THE HIGH COURT

JUDICIAL REVIEW

[No. 2009/641/J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996, IMMIGRATION ACT 1999, THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 AND STATUTORY INSTRUMENT 518 OF 2006 I EU DIRECTIVE 2004/83

BETWEEN

T.O.

APPLICANT

-AND-

THE REFUGEE APPEALS TRIBUNAL (SUSAN NOLAN) AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 10th day of May2013

1. This is a 'telescoped' application for leave to seek judicial review in respect of a decision of the Refugee Appeals Tribunal (the "Tribunal") dated 3rd March 2009 refusing the applicant refugee status. The applicant is seeking, *inter alia*, an order of certiorari quashing the decision, an order of mandamus directing that the matter be remitted to the Tribunal for full reconsideration and a declaration that the decision of the Tribunal was *ultra vires* and without efficacy.

Background:
2. The applicant is a Nigerian national who was living with her family in Lagos prior to her arrival in the State. She claims that on 26th December 2006, while she was out at the market, there was an oil pipeline explosion in the area in which she was living. On her return, she found that her house had been burned to the ground and her husband and children were missing. She did not know if they were dead or alive and after spending some time looking for them, she tried to report their disappearance. On that same night she claims she resorted to staying on a street corner and it was whilst staying there that she was attacked, beaten and raped by three men.

3. The applicant claims that rather than this being an opportunistic attack, her attackers were associates of her husband and that the attack was carried out because of his actions. She claims that these men made threats against her life and that of her family. While she states that she was unaware of her husband's activities, she knew that he was part of a gang which she suspected had political affiliations. She claimed that the men who attacked her were members of the OPC (Oodua Peoples Congress). As such, she initially claimed that her fear of persecution is by reason of an imputed political opinion. Further, she claims that she will be denied state protection owing to her membership of a particular social group, namely her status as a woman in Nigeria.

4. Following her attack, the applicant states that she fled to her local church where she sought the assistance of her Pastor who allowed her stay there for two months. The applicant did not tell the Pastor of her ordeal, nor did she ask him to take her to the hospital because she was ashamed of her situation. She didn't report the rape to the police as she believed that they would not do anything to help her and would simply tell her it was her own problem.

Tribunal Decision:
5. The decision of the Tribunal Member rejecting the application for refugee status is based on, *inter alia*, analysis that the applicant could have availed of state protection in Nigeria and further that there is no Convention nexus to the applicant's claim as she does not come within the category of 'membership of a social group' as a woman in Nigeria who would be denied protection.

Submissions:
6. Counsel for the applicant notes, in the first instance, that the Tribunal decision contains no adverse credibility findings in respect of the applicant's account of her past experiences in Nigeria. Nor is the applicant challenging the finding of the Tribunal in respect of a fear arising on the basis of an imputed political opinion. Rather, the applicant contends that the Tribunal Member erred in basing her recommendation to refuse refugee status on three flawed findings. Counsel submits that the Tribunal Member erred in deciding:

> i. That the applicant failed to seek State protection in Nigeria;
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> ii. That state protection would have been available to the applicant and she did not avail of it and I or provide a reasonable explanation for failing to do so; and
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> iii. That the applicant does not come within the category of membership of a social group as a woman who would be denied protection and that there is no Convention nexus to her claim.

7. It is clear that in the assessment of the above findings of the Tribunal some issues may overlap to a degree, however I propose to examine each in turn insofar as discreet points were argued on behalf of the applicant and by the respondent in this case.

Failure of the applicant to seek State protection:
8. In respect of the first imputed error of the Tribunal which was urged upon the court, counsel for the applicant states that the Tribunal Member has acted in breach of Reg. 5(1)(a), (b) and (c) of the EC (Eligibility for Protection) Regulations 2006 (the "2006 Regulations"). In this regard the applicant contends that the Tribunal Member has failed to properly or adequately assess the country conditions in Nigeria using country of origin information in respect of the availability of state protection for women and I or women who have been subjected to rape. The 2006 Regulations include the obligation for a decision maker to examine: (a) the laws and

regulations of the country of origin and the manner in which they are applied; (b) the relevant statements and documentation supplied by the applicant; and (c) the individual position and personal circumstances of the applicant.

