Neutral Citation Number: [2010] IEHC 135

THE HIGH COURT

2008 323 JR

BETWEEN

E. E.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL AND THE MINISTER

FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered on the 24th day of March, 2010.

1. In this case, the circumstances out of which the applicant's claim for asylum arises are not in dispute. She was trafficked to Ireland as a 16-year old girl by a woman she calls "Christy" or "Christina", who, she says, was known to her parents in Benin in Nigeria. Shortly after her arrival here in late 2006, she was found by the gardaí in a house in Sligo which the gardaí suspected was being used as a brothel. She was placed in a hostel in Dublin by the HSE. While there, an incident occurred in which a number of women called to see her and told her that the woman, Christina, wished to speak with her. According to a social worker, the applicant has since, on a number of occasions, gone missing and is thought to have been forced into work as a prostitute. She has, since her arrival here, been diagnosed as suffering from HIV/AIDS.

2. The Refugee Appeals Tribunal decision of the 22nd January which is sought to be quashed, if leave is granted, affirms the negative recommendation of the Refugee Applications Commissioner, broadly for three reasons. The main reason is that in the Tribunal member's judgment the applicant is not at risk of persecution or harm if returned to Nigeria on the basis she claims to fear namely, that she would be traced and retaliated against by Christina, the woman who trafficked her to Ireland and who will want, as it were, to recoup her wasted investment in the applicant. Relying on country of origin information, the Tribunal member considered that women returning to Nigeria, after having been trafficked for prostitution abroad, are not at risk of reprisals by the trafficker or, of facing problems of ostracisation in the community for having worked abroad as a prostitute. Secondly, and again based on country of origin information, the Tribunal member considers that, even if such a risk from the woman existed, protection from any threats of reprisal would be available to the applicant from appropriate authorities. Thirdly, and once more based on country of origin information, the Tribunal member deals with a claim which did not feature in the section 13 report or arise from the notice of appeal but which appears to have been raised, for the first time, at the appeal hearing, namely the risk to the applicant on return of persecution or harm in the form of severe stigmatisation and discrimination, including denial of medical treatment, for her condition of HIV/AIDS.

3. The central thrust of the grounds advanced as to the illegality of the appeal decision is directed at a common element, namely that the findings in question are vitiated in each instance by a selective or partial reliance on country of origin information, in that, in particular, the decision cites only material supportive of the negative recommendation and not merely ignores but, as counsel put it, "excises from the consulted documentation" passages which conflict with that material. Furthermore, it is alleged that the decision is defective in giving no rational explanation for this selective choice in the information relied upon.

4. This is an application for leave and the Court is concerned only to assess whether the grounds to be advanced to this effect are "substantial" in the sense of section 5 of the Illegal Immigrants (Trafficking) Act 2000. In that regard, the approach of the Court to the reliance placed by the Tribunal on such information is clear. It is for the Tribunal member to weigh and assess relevant information drawn from country of origin documentation and to decide what value or weight should be accorded to various parts of it, having regard to its relevance, the authoritative quality of its source, its apparent reliability and so forth. As with issues of credibility, the Court cannot substitute its own assessment of that information. It is concerned only with the legality and rational character of the process by which the conclusions or findings have been reached in the analysis which the Tribunal member has employed. As illustrated by the cases which have been cited to the Court in argument, (the Simo case, the H.O. case, the M.I.A. case,) the Court should intervene to disturb a decision based upon an assessment of country of origin information only where it is shown that some fundamental mistake has occurred in the use or interpretation of the available information or where the conclusion reached is manifestly at variance with the content and obvious effect of the documentation. In the present case, it is convenient to deal with the three issues or facets of the decision mentioned above in reverse order.

