This judgment is circulated in redacted form to avoid identification of the parties

Neutral Citation Number: [2007] IEHC 165

THE HIGH COURT
JUDICIAL REVIEW
IN THE MATTER OF THE REFUGEE ACT 1996 AND THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000
[2005 No. 1054 J.R.]

BETWEEN

S. I.

APPLICANT

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE REFUGEE APPEALS TRIBUNAL (TRIBUNAL MEMBER, ELIZABETH O'BRIAN)

RESPONDENT

Judgment of Ms. Justice Finlay Geoghegan delivered on the 11th day of May, 2007.

1. The applicant is a national of Nigeria. He arrived in the State on the 10th February, 2003 and made an application for a declaration of refugee status on the 11th February, 2003. The application was processed by the office of the Refugee Applications Commissioner with interview in the normal manner and a report issued under s. 13(1) of the Refugee Act 1996 on the 8th July, 2003, recommending that he not be granted a declaration of refugee status. He served a notice of appeal from that recommendation to the Refugee Appeals Tribunal on the 28th August, 2003.

2. The applicant's claim for refugee status was based upon an alleged well founded fear of persecution by reason of his religion. He is a Christian and claims to have been living in Kaduna and to have been subject to persecution by Muslim extremists in 2002.

3. The applicant's wife came to the State in December, 2002. She gave birth to their daughter V. in the State in 2002.

4. Prior to the first hearing of the applicant's appeal before the Tribunal, it was disclosed that both he and his wife were HIV positive. Their daughter V. was diagnosed shortly after her birth with HIV infection, which rapidly progressed to AIDS. The applicant and his wife are under medical care, as is their daughter, who has been stabilised on what is described as "a complex therapeutic regimen".

5. Following the disclosure and procurement of medical reports, additional grounds of appeal dated 15th February, 2004, were lodged claiming a well founded fear of persecution by reason of the applicant's membership of a particular social group, namely persons suffering from HIV. It was claimed that such persons are subjected to denial of fundamental rights including the right to essential medical care and to discrimination amounting to persecution in Nigeria. Further, that there was a significant risk that his daughter would die if returned to Nigeria and that the essential treatment and monitoring and long term follow-up required by the applicant and his wife would not be available to them in Nigeria.

6. There was an initial oral appeal hearing in 2004 and a decision issued by a letter dated the 18th May, 2004, refusing the applicant's appeal. The applicant challenged that decision by way of an application for judicial review and it appears from his grounding affidavit herein that such application was compromised on terms favourable to him resulting in his appeal being remitted for fresh adjudication by a different Tribunal Member.

7. The further oral hearing was scheduled before a new Tribunal Member on the 7th March, 2005 and certain additional submissions, legal authorities and country of origin information was submitted in advance of and at the time of the hearing.

8. By letter of the 31st August, a decision of the Tribunal Member dated the 29th July, 2005, rejecting the applicant's appeal was furnished to him. That decision is a decision of Ms. Anne Tait and is the decision now sought to be challenged in these proceedings. It is not a decision of Ms. Elizabeth O'Brian who is named in the title to the proceedings. Nothing turns on this apparent error in the title. This was not adverted to by counsel for either party at the hearing before me. Subject to any submissions of counsel, it appears probable that an order should be made amending the title to this application.

Application for Leave

9. This is an application for leave to issue judicial review. It is subject to s. 5 of the Illegal Immigrants (Trafficking) Act 2000. The applicant must therefore satisfy the court that there are substantial grounds for contending that the decision is invalid or ought to be quashed as required by s. 5(2)(b) of the Act of 2000. In accordance with the decision of the Supreme Court in *The Illegal Immigrants (Trafficking) Bill 1999* [2000] I.R. 360, approving the formulation of Carroll J. in *McNamara v. An Bord Pleanála (No. 1)* [1995] 2 ILRM 125 that such grounds must be reasonable, arguable and weighty and must not be trivial or tenuous.