9. The applicant also contends that the Tribunal member applied an incorrect burden or test in finding that the reasons provided by the applicant for her failure to seek state protection were not "...sufficient to discharge the onus which is on an Applicant to seek the protection of his or her own state before claiming refugee status" and that such a finding was itself unreasonable in light of the country of origin information provided. Further, the applicant claims that the Tribunal did not adequately assess the explanation given for her failure to seek state protection or whether state protection, even if sought by the applicant, could reasonably be expected to be forthcoming.

10. At hearing and in her submissions, counsel for the applicant directed the court to various extracts from the country of origin information (in particular a report of Amnesty International) in respect of the position of women who had been subjected to rape and the inadequacy of the approach of the Nigerian government in enforcing the law in this area. A summary of the country of origin information led the applicant to assert that there is no effective system in place to detect and prosecute allegations of rape in Nigeria. As such, the applicant submitted that the Tribunal Member's finding was unreasonable in light of the overall content of such information.

11. To the contrary, the respondent submitted that the Tribunal did take into account the relevant country of origin information and clearly noted the fact that rape is recognised as a crime in Nigeria and that it is punishable by life imprisonment under the Criminal Code in operation there. Further, counsel highlighted that the Tribunal Member accepted that there could be problems with the Nigerian Police Force, in particular with regard to corruption and also that some women were reluctant to report crimes such as rape due to the fear of stigma. However, the respondent submitted that the Tribunal Member applied the correct legal test in making her assessment in this case, namely that a State is not expected to provide absolute protection to its citizens. Rather, a practical standard is applied which takes account of the duties which a state owes to its citizens without extending those duties to the extent of expecting a state to provide complete protection for everyone. In this regard the respondent made reference to the case of *Horvath v. Secretary of State for the Home Department* [2000] 3 AER 577.

12. In the view of the court, the Tribunal Member has properly carried out her function in deliberating on the failure of the applicant to seek state protection in her home country. In the first instance the Tribunal sets out the general principle that where an applicant fears persecution at the hands of non-state actors there is a basic requirement to seek the protection of the home state before applying for the protection of another. In other words, where the presumption of state protection applies, as in this case, an applicant who fails to seek out such protection will be required to give a reasonable explanation for such failure. Clearly the presumption of state protection may be rebutted, *inter alia*, by reference to country of origin information and the applicant's own evidence, however it is clear that the absence of a reasonable explanation for the failure to seek protection can go towards an applicant's credibility and in that respect an onus is placed on an applicant. It is evident in this case that the Tribunal Member did not accept that the reasons given by the applicant for the failure to seek state protection constituted a reasonable explanation.

13. The dicta of La Forest J. in *Ward v. Attorney General* [1993] 2 S.C.R 689 is applicable in this regard:

> "The claimant must provide clear and convincing confirmation of a state's inability to protect absent an admission by the national's state of its inability to protect that national. Except in situations of complete breakdown of the state apparatus, it should be assumed that the state is capable of protecting a claimant. This presumption, while it increases the burden on the claimant, does not render illusory Canada's provision of a haven for refugees. It reinforces the underlying rationale of international protection as a surrogate, coming into play where no alternative remains to the claimant."

14. This approach was approved by Herbert J. in *Kvaratskhelia v. Refugee Appeals Tribunal* [2006] IEHC 132 who remarked:

> "...it would in my judgment be contrary to reason to require a requested state to approach every application for refugee status from the premise that the state of origin is or may be unable or unwilling to provide protection from persecution to the claimant. I agree with La Forest J., that subject to such exceptional cases, the fact that the power of the state to provide protection to its nationals is a fundamental feature of sovereignty and, the fact that the protection afforded by refugee status is "a surrogate coming into play where no alternative remains to the claimant", renders it both rational and just for a requested state to presume, unless the contrary is demonstrated by "clear and convincing proof', on the part of the Applicant for refugee status, that the state of origin is able and willing to provide protection to the Applicant from persecution, even if at a lesser level than the requested state."

