Neutral Citation [2016] IEHC 638

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 196 J.R.]

BETWEEN

S. M.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 9th day of November, 2016

Background

1. The applicant is an Albanian national who worked as a childcare worker in Albania. On 31st August, 2012, the applicant was raped by her employer. At the time of her rape, she was three months pregnant by her husband. Three days after the rape the applicant reported the rape to the police. On 5th September, 2012, the police informed applicant's employer and his wife of the rape complaint. As a result of the police having informed the employer of the rape allegation, his wife left him taking their child. The police did not pursue any further investigation into the rape as, according to the applicant, her employer bribed the police. After she complained to the police, the applicant's employer began a daily campaign of harassment of her and regularly threatened to kill her for reporting the matter. The applicant reported the harassment and threats to the police but no action was taken. The applicant's in-laws with whom she and her husband lived became concerned at the extent of the harassment and intimated that their son would either have to divorce the applicant or that the couple would have to leave their home. The applicant and her husband then made a decision to leave Albania to get away from her assailant. In the course of their journey, the applicant became separated from her husband. She arrived in Ireland in November 2012.

2. The applicant applied for asylum in the State on 29th November, 2012. She completed an asylum questionnaire on 10th December, 2012. Her son was born on 27th February, 2013. The applicant presented for her s. 11 interview under the Refugee Act, 1996 on 22nd August, 2013. The Commissioner's report issued on 20th November, 2013. It recommended that the applicant not be declared a refugee on the basis that:-

> (i) the incident she complained of was an isolated criminal act;
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> (ii) the incident did not have a nexus to the Convention;
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> (iii) the applicant was lacking in credibility in that, *inter alia*, she had denied having applied for a visa to come to Ireland previously and the information given by her regarding her travel to the State and her documentation was inconsistent with her background and education ; and
>
> (iv) State protection and internal relocation were available to the applicant.

3. In light of the foregoing, the Commissioner found that the applicant had failed to establish a well- founded fear of persecution.

4. A notice of appeal was filed with the Refugee Appeals Tribunal on 11th December, 2013. Written submissions together with the applicant's own written statement were also furnished, along with country of origin information (COI) on the situation of women in Albania. Submissions were made *inter alia* on the issue of the nexus to the Refugee Convention. It was also claimed on the applicant's behalf that her ordeal should be considered atrocious past persecution and that this gave rise to compelling reasons for a grant of refugee status pursuant to Regulation 5(2) of the European Communities (Eligibility for Protection) Regulations 2006. ("2006 Regulations")

5. The applicant duly furnished reports from her GP, NASC and Cork Sexual Violence Centre. The latter apprised the Tribunal that the applicant continued to receive counselling to "cope with the rape, lack of protection and dislocation she had experienced." Her GP's letter advised that she "has a history of depression".

6. Because she continued to be traumatised from the events in Albania, and having found the process before ORAC difficult, the applicant opted to waive her right to an oral hearing before the Tribunal. Accordingly, her appeal was determined on the papers.

The Tribunal's Decision

7. The Tribunal's decision issued on 18th March, 2015, affirming the Commissioner's recommendation.

8. In the course of the Tribunal's decision the applicant's claim to have been raped in the circumstances described by her was accepted, as was her claim to have suffered harassment at the hands of her assailant. Her claim to have been denied police protection was also accepted based on country of origin information referable to the issue of bribery of the police. Her explanations concerning her Irish visa application and her account of her travel to Ireland were not accepted, although these matters were held to be peripheral only and not central to her refugee claim.

The applicant's well-founded fear was expressed as follows:

> "The Tribunal finds that the isolated incident of rape as suffered by the appellant was a persecutory act. Looking forward, the appellant does not claim to fear that her persecutor would attempt to rape her again if returned to Albania; rather her fear is based on his verbal threats. While verbal abuse in itself may not amount to persecution, the abuse and threats combined with the past rape suffered by the appellant is such as to amount to a well-founded fear of persecution."

9. The Tribunal went on to find that:-

> "Considering the appellant's experiences which have been accepted and the COI relevant to the analysis I find that there is a reasonable chance that if she were to be returned to her country of nationality she would face a well- founded fear of persecution."

10. As to whether the harm feared by the applicant should she return to Albania constitutes persecution, the Tribunal Member opined:-

> "The appellant was the victim of a violent crime. While she has not expressed a fear of being raped again if returned to Albania, the person she fears has already been violent and has threatened to harm or kill her, and bribed the local police in an effort to protect himself from prosecution. Having considered the appellant's evidence …the Tribunal considers that what the appellant faced and would reasonably be expected to face in Albania constitutes persecution on a cumulative basis."

The decision-maker went on to consider whether the persecution feared by the applicant should she return to her country of nationality, had a nexus to Convention grounds:

> "The Tribunal finds that the appellant was not raped or persecuted by her former boss 'on account of' membership of a social group, or for any other Convention reason. Neither was his motivation in threatening her after she reported the rape to the police 'for reasons of' her social group. The question then is whether the state of Albania would be unable or unwilling to offer protection to the appellant for a Convention reason.
>
> The appellant submitted that she made a complaint to the local police in Albania but that no action was taken because the assailant bribed the local police. She stated that her assailant was not a man of note, but just the owner of the crèche in which she worked…
>
> The Tribunal finds that where the police were bribed by the man who raped the appellant and therefore failed to afford her protection, such failure of protection was not for a Convention reason. That is, the police did not refuse to assist the appellant for reasons of her membership of a particular social group or other Convention ground, but rather for money.
>
> Having considered the appellant's evidence and the documents cited above, the Tribunal finds that the appellant has not established that her claim has a nexus to the Convention."

11. In dismissing the applicant's claim for a grant of refugee status on the basis of compelling reasons arising out of atrocious past persecution, the Tribunal Member held that "[g]iven the nature of the persecution suffered in the past as documented in this decision, I am of the view that it does not reach the threshold of being atrocious or that returning the appellant to her country of nationality would be wrong and, therefore, I find that compelling reasons do not arise in this claim". In support of this finding, the Tribunal Member referred to the UNHCR Guidelines on International Protection (No. 3), the decision of Cooke J. in *M.S.T. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 529 and the applicant's evidence.