10. At the time of the appeal hearing in March, 2005, the applicant's claim for a declaration of refugee status was based on two separate and distinct grounds:-

> (i) A claim to a well founded fear of persecution by reason of his religion; and
>
> (ii) A claim to a well founded fear of persecution by reason of his (and his wife and daughter's) membership of a particular social group i.e. HIV sufferers.

11. Each of the above claims was rejected by the Tribunal Member. The applicant seeks leave on a number of grounds which relate to the procedure followed by the Tribunal Member and the principles applied and conclusions reached on each of the claims. Whilst there is some overlap in the reasoning of the Tribunal Member, having regard to the distinct basis of the claims and the nature of the challenges advanced, it appears appropriate to consider separately, whether the applicant has established substantial grounds in relation to each claim.

12. There is, however, one ground which relates to the entire decision and which is independent of the specific claims made. It is contended at para. B(ii) of the statement of grounds that the delay in giving the decision subsequent to the oral hearing is contrary to public policy, is a breach of the relevant appeals regulations and a breach of the applicant's rights under articles 6 and 14 of the ECHR.

13. To obtain leave under s. 5, the relevant ground must be a substantial ground for contending that the decision is invalid. It does not appear to me that the applicant has made out on the facts herein any legal basis for contending that the delay of approximately

5 months herein in issuing the decision is such that it, of itself, constitutes substantial grounds for contending that the decision is invalid. Such delay is undesirable, particularly where there is no transcript of the oral hearing, and is a matter which should be taken into account by the court in assessing whether certain of the other grounds relied upon, constitute substantial grounds for contending that the decision is invalid. However, in the absence of special or specific facts or factors capable of supporting a contention that the delay renders the decision unlawful or invalid, such delay cannot of itself amount to a substantial ground for contending that the decision is invalid. There are no such special or specific facts or factors relied on herein.

Decision to reject claim based on religion

14. The grounds pursued at the leave hearing, as constituting substantial grounds for contending that that part of the decision which rejected the applicant's claim to a well founded fear of persecution by reason of his religion if returned to Nigeria was invalid, may be summarised as follows:-

> 1. The Tribunal Member made an incorrect finding of fact of sufficient importance to invalidate the decision.
>
> 2. The Tribunal Member, in making negative conclusions on the applicant's credibility, failed to take account of relevant material, information and evidence presented by the applicant and based such conclusions on personal conjecture and speculation.
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> 3. The Tribunal Member erred in law in concluding that personal targeting was a precondition or prerequisite for a finding of a well founded fear of persecution.

15. The alleged factual inaccuracies are based on two statements at pp. 13 and 14 of the decision, to similar effect which form part of the assessment of the applicant's claim in relation to what he stated took place in Kaduna, in November, 2005. On p. 13 of the decision, the Tribunal Member states that the first question which must be determined is the applicant's credibility. She then states:

> "Having heard the applicant give evidence and having seen the applicant present this evidence at Hearing the following occurs to this Member in relation to the applicant's credibility:
>
> > 1. During the religious rioting of late November 2002, the applicant stated that his shop was burned and as a result of the rioting he and his family fled Kaduna. He travelled from Kaduna to Port Harcourt, a journey which he said took five hours on a bus and in Port Harcourt he remained for two weeks in a church and then he immediately arranged to have his wife leave Nigeria. He then subsequently followed her in February 2003. Country of origin information on file and well documented in relation to the riots of November 2002 disclose[s] that the violence in Kaduna inter-Christian and Muslims lasted some four days. During this time it is accepted that more than 20 people were killed but the government and the authorities moved quickly to restore law and order and at no time was the state complicit in the rioting by either faction and moved in concert with the military and all state bodies to quell this rioting and to restore peace. It is noted that the applicant was not particularly targeted and did not suffer any harm albeit he gave evidence that one of his neighbours was killed…
> >
> > … During the religious riots of November 2002, he was not targeted in any way and he was not hurt. He said he was caught up in the general rioting but no feature of such rioting was particular to him."