15. The Tribunal Member then proceeded to address the relevant country of origin information as required under the 2006 Regulations in her assessment of the facts and circumstances of the claim and with regard to the consideration as to whether state protection would have been forthcoming. The Tribunal Member refers specifically to the Amnesty International report provided and to the Nigerian Criminal Code and specifically notes that rape is a crime in Nigeria. However, having assessed all of the evidence and while accepting that there can be problems within the Nigerian Police Force she makes the finding that state protection would have been available to the applicant. I find no legal fault with this finding of the Tribunal. It is clear that in making the finding the Tribunal Member took cognisance of the dicta of Lord Hope in *Horvath v. Secretary of State for the Home Department* [2000] 3 WLR 379 to the effect that:

> "The primary duty to provide the protection lies with the home state. It is its duty to establish and to operate a system of protection against the persecution of its own nationals. If that system is lacking the protection of the international community is available as a substitute. But the application of the surrogacy principle rests upon the assumption that, just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected of the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard, which takes proper account of the duty which the state owes to all its own nationals...under reference to Professor Hathaway's observation in his book, at p. 105, it is axiomatic that we live in an imperfect world. Certain levels of ill-treatment may still occur even if steps to prevent this are taken by the state to which we look for our protection."

State protection would have been available to the applicant and she did not avail of it and I or provide a reasonable explanation for failing to do so:

16. In challenging this finding, the applicant submitted that the Tribunal Member failed to have any or any adequate regard to the country conditions in Nigeria concerning state protection (as referred to above) for persons in the social group of the applicant, being

a woman in Nigeria and I or a woman who is a victim of rape. The applicant claimed that the Tribunal Member made a flawed assessment of the country of origin information supplied in respect of state protection and failed to consider all such information in a balanced and fair manner.

17. The applicant also submitted that the Tribunal failed to have regard to the provisions of Reg. 2(1) of the 2006 Regulations in assessing the matter of state protection. In this regard the applicant contends that the Tribunal Member, in reaching a decision on state protection by reference to the country of origin information, is obliged to take into account the definition of "protection against persecution or serious harm" provided for in Reg. 2(1). Reg. 2(1) regards this as constituting reasonable steps taken to ensure protection from persecution or serious harm through the operation of an effective legal system for the detention, prosecution and punishment of acts, which is accessible to an applicant. As such, and taking into account the country of origin information referred to by counsel, it is contended that state protection would not have been available to the applicant in this instance. In this respect, the applicant submits that where it is objectively unreasonable for the applicant to have sought state protection, her failure to do so is not relevant.

18. With regard to the finding of the Tribunal Member to the effect (or in the alternative) that the applicant did not provide a reasonable explanation for failing to seek state protection, counsel submitted that the applicant did in fact give adequate reasons. In particular, counsel noted that the applicant stated that she failed to seek state protection on the basis that: i) the police would do nothing about it and I or say it was her own problem; ii) the police would seek a bribe before pursuing any investigation; and iii) the shame and stigma attached to being a rape victim in Nigeria. Not only does the applicant claim that these reasons provided are adequate in the circumstances, she also claims that the veracity of same is borne out by reference to the country of origin information submitted.

19. In response to this, the respondent claims that in asserting that the Tribunal Member erred in finding that state protection is available, the applicant does not actually identify a legal error. Also, in respect of the applicant's claim that the Tribunal did not consider relevant country of origin information, the respondent points to the fact that the applicant does not identify the relevant country of origin information involved. The respondent also refers to the assertion by the Tribunal Member that all such information was considered and submits that there is no evidence that such statement was made in bad faith or that anything was overlooked.