12. Judicial review proceedings were initiated in April 2015. By order of the court, and with the consent of the parties, the within proceedings proceeded by way of a telescoped hearing in which the applicant seeks the leave of the court to challenge the Tribunal's decision by way of judicial review and an order of certiorari quashing the decision.

13. The grounds of challenge relate to the Tribunal Member's findings as to the want of a Convention nexus and the absence of compelling reasons for a grant of refugee status on the grounds of past persecution. In summary, the statement of grounds assert that the Tribunal's finding that the applicant's did not establish a nexus to the Convention was: (a) in breach of s. 2 of the Refugee Act and Regulations 9 and 10 of the EC (Eligibility for Protection) Regulations 2006; (b) was irrational; (c) was inconsistent with the finding that the rape of the applicant was a persecutory act; and (d) was in error in that the Tribunal Member failed to take into account relevant considerations. It is further asserted that the finding that the persecution suffered by the applicant did not reach the threshold of being "atrocious" is tainted by error of law and/or is irrational.

14. A short extension of time was required for the bringing of the within proceedings, which the court was satisfied to grant.

The submissions advanced on behalf of the applicant

15. It is submitted that the Tribunal Member erred in the approach she adopted on the question of a nexus to the Convention. In her notice of appeal, the applicant had made the case for a Convention nexus on the basis that she "has a well founded fear of persecution in Albania because of her membership of a particular social group, as a woman who has previously suffered gender-based violence in circumstances where there is no adequate State protection."

16. In later appeal submissions to the Tribunal, the applicant had advised that:-

> "Country of origin information confirms that sexual violence against women commonly goes uninvestigated and unpunished in Albania, and that corruption is a factor in this failure on the part of the police and the courts."

17. In this regard, the Tribunal was referred to the US State Department "*2013 Country Reports on Human Rights Practices – Albania, 27th February, 2014*".

18. The applicant's submissions to the Tribunal had also made the case that "women are a particular social group for the purposes of s. 2 of the Refugee Act 1996", and the Tribunal was referred to the decision *K. and Fornah v. Secretary of State for the Home Department* [2007] 1 A.C. 412, (para.16). Additionally, under the heading "State protection" the Tribunal was advised that "[c]ountry of origin information confirms that the Albanian State is unwilling or unable to provide protection for women against gender-based violence".

19. While the applicant's appeal submissions to the Tribunal on the issue of particular social group could have been set out more succinctly, it is submitted that they were still sufficient for the applicant's particular social group to have been defined by the Tribunal as women in Albania, based on the approach of the House of Lords in *Fornah*.

20. It is submitted that Albanian women "share an innate characteristic, or a common background that cannot be changed", which is their gender, as provided for in Regulation 10(1)(d)(i) and (ii) of the 2006 Regulations. Moreover, their characteristics as women also identify them as a group in society, subjecting them to different treatment and standards in Albania.

21. Counsel points to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence 2011 (Istanbul Convention), which recognises: (a) that violence against women is a manifestation of historically unequal power relations between men and women; (b) that violence against women is one of the crucial social mechanisms which women are forced into a subordinate proposition compared with men; and (c) that women and girls are exposed to a higher risk of gender-based violence than men. Furthermore, the UNHCR Guidelines on International Protection (No. 1) on Gender Related Persecution are clear that rape and other forms of gender-based violence can be persecution even where the perpetrator is not a State agent. (Para. 19)

22. The case is not being made that all women in Albania are refugees; it is a question of context. The proposition was made to the Tribunal Member that the applicant constituted a particular social group. Yet, the Tribunal Member only looked at the issue of bribery of the police; she did not engage with the applicant's submissions on the issue of the absence of effective State protection because the applicant was a woman. As stated in *Fornah (and Islam v. Secretary of State for the Home Department and R v. Immigration Appeals Tribunal and Another Ex parte Shah ("Shah and Islam")* [1999] 2 A.C. 609, even if the persecutory act itself is not related to gender, the applicant's circumstances may nonetheless be persecution for the purposes of the Convention if she is afforded no protection in Albania because she is a woman.

23. In order to determine whether the applicant's circumstances as a woman in Albania constituted a particular social group, it was necessary for the decision-maker to have regard to country of origin information. It submitted that the relevant country of origin information showed that there is discrimination against women in Albania and that the law on rape is not enforced. It is submitted that all of the laws which are not enforced relate to women.

24. In the context of the country of origin information, the Tribunal Member's finding that the rape the applicant suffered was not related to her status as an Albanian women, is unreasonable. First, it is difficult to divorce rape from gender and/or from the place of women in society. Secondly, and having regard to the country of origin information, it is clear that the assailant could act with impunity. It is submitted that this must have been a relevant contributing factor in his decision to rape the applicant and then to harass her and her family after the attack.

25. The failure of the Albanian police to investigate the applicant's complaint required to be assessed in its societal context. While the applicant told the Tribunal she suspected her rapist may have bribed the police, she situated her evidence in the context of country of origin information, to the effect that Albania's laws against gender-based violence are not effectively enforced and that women occupy a subordinate place in Albanian society. It was thus incumbent on the Tribunal to consider whether the subordinate status of women in Albanian society was a relevant contributory factor in the rape the applicant suffered and in the failure of the Albanian State to protect her.

26. While the country of origin information before the Tribunal Member was terse on the issue of women in Albania, it was damning. The Tribunal Member was required to look at the issue of a nexus to the Convention in a lot more detail and with a lot more care than she did. The case is not being made that the Tribunal Member should have found a nexus, rather the country of origin information indicated a context in respect of which one could say that persecution exists because of the fact the applicant was a woman.

