

## THE HIGH COURT

## JUDICIAL REVIEW

[2015 No. 455 JR]

BETWEEN

S.O.

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL,

THE MINISTER FOR JUSTICE AND EQUALITY

AND

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

**JUDGMENT of Mr Justice David Keane delivered on the 27th April 2017****Introduction**

1. The applicant challenges the decision of the International Protection Appeals Tribunal ('the Tribunal'), pursuant to s. 16 (2) of the Refugee Act 1996, as amended ('the 1996 Act'), to affirm the recommendation that she should not be declared to be a refugee. That decision was made on 16 July 2015.

2. On 12 October 2015, Mac Eochaidh J. granted leave to the applicant to apply for an order of *certiorari* quashing the decision on three specified grounds.

3. At the time when leave was granted, the Tribunal was known as the Refugee Appeals Tribunal. When s. 71(5) of the International Protection Act 2015 ('the 2015 Act') came into force on 31 December 2016, the International Protection Appeals Tribunal was substituted for the Refugee Appeals Tribunal in these proceedings by operation of law.

4. It is not clear why the Minister for Justice and Equality, Ireland and the Attorney General have been made respondents to the application. However, nothing turns on it.

**Background**

5. The applicant swore an affidavit on 29 July 2015. It contains averments to the following effect. The applicant is a national of the Republic of Guinea in West Africa. She is a member of the Malinke ethnic group and is now 54 years old. Her husband died of a stroke in 2005. She has nine dependent children who remain in Guinea. She claimed asylum upon her arrival in the State on 8 January 2009.

6. In broad outline, the evidence before the Tribunal was as follows:

(a) In 1984, President Sékou Touré, the leader of the Democratic Party of Guinea ('the PDG'), who was also of Malinke ethnicity and who had ruled as head of a one party state since shortly after the country gained independence from France in 1958, died in the USA after undergoing heart surgery there. A military coup ensued and Colonel Lansana Conté, of Soussou ethnicity, assumed the presidency. The applicant's father-in-law, who had been Minister for Security under Touré, and her husband, who had been active in the PDG, were arrested and interned in a military camp. The applicant's father-in-law was later summarily executed, together with other former ministers and officials of the Touré regime. The applicant's husband was detained for two and a half years before being released. Shortly after the arrest of her husband and father in law, soldiers came to the applicant's home. Although pregnant, she was detained for two days, during which period she was tortured, drugged and repeatedly raped, before being released.

(b) In 1996, in response to a radio advertisement, the applicant successfully completed an assessment test and obtained a job as a secretary in the accounting or finance department of the Guinean National Assembly, the country's unicameral parliament. The President of the National Assembly between 2002 and 2008 was El Hajj Aboubacar Somparé, a member of Conté's Unity and Progress Party ('the PUP'). As part of her duties, the applicant dealt with confidential files concerning the operations and budget of the National Assembly and she was trusted in that role by Somparé.

(c) In the early hours of 23 December 2008, Somparé, as President of the National Assembly, announced on television that Conté had died the previous day, due to illness. According to the relevant provisions of the Guinean Constitution, as President of the National Assembly, Somparé was to assume the Presidency of the country in a caretaker capacity, and a new presidential election was to be held within 60 days. However, within hours of the announcement, Moussa Dadis Camarra led a military coup d'état, later declaring himself president of the country and dissolving the government and various other institutions, including the National Assembly.

(d) According to the applicant, shortly after the coup occurred she was phoned by Somparé, who had found refuge in a foreign embassy. He told the applicant to hide because the military were looking for her in the belief that she held 'very important and secret documents concerning the functioning of the budget of the Assembly', together with other documents concerning 'some mining contracts', and that Somparé had placed large amounts of money in bank accounts under her name.

(e) Somparé arranged a vehicle in which the applicant left Guinea on 24 December 2008, entering the neighbouring state of Mali. There she was placed in the hands of a woman who, on his behalf, arranged tickets and travel documents for the applicant and accompanied the applicant on her journey by air from Mali to Dublin, via Paris.

### The application for refugee status

7. The applicant completed a questionnaire in support of her refugee status application on 12 January 2009. She was interviewed by an authorised officer of the Refugee Applications Commissioner ('the Commissioner') on 8 June 2009.