16. The alleged factual errors are the statements by the Tribunal Member that in November, 2002, "the applicant was not particularly targeted and did not suffer any harm" and later that "he was not targeted in any way". It is contended that the applicant gave evidence that his shop was burned and that this was, of itself, harm to the applicant. In his affidavit at para. 35 the applicant said:-

> "My shop was burned. This occurred because of the targeting of Christians by Muslims."

17. Counsel for the respondent correctly submits that the decision of the Tribunal Member must be viewed in its entirety and that the statements objected to must be understood in context. The applicant gave evidence referred to in the decision that he was attacked by a group of Muslims in March, 2002, and sustained injuries at that time, for which he stated he received hospital treatment. He did not give evidence of any similar personal attack on him during the riots in November, 2002. It appears to me that it is in this context that the Tribunal Member is indicating that he was not personally targeted in November, 2002. On the evidence given, it was open to her to reach this conclusion. She does not appear to have ignored the fact that, as a Christian, his shop was burned during the rioting in November, 2002. Whilst I can understand that the applicant considers that such burning amounts to targeting of him, such burning was not ignored by the Tribunal Member.

18. In such circumstances, it appears to me that the statement of principles relied upon, both in the judgment delivered by me in *Traore v. RAT* (Unreported, High Court, Finlay Geoghegan J., 14th May, 2004) and by Peart J. in *Da Silveira v. RAT* (Unreported, High Court, Peart J., 9th July, 2004) do not have application to the facts herein.

19. It does not appear to me that the applicant has established any substantial ground for contending that the decision is invalid by reason of any incorrect factual finding by the Tribunal Member.

20. The courts have repeatedly stated that the assessment of the credibility of the applicant is a matter for the relevant decision maker, who, in the scheme established by the Refugee Act 1996, is either the official of the Refugee Applications Commissioner or, on appeal, the Tribunal Member. Further, that this is often a difficult task as the story normally relates to what is alleged to have happened in the country of origin and is more often than not unsupported by any contemporaneous material. However, the assessment is required to be carried out in accordance with established legal principles including the principles of constitutional justice. On an application for leave to issue judicial review, the task of this court is only to determine whether there are substantial grounds for contending that the assessment was not carried out in accordance with established legal principles or in accordance with the principles of constitutional justice.

21. Where, as in this instance, credibility is being assessed in relation to an applicant's story of what is alleged to have happened, one of those principles is that the applicant's story should be assessed in the context of what is known from available country of origin information (See Kelly J. in *Kamara v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Kelly, J. 26th July, 2000) and my decision in *Traore v. the Refugee Appeals Tribunal and Another* (Unreported, the High Court, Finlay Geoghegan J., 14th May, 2004)).

22. In her decision, the Tribunal Member, in paras. 1 to 4 inclusive on pp. 13 to 15, assesses the credibility of the applicant's story and his alleged well founded fear of persecution by reason of his Christian religion if returned to Nigeria, in the context of country of

origin information in relation to rioting between Christian and Muslims in Kaduna in 2002, in addition to what was known of the position pertaining elsewhere in Nigeria and the geography of Nigeria. I am not satisfied that the applicant has established any substantial ground for contending that the Tribunal Member was incorrect in her legal approach to the assessment of his credibility in relation to his claim to have a well founded fear of persecution by reason of his religion, or in relation to the stories told in support of that claim or that her conclusion was based on personal conjecture or speculation.

23. At para. E of the statement of grounds it is contended that:-

> "The Tribunal Member erroneously concluded that personal targeting was a precondition or prerequisite for a fear of persecution within the terms and meaning of s. 2 of the Refugee Act 1996."