27. It is submitted that the applicant's circumstances can be distinguished from *Lelimo v. Minister for Justice* [2004] 2 I.R. 178 where the High Court affirmed a decision to refuse refugee status to a South African woman who had been raped in her country of origin on the basis that there was no evidence that the South African police were unwilling or unable to protect her given they had arrested and prosecuted the rapist. In the present case, the police failed to prosecute the rape and there is evidence of a general failure of the Albanian authorities to enforce laws which should protect women. Similarly, *Msengi v. Minister for Justice* [2006] IEHC 241can be distinguished from the applicant's case in that the social group being asserted by the applicant is Albanian women *simpliciter* and there was evidence of the subordinate status of women in Albanian society. Furthermore, unlike the present case, in *Msengi,* no evidence of discrimination against women in South Africa had been submitted to the Tribunal. Counsel contends that the applicant's circumstances are also distinguishable from the decision of Mac Eochaidh J. in *T.O. v. Refugee Appeals Tribunal* [2013] IEHC 258 which upheld the Tribunal's finding of adequate state protection in Nigeria, as in that case the court did not disagree with the Tribunal's assessment of adequate state protection.

28. Counsel submits that international refugee law jurisprudence also supports the applicant's case. He cites the decision of the Federal Court of Canada in *Dezemeau v. Minister for Citizenship and Immigration* (2010) FC 559 (paras. 34 – 35) and the decision of the same court in *Josile v. Minister for Citizenship and Immigration* (2011) FC 39 (para. 33).

29. It is thus submitted that there are substantial grounds for contending that by failing to consider these possibilities, the Tribunal Member acted unlawfully such that her decision in respect of applicant's appeal is invalid and should be quashed. This is in the particular context where the Tribunal Member looked only at part of the country of origin information in making her finding that the absence of state protection for the applicant arose because of bribery. Furthermore, in the present case, there was no other country of origin information invoked by the decision-maker to counter-act the information provided by the applicant.

30. It is further submitted that the Tribunal's finding on the applicant's "compelling reasons" claim is irrational in that it does not flow from the premises on which it was based. The UNHCR guidelines themselves include in their list of examples both survivors of sexual violence and traumatised persons. The applicant is both a victim of sexual violence and a traumatised person.

31. Additionally, the Tribunal Member erred in law in that, by her reference to *M.S.T.*, she set too-high a threshold in requiring the applicant's past persecution to be on the level of "mass murder, genocide or ethnic cleansing" in order to be atrocious. It is submitted that there is no basis for such a high threshold in Regulation 5(2) of the 2006 Regulations. Even if such a high threshold was appropriate, the decision is nonetheless irrational in the absence of a reasoned decision as to why the rape of a pregnant woman is less atrocious than the acts listed in *M.S.T.* In the circumstances, the conclusion reached flies in the face of common sense. Counsel further relies on the decision of this court in *N.B. v. Minister for Justice* [2015] IEHC 267.

The respondent's submissions

32. Counsel for the respondents submits that according to her evidence before the Tribunal the applicant was raped by a "non-state actor". However, she gave no evidence of the basis of the attack or the assailant's objective, save that she suggested in her submissions to the Tribunal that it was gender based. No evidence was tendered by the applicant as to what was happening in Albania in this regard. Thus, there is no evidence of any motivation by her assailant over and above a criminal act perpetrated on her. While it is maintained that the applicant's real claim is the one she made on appeal to the Tribunal, namely that her circumstances constitute a particular social group for the purposes of the Convention, the best starting point is the claim she made to ORAC. It is clear from her questionnaire that the applicant was fleeing from someone who continued to threaten her because she reported him to the police, not for any Convention reason.

33. In the course of her s. 11 interview, the applicant states that her fear relates to "a big problem in (her) workplace". That is how she perceived her claim. She again asserts that her fear is based on the fact that she was raped and that following her reporting of this crime her employer began to harass and threaten her. There is no evidence that the continuing threat to the applicant from her employer was motivated by any Convention ground. The applicant told the Tribunal that her employer threatened her because of the break-down of his marriage after she reported him to the police and because his wife divorced him after learning of the police complaint.

34. Furthermore, neither in her questionnaire nor s. 11 interview does the applicant make the case that the police failed her in any material regard because of any Convention reason or because of her gender. According to the applicant, her rape claim was acted upon in that the police apprised her assailant of the complaint, albeit no further action appears to have been taken. If the applicant felt or was aware that there were motivations behind the unwillingness of the Albanian police to assist her because she was a woman, she never made that case to ORAC; the applicant specifically states that the police would not help her because her employer "had paid already, with money you can do anything in Albania". It is thus submitted that the applicant left Albania for this reason and not for any Convention reason.

Additionally, the applicant simply replied in the negative when asked at her s. 11 interview if she had sought help from any other organisation or higher authority; she never asserted that seeking such help would be fruitless.

35. While it is acknowledged that in her notice of appeal the applicant based her fear on her membership of a particular social group; that is as a woman who had previously suffered gender based violence in circumstances where there is not adequate state protection, this does not however reflect the focus of the applicant's questionnaire or s. 11 interview.

36. In any event, the applicant made only a scant submission to the Tribunal that women, and/or a family, may constitute a particular social group, by reference to the decision of the UK House of Lords in *Fornah*. No submissions over and above this were submitted for consideration. In her personal statement to the Tribunal, the applicant did not ascribe to her assailant any Convention motivation for his threats to kill her.

37. It is acknowledged however that the Tribunal Member accepted that the basis of the applicant's claim at the appeal stage was her membership of a particular social group.