8. The report prepared for the Commissioner on 25 June 2009 concluded that the applicant had failed to establish her general credibility in relation to, in particular: her secretarial role in the National Assembly, in light of her family's ethnic background and history of persecution at the hands of the Conté/Somparé regime; her possession of highly valuable confidential information in that role; the existence of any risk to her based on her perceived possession of such information, in light of uncontroverted reports which suggest that Somparé himself came to no harm after the coup; the plausibility of the travel arrangements that Somparé made for her, which brought her through France *en route* to Ireland without contemplating an application for refugee status there, although both Somparé and the applicant are French speakers; and the circumstances of her journey to Ireland, specifically the retention of her travel documents at all times by the unidentified woman who travelled with her and the failure of the relevant authorities to require the applicant to present her own travel documents for inspection at any stage of that journey, in particular upon her entry to the State.

9. In consequence, the report found that the applicant had failed to establish a well-founded fear of persecution, as required by s. 2 of the 1996 Act. On 29 June 2009, the Commissioner recommended that the applicant should not be declared to be a refugee.

10. That decision was communicated to the applicant by letter of 10 July 2009. Through the Refugee Legal Service, the applicant lodged a notice of appeal, dated 22 July 2009. The appeal was heard by the Tribunal on 16 April 2015.

### The appeal

11. The Tribunal's decision is dated 16 July 2015. After a recital of the evidence, it addresses the applicant's claim in the following way.

12. It begins by accepting the uncontroverted evidence of the applicant that she is a national of Guinea. It then sets out an 'analysis of credibility.'

13. That section begins by noting the adverse credibility findings that had been made at first instance, including those in relation to the applicant's travel arrangements, before observing that '[w]hat is required from s. 11B [of the Refugee Act 1996, as amended] is whether a reasonable explanation is provided.' Presumably, this is a reference to the requirements under s. 11B (b) and (e) of the 1996 Act, whereby, in assessing the credibility of an applicant, the relevant decision-maker is required to have regard to 'whether the applicant has provided a reasonable explanation to substantiate his or her claim that the State is the first safe country in which he or she has arrived since departing from his or her country of origin or habitual residence' and 'where the applicant has forged, destroyed or disposed of any identity or other documents relevant to his or her application, whether he or she has a reasonable explanation for so doing.'

14. The Tribunal then notes that 'in this case the appellant referred to reliance on a smuggler and that she merely transited through [France]', before concluding that 'these explanations are not completely unreasonable.'

15. The Tribunal next observes that 'how the applicant managed to get from here to there is a peripheral matter.' Insofar as that observation suggests that the express requirements of s. 11B of the 1996 Act are somehow qualified in their application by a decision-maker's assessment of whether they constitute 'core' matters or 'incidental' or 'peripheral' matters, it amounts to an error of law; see *NN v MJE* [2017] IEHC 99 (at §58) and the cases cited there. The decision-maker is under a statutory obligation to consider the matters set out in s. 11B of the 1996 Act as part of his or her assessment of an applicant's credibility. Whether any credibility issue thus arising amounts to a significant or trivial one is, of course, an appropriate matter for consideration as part of the overall assessment of credibility, but it cannot be entirely disregarded as 'incidental' or 'peripheral', since that would be to ignore the clear words of the statute. However, in this case the Tribunal appears to have conducted the necessary assessment under s. 11B, concluding, as part of its assessment of the applicant's credibility, that the explanations provided were not unreasonable or, removing the double negative, that they were reasonable.

16. The Tribunal found that the applicant had applied for asylum at the earliest opportunity, had been co-operative in the asylum process, and had been consistent in her evidence. Implicitly invoking the guidelines on 'establishing the facts' contained in the *United Nations Handbook on Procedures and Criteria for Determining Refugee Status* ('the UN Handbook'), the Tribunal concluded that the applicant had established her general credibility, in the sense that her statements were coherent and plausible, and did not run counter to generally known facts, and that she was, thus, entitled to the benefit of the doubt in respect of her account.

17. The Tribunal held the following facts proved on the balance of probabilities:

(a) The applicant is of Malinke ethnicity and is a national of Guinea, having been born there.

(b) The applicant was raped and beaten in 1984 by politically motivated persecutors.

(c) The applicant worked as an accounts administrator in the National Assembly under Somparé, the president of that body, until December 2008 when he advised her to leave, although she was not directly threatened or assaulted then.

(d) The applicant does not have any material political opinion.

(e) Due to her experiences in 1984, the applicant has a heightened fear of gender-based violence from political sources and is unwilling to return to Guinea because of that fear.

(f) The 'actor of persecution or serious harm' in 1984 was the state, or parties or organisations controlling the state. The applicant's fear when she left Guinea in 2008 was also of persecution at the hands of state actors, although the ruling regime had changed.

18. Having thus assessed the applicant's credibility, the Tribunal proceeded, as one would expect, to address whether the applicant had established a well-founded fear of persecution on one or more of the grounds recognised under the 1951 Convention Relating to the Status of Refugees ('the Convention') and, by extension, s. 2 of the 1996 Act. The findings fatal to the applicant's claim are contained in that portion of the decision.

