugee Appeals Tribunal & Ors* [2011] 2 I.R. 729, which held that the sole fact that particular facts or events relied upon as evidence of past persecution were disbelieved, did not relieve the decision maker of the obligation to consider whether there was a risk of future persecution of the type alleged in the event of repatriation.

21. The applicant makes the point that she is entitled to have her claim for asylum considered separately and independently of the decisions already given in respect of her mother and sister (see *A.N. & Ors v. Minister for Justice* [2008] 2 I.R. 48). The respondents accept that the applicant is entitled to make a separate claim and have it independently assessed.

22. The applicant has argued that the first named respondent has demonstrably failed to consider the applicant's claim from her prospective and has relied primarily on the failed applications of her mother and sister in the decision to refuse her refugee status. The respondent has denied that there was any refusal to consider a separate claim on behalf of the applicant, or of treating the application as entirely dependent on the outcome of the mother's application. The respondent has submitted that it was entirely material to the independent assessment of the child's claim for asylum that the only evidence put forward in relation to it (other than the objective COI) was the oral evidence of the mother. The credibility of that oral evidence was therefore in issue for the purposes of the child's claim.

23. The applicant also contends that the first named respondent erred in concluding that there was no valid basis for the applicant's

fear of persecution. The first named respondent in its analysis of the applicant's claim, stated that *"even if we accept that there is a genuine fear in the mind of the applicant's mother on her behalf, there has to be valid reason for that fear. I do not accept that there is a valid basis for the fear the applicant alleges having."* The applicant claimed that her fear was not limited to her maternal uncle. The s. 11 report reveals that the applicant's mother did not limit her fears to her uncle alone, but rather that her family would compel her to subject the applicant to FGM and also that the *"community"* would harm her child, in the sense that she would suffer discrimination.

24. However, the applicant contended that the first named respondent referred to the answer of the applicant's mother in the s. 11 interview to the pointed question *"who exactly in your family do you fear would harm your child"*, to which the applicant's mother replied that it was her uncle and the community discriminating against the applicant because she is of mixed race. Relying on this alone, the first named respondent then determined that *"thus, it is the uncle she fears in the family first and foremost"* and given that the applicant's mother does not know if the uncle is alive or aware of the applicant's birth *"it seems reasonable to conclude that there is no valid basis for the fear she alleges having on her child's behalf"*.

25. In so finding, the applicant submits that the first named respondent disregarded the scope of the persecution which the applicant feared and the range of factors of persecution. Furthermore, the first named respondent disregarded the country of origin information submitted in relation to the risk of FGM where over 90% of girls are subjected to the practice, as well as forced underage marriages in Sierra Leone where 56% of girls are married before the age of 18.

26. The applicant submits that the first named respondent ignored the applicant's written submissions and oral testimony that the source of harm was not limited to the maternal uncle, and impermissibly narrowed the scope of harm and range of factors of harm contrary to the applicant's submissions and the evidence provided.

27. The respondent states that the applicant also rejects the objective basis for this stated fear (thus proving that the credibility of the mother is not, in any event, determinative of the applicant's claim). This is because the Tribunal Member, in the exercise of her jurisdiction, considered the applicant's oral evidence to the Tribunal in the light of her evidence to the Commissioner at interview. At the Tribunal, the mother stated that her family might subject her daughter to FGM. The Tribunal Member also considered (as she was required to do by s. 16) the evidence at interview. The Tribunal Member was entitled to assess that evidence and it is clear from the interview (Q's 12 and 14 in particular) that it was her uncle who was the main basis of the fear. The Tribunal Member then considers the fact that the applicant's mother admitted that she did not even know if this uncle was alive or aware of the applicant's birth. In those circumstances, it was submitted that it was reasonable for the Tribunal to conclude that there was no objective basis for the stated fear, even if the credibility of the mother was accepted. It was not true to say that the oral testimony was ignored: it was assessed in light of the interview and this was within jurisdiction.

28. The applicant also claimed that the decision maker improperly dismissed concerns submitted on behalf of the applicant that she would be forced to become an underage bride and that she would be subject to domestic violence and/or rape and/or sexual violence in Sierra Leone. The applicant states that at in its decision, the Tribunal recorded the applicant's mother's fears from her wider family and also that she fears discrimination from her community, as well as the risk of underage marriage and domestic abuse, or the risk of sexual violence if the applicant were to become destitute.

29. They state that the mother's other fears of harm of predators have been dismissed in the context of the decision that this claim was a *"bald assertion"* and that *"no cogent reason was canvassed on this issue in support of this contention"*.

30. It is submitted that where the applicant has demonstrated objectively that there is a serious possibility of persecution, an application for a declaration of refugee status should not fail on the ground that the decision maker does not believe the applicant's subjective fear is expansive, particularly where the questioning and reasoning were narrowly focused.

31. In the appellant's written submissions, it was alleged that the decision maker *"improperly dismissed concerns submitted"* on the basis of forced marriage, domestic violence and/or rape or sexual violence in Sierra Leone. The first named respondent found that *"even if we accept that there is a genuine fear in the mind of the applicant's mother on her behalf, there has to be a valid basis for that fear, I do not accept that there is a valid basis for the fear the applicant alleges having"*.