38. It is submitted that the applicant's circumstances do not satisfy the second limb of the UNHCR guidelines on causation. There is no evidence that the Albanian authorities' failure to protect the applicant is Convention-related. At most, the country of origin information relied on by the applicant states that the Albanian government "did not effectively enforce [their] prohibitions" on discrimination based on race, gender, age, disability etc. This is the realm of the applicant's present proceedings. Counsel submits that the Irish state is not obliged to give surrogate protection on the basis that law and order in Albania is not that effective. Furthermore, it is clear from the U.S. State Department's report that rape is prohibited by law as a criminal act. Moreover, the police did investigate the complaint by contacting the assailant; there was no failure or unwillingness on the part of the police to do so because of their motivation against the applicant as a woman. Rather, their subsequent failure to act was corruption based. Thus, the Tribunal Member correctly concluded that the applicant was not a refugee. The crime perpetrated on the applicant was a personal one and the failure of the police to act was as a result of bribery.

39. Counsel contends that the applicant's circumstances do not meet the threshold set out in *Shah and Islam* or *Fornah.* In *Fornah* there was a weight of evidence as to the practice of FGM on women in Angola, the acquiescence of tribal chiefs to this practice and the endemic attitude towards women and female genital mutilation (FGM) in Angola. However, this was not a feature of the applicant's evidence to the Tribunal. The applicant's situation fall more readily into the circumstances which presented in *R. v. Immigration Appeal Tribunal (ex parte Pedro)* [1999] EWCA Civ. J-1101-5. It is submitted that the applicant is in a similar situation to *Lelimo* insofar as her claim is in fact one in which she is a rape victim against whom violence has been perpetrated and is threatened into the future. Her case does not arise because she is a member of a group of women who are raped or in respect of whom it might be said there is insufficient or defective protection by the Albanian authorities, given that her case was not pursued by local police because of bribery and not discrimination.

40. It is submitted that as in *Msengi,* the applicant is engaged in circular reasoning in that she could not have identified her perpetrator prior to the rape. While the applicant makes the case to this court that her case is capable of being distinguished from *Msengi* on the basis that her status is that of an Albanian woman *simpliciter* who has a subordinate status in society, this submission is entirely new to these proceedings. It was not made by the applicant to the Tribunal.

41. It is further submitted that the applicant's case cannot be distinguished from *T.O.* where MacEochaidh J. upheld the finding that a nexus to the Convention was not established.

42. Counsel submits that the relevant case law shows that a protection applicant who makes a claim based on membership of a particular social group, such as the claim here, must adduce evidence that there is discrimination. In the present case, the country of origin information does not show that there is no protection because there is discrimination against women, albeit that the laws enforcing rape maybe not be effective.

43. While the applicant cites the decision of the Federal Court of Canada in *Josile v. Minister for Citizenship and Immigration* (2011) F.C. 39, in that case the Federal Court found that the Immigration Boards findings that a Convention nexus was not established was unreasonable having regard to applicable legal principles, and on the basis that the documentary evidence before the Board established that women and girls in Haiti face an elevated risk of violence and rape, (a risk that was not similarly experienced by men and boys, even though men and boys can be victims of rape). Thus, this case can be distinguished from the applicant's claim.

44. With regard to the second limb of the applicant's challenge to the decision, counsel submits that the Tribunal Member did not err in finding the attack on the applicant was not so atrocious as to give rise to a grant of refugee status based on past persecution. First, the Tribunal Member properly referred to the UNHCR Guidelines on International Protection (No. 3). Secondly, she had regard to the decision of Cooke J. in *M.S.T.*, where the learned judge considered what might constitute compelling reasons arising out of past serious harm (in the context of a subsidiary protection application). He opined that circumstances such as mass murder, genocide or ethnic cleansing in a particular locality might constitute such reasons.

45. While the applicant takes issue with the Tribunal Member's finding that her persecution was not "so atrocious as to give rise to a grant of refugee status based on compelling reasons", it is contended that the Tribunal Member was entitled to frame her consideration in that fashion given that the applicant herself had submitted that she suffered "an atrocious form of persecution" and had used the word "atrocious" in a very specific legal context. Thus, the Tribunal Member was doing no more than examining the

applicant's evidence and submissions under the umbrella of "compelling reasons". Counsel also relies on *N.(N)(Cameroon) v. Minister for Justice, Equality and Law Reform* [2012] IEHC 499. In that case, in considering what might give rise to such protection, Clark J. instanced examples of a sole Tutsi survivor of a massacre returning to Rwanda, or a similarly placed Bosniac survivor of the Ahmaei massacre returning to Bosnia.

46. In all of those circumstances, based on the case law, it is denied that the Tribunal Member set too high a threshold as to what might constitute compelling reasons. In fact, no threshold was set. It is accepted that there is no test as such for what might constitute "compelling reasons".

Considerations
47. The key questions which arise in the within proceedings are:

> (i) Whether the Tribunal's finding that the ordeal the applicant suffered and the subsequent failure of State protection was not by reason of her membership of a particular social group is valid; and
>
> (ii) Whether the finding that the rape and harassment suffered could not be considered atrocious past persecution as to give rise to a grant of refugee status on the basis of compelling reasons is valid.

The "nexus" challenge
48. As can be seen from the Tribunal decision, it was accepted that the single rape and the subsequent verbal abuse and threats to the applicant constituted a persecutory act such that if the applicant returned to her country of origin she would face a well founded fear of persecution on a cumulative basis.

That rape and mental violence are capable of constituting persecution for the purposes of the Convention is not in question given the provisions of the 2006 Regulations:

> *"9. (1) Acts of persecution for the purposes of section 2 of the 1996 Act must:*
>
> *(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or*
>
> *(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in subparagraph (a)."*
>
> *9. (2) Acts of persecution as qualified in paragraph (1) can, inter alia, take the form of-*
>
> *(a) acts of physical or mental violence, including acts of sexual violence;.*
>
> *….*
>
> *9. (3) There must be a connection between the reasons mentioned in Regulation 10 and the acts of persecution referred to in paragraph (1)."*

The appropriate part of reg. 10 is in s. 10(1):-

> *"(d) a group shall be considered to form a particular social group where in particular—*
>
> *(i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, or*
>
> *(ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;*
>
> *and, depending on the circumstances in the country of origin, a particular social group may include a group based on a common characteristic of sexual orientation. Sexual orientation shall not include acts considered to be criminal in the State: gender related aspects may be taken into account, without by themselves alone creating a presumption for the applicability of this Regulation;"*

49. Albeit found to be facing persecution in her country of origin, the applicant's claim for international protection failed because she did not establish a nexus to the Convention. The crux of the challenge to the Tribunal decision on the "nexus" ground centres on whether it can be said that the circumstances put forward by the applicant establish a nexus to the Convention under the particular social group reason, which is the Convention ground relied on by the applicant.