24. It is further alleged that such criteria are inappropriate and a misconstruction of the definition of refugee and the meaning of a well founded fear of persecution within the meaning of s. 2 of the Act of 1996.

25. Counsel for the applicant correctly submits that it is unnecessary to establish past persecution in order to succeed on a claim to refugee status. She relies on the following statement in Hathaway, *The Law of Refugee Status* (2nd Edition p. 87):

> "Past persecution is in no sense a condition precedent to recognition as a refugee. The convention is concerned with protection from prospective risk of persecution and does not require that an individual should already have been victimised."

26. However, counsel for the applicant has not satisfied me that there are substantial grounds for contending that the Tribunal Member, in her decision, erroneously required proof of past persecution or victimisation as a prerequisite or precondition for a finding of a well founded fear of persecution. The decision must be considered in that context of the claim made. The applicant claimed to have a well founded fear of persecution by reason of his alleged past persecution on grounds of religion. He did not adduce evidence of ongoing persecution of Christians to which he feared he might be subjected if returned to Nigeria. When one reads that part of her decision which relates to the alleged well founded fear of persecution by reason of religion in its entirety, it is clear that whilst the Tribunal Member lays emphasis on the credibility of the applicant's story insofar as it relates to the alleged past persecution, she also considered at the end of p. 14 whether there was evidence that he "suffered and/or might suffer" persecution in Port Harcourt. This indicates a forward looking test as is required. In the final paragraph of her assessment at p. 18, the Tribunal Member stated by way of summary:-

> "The applicant has not discharged the necessary burden of proof and has not submitted a well founded fear of being persecuted of a credible calibre. As no credible evidence of persecution has been given, the matter of internal relocation does not arise."

27. I accept that this last sentence may give rise to some confusion. However, the decision must be considered in its entirety and in the context of the claims made in relation to alleged fear of persecution. I have concluded that the applicant has failed to establish substantial grounds for contending that the Tribunal Member has, in her decision, erroneously required personal targeting, victimisation or persecution as a prerequisite for a finding of a well founded fear of persecution. The Tribunal Member appears to be explaining why she did not go on to consider internal relocation in the context of a claim to have a well founded fear of persecution by reason of alleged persecution on grounds of religion in Kaduna, the evidence in relation to which she did not consider credible.

Decision to reject claim as HIV sufferer

28. The separate and distinct ground upon which the applicant claimed to be entitled to a declaration of refugee status, was by reason of a well founded fear of persecution of the applicant and his wife and child as members of a particular social group i.e. persons suffering from HIV/AIDS.

29. In the statement of grounds multiple grounds are advanced on behalf of the applicant challenging this aspect of the decision. Certain of the grounds were not pursued at the hearing of the application for leave. In the context of the grounds advanced it is necessary to emphasise the limits of the jurisdiction of the Tribunal Member in hearing an appeal from the Commissioner, as was done by counsel for the respondent. Section 16(1)(a) of the Act of 1996 obliges the Tribunal to affirm a recommendation of the Commissioner unless it is satisfied that the applicant is a refugee. The Tribunal Member is, therefore, confined to considering whether or not the applicant is entitled to a declaration of refugee status. The Tribunal Member is not concerned with wider issues which may be relevant to a decision as to whether or not the applicant or the members of his family should be deported. Such matters might be whether to do so would be in breach of the prohibition against refoulement in s. 5 of the Act of 1996, or whether to do so would breach articles 3, 8 or any other provision of the European Convention on Human Rights.

30. Whilst the Tribunal member, in her decision summarises the applicant's claim under this heading and sets out her reasoning and conclusions at paragraph 6 of the matters which are expressed to occur to her in relation to the applicant's credibility, this appears to be an error in the formatting of her decision, and when read in its entirety no issue arises as to the credibility of the applicant in relation to the personal facts which ground this aspect of his claim. There may be dispute about his contentions as to the position in Nigeria for HIV/AIDS sufferers.