19. Before turning to those findings and the grounds upon which they are now challenged, it may be helpful to make the following

observations.

20. Once the applicant's statements were accepted as credible, it seems to me that there were two separate and distinct foundations upon which she might be able to establish a well-founded fear of persecution on the ground of political opinion.

21. The first is that the grave acts of persecution to which she had already been subjected in 1984 might alone be enough to establish a well-founded fear of persecution, in the absence of good reason to consider that the relevant treatment would not be repeated were she now to return to her country of origin. As the Tribunal acknowledged, this follows from the express terms of Reg. 5 (2) of the European Communities (Eligibility for Protection) Regulations 2006 ('the Protection Regulations'), which derives from the terms of Article 4 (4) of Council Directive 2004/83/EC ('the Qualification Directive'), in turn a reflection of what is set out at paragraph 45 of the UN Handbook.

22. The second is one that, judging from the Tribunal's summary of the evidence and submissions at the hearing before it, does not appear to have been addressed then in any detail, if at all, but which the Tribunal was nonetheless required to consider by operation of the provisions of s. 16, sub-s. 16 of the 1996 Act.

23. As already described, it derives from the applicant's statement in her original asylum questionnaire that she left Guinea because Somparé had told her that the military was searching for her in the belief that she had very important and secret documents concerning the functioning of the budget of the National Assembly, certain mining contracts, and certain bank accounts in the applicant's name in which Somparé was holding, or had held, great amounts of money. The applicant touched on this again during her s. 11 interview when she stated that Somparé had telephoned her to inform her that she should go into hiding at once because the new military junta wanted to question her on the basis that she was 'privy to many confidential things.' The applicant's expressed fear in that regard is that the military would detain and torture her to obtain the relevant information, in the same way that she was detained, raped and tortured by the military on behalf of the previous regime in 1984, although, obviously, not for the same reason.

24. A significant aspect of the applicant's account is that, while she acknowledges that she was merely a secretary in the finance or accounting department of the National Assembly, it is clearly implicit, if not explicit, in both her original questionnaire and subsequent s. 11 interview that she claims that her functions as such were unique, in that she dealt with 'all of the confidential files concerning the functioning, the carrying out and the nomenclature of the budget of the National Assembly.' That this is the claim the applicant is making is confirmed when she writes subsequently: '[Somparé] really trusted me. Some people said I was his mistress.'

25. Thus, the applicant's claim is not based simply on the secretarial position that she held in the civil service attached to the National Assembly, nor even entirely on the nature and extent of the confidential information to which she was directly privy in her role there. Rather, it is based on what Somparé told her concerning the perception of the military junta that she has knowledge of, or documentation concerning, a range of confidential matters.

26. And of course, in law and logic, the Tribunal was bound to consider those statements – and that argument – based on its general preliminary finding that the applicant's statements were credible and that she was, therefore, entitled to the benefit of any doubt.

### **The impugned findings**

27. The Tribunal first concluded that the grave persecution suffered by the applicant due to her association with her husband and father-in-law will not be repeated because of the 'passage of time' since 1984. While that finding removes the first possible foundation for the applicant's claim to have a well-founded fear of persecution, the basis for it is far from clear.

28. It is true that, when a second military-led coup d'état occurred in 2008, almost a quarter of a century had passed since 1984. It is also true that the specific political opinion imputed to the applicant in 1984, based on her close family connection to a deposed government minister, was no longer material to her situation in 2008. But the Tribunal simply did not address the applicant's arguments that the military-led coup in 2008 was closely similar to that which occurred in 1984, and that, once again an imputed political opinion, this time based on her close working relationship with Somparé (and perceived close personal relationship with him), placed her at the same risk of detention, rape and torture, rendering the passage of time between 1984 and 2008 irrelevant to her more recent predicament.

29. Having considered the limited, available country of origin information relevant to the applicant's claim (including uncontroverted reports that Somparé publicly denounced the coup without evident repercussions and, later, met with the transitional government), the Tribunal next assayed an objective assessment of whether there is a reasonable degree of likelihood or real possibility that the applicant will be persecuted if returned. The Tribunal did this under five headings, apparently of its own devising. The first is whether the applicant suffered serious harm in 2008. Of course, it is common case that she did not. She contends that is because she went into hiding and then fled the country. The Tribunal had expressly found the applicant's evidence to be credible and the applicant to be entitled to the benefit of the doubt, accordingly. And, as the Tribunal acknowledged, in order to establish a risk of persecution it cannot be necessary to wait for actual harm to occur before fleeing to seek protection.