50. How the causal connection is to be established is aptly set out by Bingham J. in Fornah:

> *"17. The text of article 1A(2) of the Convention makes plain that a person is entitled to claim recognition as a refugee only where the persecutory treatment of which the claimant has a well-founded fear is causally linked with the Convention ground on which the claimant relies. The ground on which the claimant relies need not be the only or even the primary reason for the apprehended persecution. It is enough that the ground relied on is an effective reason. The persecutory treatment need not be motivated by enmity, malignity or animus on the part of the persecutor, whose professed or apparent motives may or may not be the real reason for the persecution. What matters is the real reason. In deciding whether the causal link is established, a simple 'but for' test of causation is inappropriate: the Convention calls for a more sophisticated approach, appropriate to the context and taking account of all the facts and circumstances relevant to the particular case."*

51. The UNHCR Guidelines on International Protection (No. 1) also provide that:-

> *"The Convention ground must be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause."* (Para. 20)

52. The basis of the applicant's claim to the Tribunal was that the applicant "has a well-founded fear of persecution in Albania because of her membership of a particular social group, as a woman who has previously suffered gender-based violence in circumstances where there is no adequate State protection."

53. The respondent argues that in the course of these proceedings the applicant now seeks to extend her claim, namely to membership of a particular social group by reason of her being a woman in Albania *simpliciter,* a case that was not made to the Tribunal. While I have some sympathy with the respondent's position, I do not believe that the issue which the court has to decide actually turns on this point. Irrespective of whether the particular social group canvassed by the applicant was to be defined as women in Albania *simpliciter* or women as victims of gender-based violence, the question is whether the Tribunal lawfully arrived at the conclusion that the persecution was not Convention related.

54. As a matter of first principle, there is no question but that women, generally, or women who are subjected to gender-based violence, may constitute a particular social group for the purposes of the Convention. In the seminal decision of the House of Lords in *Shah and Islam*, the majority held that women in Pakistan were a particular social group within the meaning of the Convention because in Pakistan women were discriminated against as a group in matters of fundamental human rights and the State of Pakistan gave no protection because they were not perceived as being entitled to the same human rights as men.

55. In *Fornah,* the House of Lords held that:

> *"Women and girls can constitute a group recognised as entitled to the protection of the Refugee Convention where their claims to refugee status are based on well founded fear of persecution for Convention reasons, which may include sexual violence or other gender-related persecution.*
>
> *…*
>
> *Women can therefore claim refugee status where they are seen as a cognisable group for the society in which they live, because of discrimination and/or stereotyped gender roles and they are (a) subjected to serious ill treatment because of their gender against which the State is unable or unwilling to protect them; or (b) their gender is a contributory factor for serious ill treatment in which the State is unable or unwilling to protect them; or (c) there is no protection from non-discriminatory forms of harm because of gender; or (d) gender is a contributory factor in their lack of protection."*

56. In the course of her judgment in Fornah, Baroness Hale states:-

> *"the world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society. States parties to the Refugee Convention, at least if they are also parties to the International Covenant on Civil and Political Rights and to the Convention on the Elimination of All Forms of Discrimination against Women, are obliged to interpret and apply the Refugee Convention compatibly with the commitment to gender equality in those two instruments. (Para. 86)*
>
> *…*
>
> *Thus, while the Guidelines stop short of saying directly that women are always a particular social group, they do make it clear that if a woman is persecuted because she is a woman and women generally are assigned an inferior status in the society, she should qualify for recognition as a refugee." (Para. 101)*

57. An essential element of persecution by reason of particular social group is that the group, as Lord Hope puts it in *Shah and Islam*, "*must exist independently of the persecution" and* "[the] *persecution alone cannot define the group."* Furthermore, discrimination is a key element in the identification of particular social group, as with other Convention grounds. As put by Lord Hoffman in *Shah and Islam*:-

> *"In my opinion, the concept of discrimination in matters affecting fundamental human rights and freedoms is central to an understanding of the convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of human rights regard as inconsistent with the right of every human being to equal treatment and respect."*

58. On the question of causation, Lord Hoffman states:

> *"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 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 a 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."*

59. The Irish courts have endorsed the approach adopted in *Shah and Islam* as to how a particular social group is defined. In *Lelimo*, O'Sullivan J. states:

> *"I have carefully considered the submission that the applicant is a member of a particular social group with the purposes of Article 1 A (2) of the Convention relating to the status of refugees. 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, that 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 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."

60. In Msengi, MacMenamin J. addressed the concept of particular social group, as follows:

> *"[T]he accepted view as expressed in Shah that it is a general principle that there can only be a "particular social group" if the group exists independently of the prosecution. Ms. Stack B.L. puts the position distinctly were she states that while persecution cannot define the social group it may serve to identify it. However social group must exist independently of the prosecution. In this case because the group is defined by reference to rape it is submitted that the applicant is engaged in circular reasoning it was rejected by the House of Lords in Shah. The necessary element or litmus test is that there must be discrimination. Counsel adds that while it is true that women are more likely to be victims of sexual violence that does not mean that women in South Africa are more likely to "be" the victims of sexual violence because they are women."*

61. The above comprises the legal landscape against which the challenge to the Tribunal's rejection of a nexus to the Convention must be assessed.