31. It is undisputed that the applicant only learnt that he was HIV positive after he arrived in Ireland. The same appears to be the position in relation to his wife. His daughter was born in Ireland with HIV infection which then unfortunately rapidly progressed to AIDS. Medical opinions of the treating doctors in Ireland were furnished as part of the claim and not disputed. The applicant does not base any part of his claim on a past experience of treatment as a HIV sufferer in Nigeria.

32. The claim of the applicant to be a refugee on this ground is expressed by the Tribunal Member at p. 15 of her decision in the following terms:-

> "The applicant's advisor has suggested that the applicant further fears persecution in Nigeria by reason of his membership of a particular social group and comprising persons with HIV subjected to a denial of fundamental rights, including the right to essential medical care. It is indeed unfortunate that the applicant has been diagnosed in this jurisdiction as HIV Positive. It is also noted that his wife and young baby have further been diagnosed as HIV Positive and it is suggested that the applicant has a fear of persecution also by reason of the denial to his family members of essential medical care in Nigeria."

33. The Tribunal Member assessed this claim by considering certain country of origin information in relation to attempts made or being made by Nigerian authorities to address the AIDS/HIV problem in that country. The final matter referred to at p. 17 is:-

"The Chairman of NACA also revealed a bill that is to be passed into Law in Nigeria during the year on the issues of stigmatisation and discrimination (refer to Daily Champion (Lagos) March 3rd 2005 titled NACA Reveals 2005 agenda for HIV and AIDS)."

34. The Tribunal Member then set out her conclusions:-

"It may be that the applicant is a member of a particular social group, as a sufferer from HIV. However, country of origin information as referred to discloses that the treatment of the members of that group by the State of Nigeria does not constitute persecution within the meaning of the Convention as it is clear that the State and the authorities and non-governmental organisations are trying to protect HIV sufferers from discrimination and or discriminatory practices. It is accepted that HIV sufferers are sometimes stigmatised and isolated in all jurisdictions and not just in Nigeria but it is not accepted that the State is complicit in any such actions and in fact the Government in Nigeria is pumping funds and resources into education and treatment given that it is estimated that over 5 per cent of the population suffers from HIV. The Convention is forward looking only and it notes in the aforesaid extract from the Daily Champion of March 3rd 2005 that a bill has now been initiated to remove the stigmatisation and discrimination of AIDS sufferers and to promote and protect their rights. The Member has considered the case law, as aforesaid, submitted by the applicant's advisors and overall does not find the Nigerian Government/State persecutory either by way of action and or inaction towards its population of HIV sufferers. It is concluded that the applicant would be in a position to avail of state protection afforded to HIV sufferers and treatment as afforded by the State to such sufferers if he is returned to Nigeria.

… For the reasons aforesaid it is considered the applicant would receive treatment for his condition in his county of origin and hence it is concluded that he is not a member of a particular social group as might suffer serious harm by reason of being HIV Positive in Nigeria."

35. The grounds upon which it is contended that this part of the decision is invalid may be summarised as the following:-

1. The Tribunal Member relied on country of origin information (the report in the Daily Champion (Lagos) March 3rd, 2000) which was not drawn to the attention of the applicant nor was the applicant given an opportunity to make submissions in relation thereto, in breach of s. 16(8) of the Act of 1996 and in breach of fair procedures. (Statement of grounds para. A).

2. The Tribunal Member's conclusion that the applicant "would receive treatment for his condition in his country of origin" is unreasonable and irrational in the legal sense (statement of grounds para. D(vii) and L).

3. The Tribunal Member erred in law in failing to consider the applicant's fear of persecution by reason of alleged denial to his wife and child of the right to fundamental and essential medical care (statement of grounds para. C).

4. The Tribunal Member erred in law in the manner in which she purported to assess and consider a change of circumstances in the country of origin in relation to the position of persons with HIV/AIDS. (Statement of grounds para. H).