32. The applicant submitted that COI demonstrates that up to 90% of girls in Sierra Leone are subjected to FGM, which provides a reasonable likelihood that the applicant would be subjected to mutilation. In the alternative, it was submitted that there was a reasonable likelihood that she would be at risk of persecution as one of a minority of girls who refused to be subjected to the practice.

33. The applicant also submits that objective facts further demonstrate that 56% of women in Sierra Leone are married before the age of 18. Accordingly, there is a real chance of persecution on the grounds submitted by the applicant. According to objective country of origin information, therefore, the applicant is more likely than not to be forced into an underage marriage and more likely than not to be forced into prostitution if her family become destitute.

34. The first named respondent contends that there was merely a bald assertion that these events would come to pass. It submitted that the RAT was entitled to come to the following conclusion on these matters:-

"The applicant is at risk of domestic violence and would be forced to be an underage bride according to the applicant's mother. In support of this contention at p. 8 of the submissions general COI is quoted which indicated that such issues can be problematic in Sierra Leone. Other than a bald assertion that this will be the case for this applicant, no cogent reason was given to support this and it is not accepted by the Tribunal as credible. Another issue raised was that she would be arrested as a failed asylum seeker if returned to Sierra Leone. Again, this was another bald assertion by the applicant's mother, in that the authorities 'might say I exposed the country' ... 'they might get her', (Q22) and no cogent reason was canvassed on this issue in support of this contention. "

35. The first named respondent points out that there was no actual ground for judicial review as set out in the applicant's written submissions on this topic, nor is it demonstrated how an error of law or irrationality occurred.

36. The first named respondent submits that the applicant's claims were properly dealt with by the Tribunal in light of the available COL In relation to the alleged risk of domestic violence and forced marriage, the respondent submitted that the Tribunal Member correctly stated that other than a bald assertion, no case has been made to support the applicability of these issues to the applicant. In these circumstances, it was submitted that no irrationality or illegality attached to the findings.

37. The applicant also complained that the finding of the RAT that the applicant's "assertions (in relation to FGM) run counter to the COI in any event", was clearly contrary to the representations made and to the COI consulted and that this conclusion did not flow from the COI provided. They submit that the COI regarding lack of protection in Sierra Leone for victims of FGM and domestic and sexual violence, clearly indicated that the applicant's assertions conformed with the COI submitted and it was irrational for the first named respondent to find that her assertions in relation to FGM run counter to the COI.

Conclusions

38. Having regard to the documents and legal submissions submitted by each party, I am satisfied that the RAT approached this case on the correct basis. The COI establishes that FGM is extremely prevalent in Sierra Leone. However, it appears that this is due to the fact that mothers want the procedure to be carried out on their daughters. It is not established that this is carried out against the wishes of the parents. Where, as here, the mother is against the practice, it would appear that the child would not be at risk of FGM. This is a finding which the RAT was entitled to make.

39. In considering whether the fear of FGM was objectively well founded, the RAT was entitled to have regard to the fact that the applicant's mother had not raised this issue in relation to the asylum application brought on behalf of the applicant's sister. If FGM was really a cause for concern, one would have expected the applicant's mother to have raised the issue at the time of that asylum application in 2010.

40. I am also satisfied that the RAT had proper regard to the available COI when reaching its decision. The Tribunal was entitled to come to the conclusion that while FGM was extremely prevalent in Sierra Leone, it was performed at the behest of girls' mothers. Where, as here, the applicant's mother was opposed to the procedure, the RAT was entitled to rely on the COI for the proposition that there was no risk to the particular applicant. There is a minority of girls in Sierra Leone who are not subjected to FGM. The Tribunal was entitled to come to the view that the applicant would be part of that minority given the views expressed by the applicant's mother.

41. It was also open to the RAT to have regard to the fact that the applicant's mother indicated that it was her uncle whom she feared most in relation to subjecting the applicant to FGM. This man was apparently a poor man living some distance from Freetown and as far as is known was not aware of the existence of the applicant. In these circumstances, it was open to the RAT to find that the applicant's mother did not have an objective basis for her stated fear of her uncle.

42. In relation to the allegation that if repatriated, the applicant would run the risk of becoming an underage bride and/or would experience domestic or sexual violence, there was no evidence before the RAT that this was likely to happen to the applicant. The COI reports a figure of 56% for underage brides. There is no reason to suspect that the applicant would not find herself in the 44% who would not get married until they had reached adulthood.

43. It was also argued that the applicant would suffer discrimination due to the fact that she was the daughter of a mixed race couple. However, the COI indicates that inter-ethnic partnerships are widely accepted in Sierra Leone. There was no evidence that she would suffer persecution on this ground.

44. In the circumstances, I am satisfied that the RAT was entitled to come to the conclusion that, given the stated views of the mother, the applicant was not at risk of having to undergo FGM if returned to Sierra Leone. Accordingly, I refuse the applicant's application for an order of *certiorari* in respect of the decision of the first named respondent dated 5th April, 2013.