62. The claim advanced before the Tribunal was not concerned with persecution of the applicant at the hands of the Albanian State, but rather at the hands of a non-state actor. In considering the issue of "non-State actors and the causal link" the Tribunal Member had regard to the test set out in the UNHCR Handbook Guidelines on International Protection (No. 2) that state a causal link may be satisfied:-

> "(1) where there is a real risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or (2) where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason."

63. While counsel for the applicant made some submissions as to the motivations of the applicant's assailant, overall, I do not perceive from the submissions that the case is being made on the applicant's behalf that the Tribunal Member erred when she concluded that the applicant's employer's attack and subsequent harassment of the applicant was not "'on account of' her membership of a social group, or for any other Convention reason." Even if I am wrong in this surmise, in any event I agree with the respondent's submissions that there is nothing in the subjective account given by the applicant of the rape and harassment, or in the objective evidence which was before the Tribunal, to persuade the Court that the Tribunal Member was in error when she concluded that the assailant's motivation in raping the applicant and in threatening her thereafter was not Convention related.

64. What is essentially in issue in the present case is whether the Albanian authorities' inability or unwillingness to provide protection to the applicant has its basis in a Convention reason. The Tribunal Member, albeit finding that the applicant would not be afforded State protection, was of the view that the failure of protection arose because of bribery (which she found was supported by COI). In contending that the Tribunal Member erred in her determination that the absence of State protection was not Convention related, the applicant's principal argument is that the decision-maker neglected to consider whether the country of origin information before the Tribunal had the necessary elements to illustrate that female victims of sexual violence in Albania are not afforded state protection by reason of their being women, thereby rendering them a particular social group for the purposes of the Convention. Counsel for the applicant relies on the content of country of origin information which was before the decision-maker, namely the US State Department "*2013 Country Reports on Human Rights Practices – Albania,* 27th February, 2014" report.

65. The essence of the case put on behalf of the applicant is that there was objective material before the Tribunal sufficient to put the decision-maker on enquiry as to whether the failure of the police to afford her protection was because of discrimination on account of her gender. On the other hand, counsel for the respondent submits that the conclusion reached by the Tribunal Member was open to her on the evidence and submits that the country of origin information did no more than state that laws in Albania were not effective. In particular, counsel for the respondent points to the evidence put forward by the applicant herself, namely that she did not get protection because the police were bribed.

66. It is the case that in her questionnaire she states that nothing was done by the authorities because her assailant had paid the Chief of Police in the station. Thus, the applicant did not ascribe any Convention motives to the police at this particular juncture, nor did she do so in the course of her s. 11 interview. A Convention ground was however put forward at appeal stage. Given that an appeal to the Tribunal is a *de novo* hearing, the Tribunal was obliged to consider her submissions on the issue of a Convention ground. The question is whether the matter was properly considered. I should state at this juncture that the question of whether there may be another reason (e.g. bribery) for the failure of State protection over and above any Convention-related reason would not, to my mind, defeat a claim for protection under the Convention, if there was evidence that the Convention ground was "a relevant contributing factor". This is borne out by the provisions of the UNHCR Guidelines on International Protection (No. 1), as already referred to, and indeed the *dictum* of Bingham J. in *Fornah*, already quoted above.

67. I turn now to the country of origin information which was before the decision-maker. The US State Department report sets out, *inter alia*, that:

> *"The most significant human rights problems were: pervasive corruption in all branches of government, and particularly within the judicial system; the stalling of the reform agenda, in particular the fight against corruption, as the political parties focused on the June elections; and domestic violence and discrimination against women."*

68. Under the heading "Discrimination, Societal Abuses, and Trafficking in Persons", the report continued:-

> *"The law prohibits discrimination on the basis of race, gender, age, disability, language, religion, gender identity and/or sexual orientation, health, family, economic, or social status; however, the government did not effectively enforce these prohibitions."*

69. Under the heading "Women", the report continued:-

> *"Rape and Domestic Violence: The criminal code penalizes rape, including spousal rape, but the government did not enforce these laws effectively. Victims rarely reported spousal abuse, and officials did not prosecute spousal rape. The concept of spousal rape was not well established, and authorities and the public often did not consider it a crime. The law imposes penalties for rape and assault depending on the age of the victim.*

….

Domestic violence against women, including spousal abuse, remained a serious problem. As of October police reported 2,130 cases of domestic violence, compared with 1,860 cases during the same period in 2012.

….

Sexual Harassment: The law prohibits sexual harassment; however, officials rarely enforced the law. NGOs believe that sexual harassment was severely underreported.

….

Discrimination: The law provides equal rights for men and women under family law and property law and in the judicial system. Women were not excluded from any occupation in either law or practice, but they were underrepresented at the highest levels of their fields. Although the law mandates equal pay for equal work, the government and employers did not fully implement this provision. In many communities women were subjected to societal discrimination as a result of traditional social norms that considered women to be subordinate to men."

70. The first thing of note is that the US State Department report states that pervasive corruption in all branches of government and discrimination against women were "significant human rights problems" in Albania. Furthermore, while I note that the emphasis in the country information on lack of effective enforcement of laws on domestic violence, including spousal rape, it remains the case that the report documents that the laws against rape *per se* are not enforced effectively. What springs out from the above information, when looked at cumulatively, is that the Albanian authorities did not enforce the law against rape effectively and that officials rarely enforced the law on sexual harassment. To my mind, notwithstanding that the submissions which the applicant made to the Tribunal on the issue of a nexus to the Convention left something to be desired in terms of clarity, they did refer the Tribunal to the US State Department report. The submissions to the Tribunal also stated that country of origin information "confirms that sexual violence against women commonly goes uninvestigated and unpunished in Albania..." In my view, the country information which referred to discrimination against women and the lack of effective enforcement of laws prohibiting rape, together with the applicant's submissions in respect thereof should have been specifically considered by the Tribunal Member in the context of her assessment as to whether a nexus had been established, in the same way as she referenced the COI in aid of her finding that the absence of state protection arose because of bribery. Given the submissions that were made, it was not sufficient for the decision-maker, simply because the applicant had said that the police had been bribed, to accept that that was the reason for the failure of protection (even where the COI corroborated the applicant in this regard), in circumstances where the COI also had the potential to assist the decision-maker in deciding whether the absence of protection could be said to arise because of discriminatory practices surrounding the prosecution of or enforcement of laws against rape or sexual harassment respectively. Had the Tribunal Member embarked on this assessment, it may or may not be the case that she would have still arrived at the same conclusion on the nexus issue. That is a qualitative assessment for the decision-maker to make, and not the Court.