36. I have concluded that the applicant has made out substantial grounds in accordance with the above for contending that the decision is invalid. The reasons for which I formed this view are as follows:-

1. Section 16(8) of the Act of 1996 obliges the respondent to give to the applicant "an indication in writing of the nature and source of any other information relating to the appeal which has come to the notice of the Appeal Board in the course of an appeal". The applicant contends that the country of origin information comprising the article from the Daily Champion (Lagos) of March 3rd, 2005, in relation to the statement by the chairman of NACA that a bill was to be passed into law in Nigeria during the year (2005) on the issues of stigmatisation and discrimination of HIV and AIDS sufferers, was not disclosed. Both the applicant and Mr. O'Neill, his solicitor, who was present at the hearing, have sworn affidavits stating that this was not made available at the time of the hearing nor was it drawn to their attention nor were they given any opportunity of making submissions in relation thereto. This is disputed in an affidavit of Ms. Bodkin filed on behalf of the respondent, who contends that the article was submitted at the hearing of the appeal. However, Ms. Bodkin was not present at the appeal. For the purposes of a leave application, I am satisfied that the applicant is entitled to have the court assume that he will establish at the hearing that such article was not available at the oral hearing nor brought to his attention.

The Tribunal Member has considered the information contained in the article to be of significance and relevance, such that she has relied upon it in her assessment and conclusions in relation to the applicant's claim, as appears from the extract set out above. I am satisfied, therefore, that there exists reasonable and weighty arguments that the alleged failure to bring this material to the attention of the applicant is a breach of s. 16(8) and the applicant's right to fair procedures in the context of the appeal hearing before the Tribunal.

2. As appears from the conclusions of the Tribunal Member, as set out above, these include a conclusion that the applicant "would receive treatment for his condition in his country of origin". I am satisfied that having regard to the country of origin information referred to, that the applicant has made out substantial grounds for consent, contending that such a conclusion is unreasonable or irrational in the legal sense as stated in grounds D(vii) and L of the statement of grounds.

In so concluding, I do not wish to be taken as determining that it was necessary for the Tribunal Member to reach a conclusion as to whether or not the applicant would receive treatment for his HIV condition in Nigeria as part of the assessment of his claim to have a well founded fear of persecution by reason of being a HIV sufferer. In accordance with the principles set out below, this may not be a relevant consideration. However, it is a conclusion reached by the Tribunal Member, upon which she relied in rejecting this part of the applicant's claim and hence the applicant is entitled to leave on this ground.

3. The Tribunal Member notes at p. 15 of the decision, the claim of the applicant to a fear of persecution by reason of "the denial to his family members of essential medical care in Nigeria". Notwithstanding, she does not either exclude as a matter of law the applicant's entitlement to rely on such fear as part of his claim for refugee status, or consider the position of women or children or the availability of treatment or medical care for children with AIDS in Nigeria. The country of origin information to which the Tribunal Member refers includes BBC News reports, one of which dated the 23rd

September, 2004, states:-

> "The government clinics do not have paediatric AIDS drugs yet."

As in relation to the previous ground, in allowing leave on this ground, I am not determining that the applicant, is necessarily entitled to rely upon a fear of persecution by reason of a denial of essential medical care to his family members (including his child with AIDS) in Nigeria, but having made the claim he is entitled to have the Tribunal Member consider and determine it in accordance with the relevant legal principles.

4. The applicant at para. H of the statement of grounds alleges that the Tribunal Member erred in law in the manner in which she purported to assess and consider a change of circumstances in the country of origin in relation to the position for persons with HIV/AIDS. In the submissions made both in writing and at hearing, reliance was also placed on the shared burden of proof and the delay in making the decision in relation to this ground. I am satisfied that having regard to the forward looking test, the shared burden of proof and the nature of the country of origin information available in relation to developments in Nigeria concerning the treatment of HIV/AIDS, that there are substantial grounds for contending that the Tribunal Member was under an obligation to consider the availability of updated country of origin information including the U.K. Home Office report on Nigeria available in April, 2005, and exhibited in the grounding affidavit of the applicant prior to making her decision.