20. Further, the respondent states that in reality the greater part of the analysis of the applicant's claim by the Tribunal Member relates to the issue of whether the applicant's fear had a Convention nexus. As such, the respondent was of the view that the applicant's claim that the Tribunal Member did not take account of her membership of a social group as a woman and I or a woman who suffered rape, in making her finding on state protection is not borne out. In respect of the applicant's claim that she did not seek state protection out of shame, the respondent states that the Tribunal assessed the matter on the basis that while this may well have been the applicant's subjective feeling on the matter, it was insufficient to objectively prove a lack of state protection.

21. I find no fault with the assessment carried out by the Tribunal in respect of this ground of challenge either. As examined above, it is clear to the court that the Tribunal Member did have adequate regard for the country of origin information proffered by the applicant and made a reasonable finding that state protection was available to the applicant (or a person in her position) and that she failed to seek it and I or provide a reasonable explanation for so doing. It is evident that it was not objectively unreasonable to expect the applicant to seek state protection. It is clear that the Tribunal Member did take into account the definition provided in Reg. 2(1) in making her assessment of country of origin information in this regard and in fact quotes the relevant provision in her decision. Further, the Tribunal Member clearly considers the explanations proffered as to why the applicant did not seek state protection in this instance and finds them to be unreasonable in the circumstances. I also accept the respondent's submission that while shame may subjectively be a reason why a person doesn't seek state protection it is insufficient to objectively prove a lack of state protection

The applicant does not come within the category of membership of a social group and there is no Convention nexus to her claim.

22. The applicant submits that the Tribunal Member failed to consider properly, or at all, that the applicant may be denied state protection for a Convention reason on the basis of her membership of a social group as a woman and I or as a woman who is a rape victim (notwithstanding that the attack suffered by the applicant may be considered private harm). In this regard the applicant submits that the Tribunal Member had already decided that state protection was available to the applicant before she went on to decide that that there was no Convention nexus to her claim and that the applicant did not come within the category of membership of a particular social group as a woman in Nigeria who would be denied protection. In taking this approach, counsel for the applicant contended that if the Tribunal Member erroneously concluded that state protection was available, she could not have properly turned her mind to the issue of whether state protection would be denied for a Convention reason giving rise to a Convention nexus. Further, the applicant submitted that it is not clear from the Tribunal decision as to whether the Tribunal Member addressed and determined, or was alive to, the question of whether a Convention nexus arose because of the denial of state protection for a Convention reason.

23. The respondent is of the view that the Tribunal Member considered the nature of the applicant's claim, namely that she feared she would be killed by the men who raped her, and rejected it. In the respondent's submissions this was a sufficient finding to dispose of the overall appeal and that it was not strictly necessary for the Tribunal to examine the applicant's claim that she was a member of a social group by virtue of being a woman in Nigeria who was raped. However, in proceeding to examine such claim, the respondent submits that by seeking to define a social group by reference to those women who would be denied state protection the applicant is engaging in a type of circular reasoning disapproved of by the courts (in *Lelimo v. Minister for Justice* (Unreported, High Court, O'Sullivan J., November 12th 2003) wherein it was held that while persecution may serve to identify a particular social group, it does not define it.

24. The respondent also distinguishes the case at hand from that of *R. v. Immigration Appeals Tribunal ex parte Shah* [1999] 2 A.C. 629 as in that case detailed evidence was adduced to the effect that all women in Pakistan formed a particular social group due to the endemic societal discrimination in that society, whereas no such evidence was adduced here. The respondent accepts that women are in a more vulnerable position than men in Nigeria but contends that there is no evidence that the attack on the applicant or that rape or domestic violence in Nigeria in general is perpetrated so as to persecute women, or a category of women. As such, the respondent contends that the applicant's claim relates to a random sexual attack and that the Tribunal Member was satisfied state protection was available to the applicant in this instance.

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.

26. Taking into account all of the foregoing, I refuse the applicant leave to seek judicial review.