71. Notwithstanding the absence of any specific reference to the COI quoted above in the decision (save the quotation from COI in the context of bribery), I have considered whether the court should assume that the Tribunal Member did in fact consider the contents of the COI referable to the enforcement of the laws on rape and sexual harassment, and the general concern expressed therein regarding discrimination against women, in the context of her determination on the nexus issue. However, given that the COI, on its face, had the potential to contradict the finding that the sole reason the police did not prosecute the rape was because they were bribed, the Court cannot assume that the information in the COI referable to discrimination against women and the lack of effective prosecution of rape was considered by the decision-maker and found not to be sufficiently probative as to the existence of a particular social group.

72. In aid of his submissions that the Tribunal Member correctly determined that a nexus to the Convention was absent, counsel for the respondent referred to the decision of the UK court of Appeal in *R. v. Immigration Appeal Tribunal (ex parte Pedro).* In that case, the basis of the claim arose as a result of a rape perpetrated on the applicant by an army officer in Angola after she refused his advances to become more than an acquaintance. When her husband complained the army officer had him arrested and shot. The available country of origin information referred to a large number of violent crimes including robbery, vehicle hijackings, assault, kidnappings, rape and murder committed by members of the military in and out of uniform and that some of the attacks were carried out under orders from the Angolan Government. The country information also disclosed that the Government did not take any effective action to punish abusers. The information also documented that violence against women in Angola was widespread and that they were "the targets of violent crimes including rape and robbery in areas captured by government and UNITA soldiers."

73. The UK Court of Appeal addressed the issue of whether there existed a discriminatory element either on the part of the individual perpetrator or the Angolan State:

> "*In this particular case the difficulty is, as* [the applicant's counsel] *has very frankly acknowledged, of identifying a discriminatory element in either the actions of [the army officer] or the evidence relating to the practices of the Angolan State. The special adjudicator found that* [the army officer's] *mal- treatment was a private matter. He was an individual who happened to have a passion for this particular applicant. There is no evidence in that which has been cited to us that the Angolan authorities were discriminating against women as such in their inability or ineffectiveness in controlling the activities of criminals of all kinds."*

74. In the first instance, it is not the function of the Court to determine whether or not a Convention nexus exists; that is the function of the decision-maker. In any event, I do not find the above case sufficiently persuasive to dissuade me from a finding that the Tribunal Member erred in failing to address the relevant contents of the country information which was before her. As I have said, while she found support in the COI to accept the applicant's claim that the police were bribed, this did not mean that other potentially relevant country of origin information should not have been addressed, particularly in circumstances where it was an appeal on the papers, albeit at the applicant's instigation. Of course, as I have said, the weight to be given to the evidence is entirely matter for the Tribunal Member.

75. Counsel for the respondent also relied on the decision in *T.O.* in support his argument that the decision-maker did not fall into error on the nexus question. In *T.O.*, my learned colleague found that every such opportunity had been afforded to the protection applicant in that case. MacEochaidh J. put it as follows:

> *"25. It is clear from the face of the decision that the Tribunal Member expends some considerable effort and spends some time examining and discussing whether there is a Convention nexus to the applicant's claims. The Tribunal Member*

expressly discounts various potential categories of Convention grounds prior to finding that "the only possible Convention nexus to the Applicant's claim is as a woman in Nigeria." and proceeds to address her claim in that regard. On that basis the Tribunal makes every effort to afford the applicant an opportunity of coming within the Convention grounds before ultimately holding that the applicant "does not come within the category of membership of a social group as a woman in Nigeria who would be denied protection". I can find no fault in respect of the Tribunal Member's finding in this regard. It is clear that the Tribunal Member has made a full examination of the issue of a Convention nexus to the claim and while the nuanced argument of the applicant could appear superficially attractive I do not find it is applicable to the findings in this case."

76. I am satisfied however that the present case is capable of being distinguished from *T.O.* on the basis of this Court's finding that the decision-maker, by not considering the references to discrimination against women in the COI and/or whether the absence of state protection might in whole or in part relate to such discrimination, cannot be said to have given the applicant every opportunity to come within the Convention.

77. In all the circumstances, I am satisfied that a substantial ground has been made out on the nexus issue.

The "compelling reasons" challenge

78. Notwithstanding having found no connection to the Convention for the persecution the applicant suffered and could reasonably expect to suffer in the future, the Tribunal Member went on to consider whether the applicant's circumstances merited the grant of refugee status based on compelling reasons, which was found not to arise. In the course of his oral submissions counsel for the applicant pointed to the somewhat contradictory action of the decision-maker having gone on to consider the issue of "compelling reasons" given that she had already rejected that the applicant's fear of persecution had any connection to the Convention. In any event, he asserts that in deciding that the applicant's circumstances did not give rise to "compelling reasons" for a declaration of refugee status, the Tribunal Member erred in law.

79. Had this Court upheld the Tribunal's finding on the nexus issue, there would, to my mind, be no need to embark on a consideration of the validity or otherwise of the decision-maker's approach to the "compelling reasons" finding given the requirement in law (including under Regulation 5(2)) for a nexus to the Convention before a grant of refugee status could arise. However, in circumstances where the court has found that the challenge to the nexus to the Convention finding has been made out, it is necessary to deal with the applicant's challenge to the "compelling reasons" finding.

80. Regulation 5 (2) of the 2006 Regulations provides:

"The fact that a protection applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, shall be regarded as a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated, but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection."