Applicable Principles

37. Counsel for both parties made submissions in relation to the proper approach to the assessment of a claim to refugee status by a person suffering from HIV/AIDS based on an alleged well founded fear of persecution in his country of origin by reason of his membership of a particular social group. Reliance was placed on extracts from Hathaway, *The Law of Refugee Status* (2nd Edition) and the decision of Enfield J. in the Federal Court of Australia in *Kuthyar v. Minister for Immigration and Multicultural Affairs* (2000) FCA 110. Whilst this is only a leave application, it appears appropriate that I should set out briefly my tentative conclusions on the applicable principles as these are the context in which I have decided to grant leave. Such claims are particularly complex, and even internationally there appear to be a limited number of relevant judgments.

38. A refugee in accordance with s. 2 of the Act of 1996 means "a person who, owing to a well founded fear of being persecuted for reasons of … membership of a particular social group… is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; …"

39. The Tribunal Member accepted that the applicant, as a HIV sufferer, could be considered as a member of a "particular social group" for the purposes of the above definition. That was not disputed before me. It is also clear that part of the claim made by the applicant was that he, his wife and child would be denied the right to essential medical care if returned to Nigeria. Further, the Tribunal Member in recording the claim, made suggests that the claim included an allegation of denial of other fundamental rights to HIV sufferers, and in her assessment appears to consider an allegation of discrimination which might amount to persecution by non State agents, but does not make any finding as to whether such discrimination exists.

40. The claim recorded as made on behalf of the applicant to the Tribunal, appears broadly similar to the two part claim made by Mr. Kuthyar in the Australian proceedings referred to above, upon which significant reliance was placed both before the Tribunal and the Court. In that case, the claim made before the relevant tribunal in Australia as recorded at paragraph 74 of the judgment of Enfield J. was:-

> "The applicant's claims in relation to his medical condition have two parts: his fear that adequate medical treatment would not be available and affordable and his fear of being ostracised and discriminated against by people who learn of his condition."

41. Different legal principles may apply to the two separate parts of such a claim. The first is a fear of persecution (in the form of denial of medical treatment) by the State, and the second, a fear of persecution by non State agents, from which the State is unwilling or unable to protect the applicant.

42. Counsel for the respondent, correctly in my view, submits that a failure by a State to provide adequate medical treatment does not, of itself, amount to persecution within the meaning of section 2 of the Act of 1996 and relies on the explanation offered by Hathaway, *The Law of Refugee Status* (2nd Edition) at pp. 108 to 112, as to the level of protection required of States in relation to medical care in the context of refugee law:-

> "The dominant view, however, is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systematic denial of core human rights is the appropriate standard.
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> …
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> What rights are appropriately considered to be basic and inalienable? Within the International Bill of Rights, four distinct types of obligation exist. First in the hierarchy are those rights which were stated in the Universal Declaration, translated into immediately binding form in the ICCPR, and from which no derogation whatsoever is permitted, even in times of compelling national emergency.
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> …
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> Second are those rights enunciated in the UDHR and concretized in binding and enforceable form in the ICCPR, but from which states may derogate during a "public emergency which threatens the life of the nation and the existence of which is officially proclaimed".
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> …
>
> Third are those rights contained in the UDHR and carried forward in the International Covenant on Economic, Social and Cultural Rights. In contrast to the ICCPR, and the ICESCR does not impose absolute and immediately binding standards of attainment, but rather requires states to take steps to the maximum of their available resources to progressively realize