5. First, the risk of discrimination amounting to persecution as a HIV sufferer. As mentioned, the basis for this claim to refugee status appears to have arisen only at the hearing. The applicant was diagnosed with the condition subsequent to the making of the asylum claim. It was not examined in the section 13 report and is not mentioned in the notice of appeal. Nor is it referred to in the solicitor's brief notes of the appeal hearing, although a document entitled "Nigeria: Treatment of Persons with HIV/Aids by Society", published by the Immigration and Refugee Board of Canada, is listed amongst the documents submitted at the hearing. It is impossible, therefore, to know on what precise basis the claim arising from the HIV/AIDS condition has been made, other than what can be gleaned from the short passage in the decision itself. That is as follows:

> *While [those] with HIV/AIDS can suffer discrimination in Nigeria, from a consideration of the country of origin on file (sic)this discrimination would not appear to be so systematic as to amount to persecution. In 2006 the government reportedly introduced free antenatal care for all pregnant women who are HIV positive. In the same year the Nigerian government introduced free ARV treatment for persons living with HIV/AIDS. It is estimated that ARV treatment is available at more than a hundred centres in Nigeria, although most people living in rural areas of Nigeria may not have access to those centres. The applicant lived in Benin City, and there is nothing to suggest that she would be unable to receive medical treatment were she returned to Nigeria. According to the applicant, her mother has access to a hospital. Further, there is no evidence that the applicant would be treated any differently than any other person with HIV in Nigeria."*

6. Insofar as the country of origin information before the Tribunal member consisted of that Canadian report, the Court considers that no substantial ground is made out to the effect that this passage is, in any sense, selective, partial or unfair in distorting or misrepresenting the information. The determination of this issue, as quoted above, makes a number of points. The country of origin information on file shows HIV sufferers can suffer discrimination but it is not systematic and therefore not persecution. The Nigerian government has introduced measures for HIV/AIDS sufferers. ARV treatment is available, although not in rural areas, but the applicant is from Benin City; and there is no evidence that the applicant would be treated differently as a HIV sufferer.

7. All of that is in fact based upon the contents of the Canadian report. The material parts of the report comprise eight paragraphs under the headings "Treatment of persons living with HIV/AIDS" and "Medical health services available", and these are comprised of summaries of comments by various organisations in a variety of reports, studies and other publications. It is true that, in addition to the parts quoted by the Tribunal member, the quotations do testify to there being a stigma being attached to the HIV condition in Nigeria; that there can be discrimination against sufferers, giving rise to problems in health care services; that many Nigerians cannot afford to pay for ARV drugs, which are extremely expensive. These are, however, aspects of the general situation in this regard in Nigeria, of which the Tribunal member was obviously aware because she has clearly read that report in order to quote from it and acknowledges the confirmation in it of the prevalence of discrimination. However, the report as a whole testifies to the fact that while there is indeed a stigma giving rise to some, even to widespread discrimination, it is not systematic in the sense of being part of the official approach to health care services, so much as the result of unenlightened prejudice or unethical behaviour by health care workers and others in authority in such services.

8. There is, in the Court's judgment, no distortion or disregard of the report such as renders unsustainable the Tribunal member's view that the applicant would be in no worse position as a HIV sufferer than other Nigerians in her situation by virtue of the fact that she would be returning from abroad. The fact that the standard of treatment and its availability may be less than she has available to her and has received here is not directly relevant to the issue as to whether her return in this condition amounts to persecution.

9. Secondly, State protection. The finding in this regard is effectively incidental and forms part of the assessment of the applicant's likely reception as a returning victim of trafficking. It must be borne in mind that the essential case before the Tribunal member was the claim that the applicant had good reason to fear retaliation by Christina here, since she escaped from the brothel in Sligo and thus every reason to fear that she might also be traced and harmed by her in Nigeria. The Tribunal member says, "There is evidence that the state would be willing and able to protect the applicant were she to return to Nigeria and the applicant's fear of Christina would not appear to be well founded".

10. This conclusion is effectively based on the information set out and quoted on pages 16, 17 and 18 of the Contested Decision, drawn from various documents and reports which show that trafficking for forced labour and sexual exploitation is indeed a major problem in Nigeria but that the Nigerian government has been making strenuous efforts by legislation and the establishment of various agencies to address the problem, to conduct investigations, to bring prosecutions against traffickers and to provide reception centres, shelters and assistance for victims.