81. The UNHCR Guidelines on International Protection (No. 3) on "Compelling reasons" state:

"Both Article 1C (5) and (6) contain an exception to the cessation provision, allowing a refugee to invoke "compelling reasons arising out of previous persecution" for refusing to re-avail himself or herself of the protection of the country of origin. This exception is intended to cover cases where refugees, or their family members, have suffered atrocious forms of persecution and therefore cannot be expected to return of the country of origin or former habitual residence. This might, for example, include 'ex-camp or prison detainees, survivors or witnesses of violence against family members, including sexual violence, as well as severely traumatised persons. It is presumed that such persons have suffered grave persecution, including at the hands of elements of the local population, and cannot reasonably be expected to return..." (Para. 20)

82. In assessing the applicant's claim, the Tribunal Member quoted from both the Guidelines, and from *M.S.T.*, where Cooke J. (in the context of dealing with a claim for the grant of subsidiary protection on the basis of "compelling reasons" arising out of serious harm) opined at para. 32:

"It is relevant to bear in mind that "serious harm" is defined as including "inhuman or degrading treatment". (See para. 23 above.) It is possible therefore to envisage a situation in which an applicant had escaped from an incident of mass murder, genocide or ethnic cleansing in a particular locality. Even if the conditions in the country of origin had so changed that no real risk now existed of those events happening once again, the trauma already suffered might still be such as to give rise to compelling reasons for not requiring the applicant to return to the locality of the earlier suffering because the return itself could be so traumatic as to expose the applicant to inhuman or degrading treatment."

83. It is clear, in assessing whether the applicant's circumstances merited a declaration of refugee status for "compelling reasons", that the decision-maker had regard to the examples of persecution/ serious harm cited by Cooke J. in *M.S.T.*, and the examples set out in the UNHCR guidelines. She was not persuaded however that the applicant's past persecution merited refugee status, finding that "the persecution suffered by the appellant does not reach the threshold of being so atrocious as to give rise to a grant of refugee status based on compelling reasons."

84. In aid of his argument that the decision-maker erred in rejecting the claim for protection based on past persecution, counsel for the applicant points to the fact the UNHCR guidelines themselves cite sexual violence and trauma (suffered by the applicant in the instant case) as examples of atrocious persecution. It is thus submitted that the conclusion reached by the decision-maker does not flow from its premise. He also argues that the decision-maker set the threshold too high in raising the concept of atrocious past persecution to the levels cited by Cooke J. in *M.S.T*.

85. In all the circumstances of this case, I am not satisfied that substantial grounds have been made out to challenge the approach adopted by the decision-maker. I am not persuaded by the applicant's counsel's arguments, which is that the finding is tainted by error because neither Regulation 5(2) nor any other rule of law admit of a distinction between atrocious past persecution which gives rise to a grant of refugee status based on compelling reasons on the one hand and atrocious past persecution which does not on the other. In my view, the UNHCR Guidelines admit of a qualitative evaluation by a protection decision-maker on the issue of atrocious past persecution. The approach adopted by the decision-maker was an evaluative measure. She evaluated the applicant's circumstances in light of the relevant guidelines, case law and the applicant's evidence. I agree with the respondent's submission that whether "compelling reasons" arise is a question of degree. As I said in *N.B. v. Minister for Justice* [2015] IEHC 267, the

circumstances of any particular case fall to be considered by the decision-maker in light of the provisions of Regulation 5(2). Overall, I am satisfied that the decision-maker was within jurisdiction in determining that the past persecution of the applicant was not so atrocious as to amount to compelling reasons for her not to return to Albania. Notwithstanding, given the heinous nature of the crime of rape, that this court might reach a different conclusion, such finding as was made was not unreasonable and the Tribunal Member cannot be said to have disregarded fundamental reason and common sense in reaching her conclusion, as per the test set by the Supreme Court in *Meadows v. Minister for Justice* [2010] 2 I.R. 701. Counsel for the applicant also argues that the finding was irrational because no reasons are given or apparent for this finding. I do not accept this argument. The decision-maker's reasoning is sufficiently patent from an overall reading of the decision as to satisfy the court that there are no grounds to impugn the finding on the basis of the absence of reasons.

Is there any bar to the applicant obtaining relief in this case?
86. A question arises as to whether the fact that the applicant misled the Tribunal as to the whereabouts of her husband should have a bearing on the Court's discretion as regards any entitlement to relief she may have. It is not in dispute but that the applicant and her husband became separated on route to the State in 2012. In her submissions to the Tribunal dated 5th December, 2014, and in her personal statement, the applicant advised that she last had contact with her husband in June 2013. That was not accurate. As deposed to in the applicant's grounding affidavit in the within proceedings, her husband had in fact joined her in this State in February 2014. The explanation put forward for misleading the Tribunal is that she and her children "depend on [her husband]" and she "did not want to get him into trouble", presumably by disclosing that he had arrived in the State.

87. There was however an obligation on the applicant to apprise the Tribunal of her factual situation and, certainly, her specific contention to the Tribunal that she was unaware of her husband's whereabouts leaves a lot to be desired. The question is whether her failure to apprise the Tribunal of the true circumstances regarding her spouse should deprive her of relief in this case. On balance, I am not satisfied that it should. I take into consideration that the issue could not be said to have any bearing on the matters which the Tribunal Member took into account in determining the issues upon which the present challenge is based. Secondly, to its credit, the respondent did not make the case that the applicant should be denied relief on this basis and concentrated on the substantive issues in the case. Thus, while the applicant's misleading of the Tribunal cannot be condoned, in all the circumstances and taking into account the explanation she proffered to the court, it is not sufficient to deprive her of relief.

Summary
The challenge to the decision on the nexus ground been made out. The court will grant leave and grant an order of *certiorari* quashing the decision of the respondent and remit the matter for a *de novo* hearing before a different member of the Refugee Appeals Tribunal. It remains a hearing on the papers.