30. The second and third headings concern what has occurred since 2008 to persons in Guinea in 'a similar situation' to the applicant. Here, the Tribunal defines the first such category of persons as 'other administrative staff of politicians.' However, the applicant never made the case that she has a well-founded fear of persecution based on her position as a politician's administrative staff member per se. Her case is that she has such a fear based on her unique working relationship with Somparé and her perceived personal relationship with him. Accordingly, it is difficult to see the relevance of the finding that there was no evidence before the Tribunal of any harm suffered by, or risk of harm to, National Assembly administrative staff generally.

31. This portion of the decision includes, without elaboration, the statement that 'it is important to note that the appellant's role was apolitical.' Again, in so far as I can see, the applicant never made the case that her fear of persecution was based upon the political nature of her role or upon her personal political opinion. The relevant component of her case was clearly based upon the established doctrine of attributed or imputed political opinion. As both Reg. 10 (2) of the Protection Regulations and Article 10 (2) of the Qualification Directive make clear, the applicable test is based on whether the relevant characteristic (including political opinion) has been attributed to the applicant by the actor of persecution and not simply on whether the applicant demonstrates that characteristic.

32. The second category of persons that the Tribunal identified as being in a similar situation to the applicant is the applicant's family. Once again, it is difficult to see the relevance of this comparison to the specific case that the applicant was making, save to the limited extent that it might be suggested that in pursuing the applicant, the Camarra faction might also have targeted the applicant's family.

33. Under the fourth heading, the Tribunal simply observes that the applicant did not suffer persecution between 1984 and 2008, which is common case, and under the fifth heading, the Tribunal merely points to the inconclusive nature of the limited, available country of origin information.

34. Having addressed the risk of future persecution in the manner just described, the decision of the Tribunal contains no express conclusion on the point. I pause here to note that, while it might have been open to the Tribunal to conclude that the lack of any evident harm to Somparé in the aftermath of the 2008 coup suggests that the applicant's fear of persecution through her association with him, though credibly asserted, is objectively unwarranted, no such finding is expressed in the Tribunal's decision. And, in any event, any such finding would have to take account of whatever argument there might be that the very fact of Somparé's public prominence protects him from state persecution in a way that the applicant is not protected.

35. Instead, the decision proceeds to address the discrete issue of whether the necessary connection (often referred to as 'nexus') has been shown between the fear of persecution claimed by the applicant and the relevant Convention ground(s), in this case principally the ground of political opinion. That portion of the decision is as follows:

'Imputed political opinion was the main nexus submitted in the applicant's claim, in that the appellant could have been perceived to be in opposition to the ruling regime in 2008. Notwithstanding her late husband's political connection, she was not targeted after 1984 and was able to secure a government job. In fact, she said she was not political at all. Imputed political opinion could be highly relevant in the sense that, as someone who worked for/with Mr Somparé she could have been targeted. She was not, as she left the country, but there is no credible evidence that others in similarly (sic) situation were so targeted. Accordingly, the nexus ground of political opinion has not been made out.'

36. The principal difficulty with the foregoing analysis is that it completely ignores the applicant's contention that she was uniquely situated, and not similarly situated to other administrative staff, in relation to Somparé. That contention was based on the applicant's own statements, which the Tribunal had ruled were credible and, in respect of which the applicant was thus entitled to the benefit of the doubt, as the Tribunal correctly pointed out. The applicant never suggested that other administrative staff were in a similar situation to her, much less that all such administrative staff were therefore at risk of being targeted. That did not form any part of the quite different case advanced by the applicant, namely that there is a direct nexus between the persecution that she fears and the political opinion imputed to her by the military junta because of her unique working and - as that state actor may have perceived the position - personal relationship with Somparé.

### **Conclusion**

37. In my judgment, the Tribunal's failure to address the specific case advanced by the applicant is fatal to the decision under review, in that the decision fails the test of reasonableness for that reason. In reaching that conclusion, I am conscious that, as the Court of Appeal confirmed in *NM v Minister for Justice* [2016] IECA 217, it is critical in view of the requirements of Article 39.1 of Council Directive 2005/85/EC ('the Procedures Directive') that this Court should be able to subject the reasons of a refugee status decision-maker to thorough review. The Court is empowered to do so by reference to the well-established *Keegan* and *O'Keefe* principles, as the Supreme Court confirmed in *Meadows v Minister for Justice* [2010] 2 IR 701.

38. For the reasons I have given, I will grant an order of *certiorari*, quashing the decision of the Tribunal on the applicant's appeal, and will order that the matter be remitted to a differently constituted Tribunal for a fresh hearing of that appeal.