> rights in a non-discriminatory way. The basic values protected are the right to work… and … medical care …
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> …
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> While the standard of protection is less absolute than that which applies to the first two categories of rights, a state is in breach of its basic obligations where it either ignores these interests notwithstanding the fiscal ability to respond, or where it excludes a minority of its population from their enjoyment. Moreover, the deprivation of certain of the socio-economic rights, such as the ability to earn a living, or the entitlement to food, shelter, or health care will at an extreme level be tantamount to the deprivation of life or cruel, inhuman or degrading treatment, and hence unquestionably constitute persecution.
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> …
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> Fourth …
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> …
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> In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by international community. The types of harm to be protected against include the breach of any right within the first category, a discriminatory or non-emergency abrogation of a right within the second category, or the failure to implement a right within the third category which is either discriminatory or not grounded in the absolute lack of resources. The sections which follow examine the application of this general principle in specific contexts."

43. As appears from the above, medical care comes within the third category of rights identified by Hathaway. Further, in his summary in relation to such a right he confines persecution by the State to circumstances where there is a failure to implement the right to medical care, which is either discriminatory or not grounded in the absolute lack of resources. I accept this as a correct general statement, subject to the exceptional circumstances alluded to in the earlier passage where the deprivation of health care at an extreme level may be tantamount to deprivation of life or cruel, inhuman or degrading treatment.

44. It appears from the assessment by the Tribunal Member quoted above, that the applicant pursued before her a fear of discrimination and stigmatisation by non State agents in Nigeria similar to the second part of the claim made by Mr. Kuthyar in the Australian proceedings. It is important to note that in that case it was accepted that there existed what was termed "persecutory discrimination" against HIV sufferers in India which appears to have been by persons who were non State agents (see paragraphs 74 and 76 of the judgment). Enfield J. considered the approach of the Tribunal to both parts of Mr. Kuthyar's claim at paragraph 79 where he stated:-

> "The applicant asserted that the Tribunal ignored reports he had provided which recounted various discriminatory circumstances imposed on HIV sufferers in India. However, the Tribunal in its reasons did consider a range of independent information on HIV in India and accepted the substance of the reports. It conceded that there were few resources available but that the material did not reveal a motivation on the part of Indian authorities to harm sufferers of the disease, a situation which would have been persecution for a Convention reason. The Tribunal therefore considered that the different level of health care available in India could not be said to constitute persecution for a Convention reason. This finding was not legally erroneous but the true question here was, and is, whether the Indian authorities are in a position or are trying to protect HIV sufferers from the persecutory discrimination which it appears to be admitted does occur. It seems that the Tribunal simply failed to consider whether the applicant was reasonably unwilling to return because he could not avail himself of any such protection. In my view this omission manifests an error of law, under section 430 and section 476(1) as explained by Justice Gummow in *Eshetu* and discussed in AAA."

45. Counsel for the applicant relies upon "the true question" identified above and submits that it sets out the correct approach to the determination of this part of the applicant's claim. Whilst helpful, it must be recalled that it is identified where persecutory discrimination is admitted to exist and appears to be a particular application of the well known principles according to which a claim to be a refugee by reason of an alleged fear of persecution from non State agents should be determined. The Tribunal Member in the earlier part of her decision cites part of the speech of Lord Hope in *Horvath v. The Secretary of State for the Home Department* [2000] WLR 379 at 387 as correctly setting out the position where the persecution feared is from a non State agent. I would agree. The relevant consideration as stated by Lord Hope is whether "the State is unable or unwilling to provide protection".

46. By setting out the above principles, I am not holding that the applicant has established any of the underlying facts, which would require the application of the above principles. That is a matter for the Tribunal. I thought it desirable to do so having regard to the grounds advanced, the submissions made and my conclusion on the existence of the substantial grounds.

Conclusion

47. There will be an order granting leave to seek the reliefs sought at paragraphs 4(b),(d) (e) and (f) on the grounds set out at paragraphs 5A, C, D(vii) H and L of the statement of grounds. I will hear counsel on the necessity for an order amending the title to alter the name of the Tribunal Member.