11. Again, in Ground 3 of the statement of grounds, this appraisal by the tribunal member is sought to be challenged by citing other extracts from the documents and reports submitted in order to show that this is still a serious problem in Nigeria; that minimum standards are not complied with by the authorities, in spite of significant efforts being made; that there is serious trafficking-related corruption and that some officials condone trafficking and even collaborate in it.

12. Contrary to the submission made, the Court is satisfied that there is no substantial ground raised to the effect that the three pages of summary of country of origin information on this particular subject in the section 5 "Analysis of the Applicant's Claim" in the decision amounts, in effect, to a partial manipulation of the information. The information does indeed show that there is a serious problem and that there is corruption, and in that sense it can be said that full protection cannot be predicted to be generally available in all cases and in all places. Nevertheless, the Tribunal member was clearly making a rational assessment when concluding that on balance and in all likelihood, if this woman, returning now as a woman who was duped when she was 16 years old, were to be again approached and threatened in Nigeria, she would be able, if necessary with the assistance of support organisations, to obtain protection from the authorities against the sort of reprisal she claims to fear from the woman, Christina.

13. There remains also the issue raised as regards the Tribunal member's assessment that "country of origin information would suggest the applicant was unlikely to face difficulties because of having been trafficked if returned to Nigeria". Again, the case advanced is that the country of origin information was in the opposite sense and that Ground 2 of the Statement of Grounds gives extracts to demonstrate that agents of traffickers have strong networks and have been known to trace and kill women who have escaped before they have paid off what they are considered to owe to the trafficker. While it is true that statements to these effects can be found in the documentation, it must be said that, as a whole, they do not amount to compelling evidence of widespread or even efficient retaliation within Nigeria by traffickers who have been thwarted in Europe by their victims. Commentators are quoted as expressing concern about reprisals, and an example of one reprisal is given but of a sister residing in Italy who was killed.

14. What is of primary concern in assessing the validity of the Tribunal member's appraisal is the actual position in the present case. Here, the applicant claims to have been trafficked by the woman Christina who is known to her parents in Benin. The applicant was 16 and she was enticed by the promise of work in a shop abroad and the prospect of being able to send money back to her family, to leave voluntarily from Nigeria. She was undoubtedly duped and trafficked, yet she had not been persecuted in the sense of being kidnapped or mistreated in Nigeria. Her mistreatment commenced here. Indeed, the implication of the report of the social worker is that, even after her removal from Sligo, she continued to be at an actual risk from the trafficker here. As mentioned, the Tribunal member's conclusion, following the three pages of review of country of origin information is:

> *"The applicant's mother was unaware of Christy's intentions when the applicant was taken to Ireland and it is not unreasonable to suggest that the applicant would also have the support of her mother were she to return to Nigeria seeking assistance from the authorities. There is evidence that the state would be able to protect the applicant were she to return to Nigeria, and the applicant's fear of Christy would not appear to be well founded."*

15. In the judgment of the Court, that is not a conclusion with which the Court could interfere upon the ground that it is based upon a selective reliance upon country of origin information. Again, it is true that the information shows trafficking is a major problem and that it can be aggravated by official connivance and corruption, but it also undoubtedly shows that laws, agencies, resources and channels of assistance exist in an attempt to deal with the problem. That being so, it was not irrational or unreasonable for the Tribunal member to conclude that, if this woman returns to Nigeria, the risk of her being pursued by Christina by way of reprisal or of being re-trafficked is minimal and not such as constitutes the basis for a claim to be a refugee.

16. In the applicant's written submissions in this case, emphasis is placed upon the fact that the UNHCR guidelines identify three

possible bases for a claim to persecution in circumstances of trafficking and that the Tribunal member in this case should have enquired into each of them. The first is that the very return to the country of origin may be so traumatic for the victim as to amount, in itself, to persecution. The second and third are already identified above, namely that there may be retaliation by the trafficker over money and the possibility that the victim would be re-trafficked. It is true that both the Commissioner and the Tribunal have a duty to make sure that an applicant's situation and circumstances are fully assessed from the point of view of a refugee status, including, in some circumstances, an obligation to consider whether facts which happen to come to light may give rise to a basis for a claim of which the applicant had been unaware. However, the primary function and duty is to assess the claim as made and that is particularly so when the asylum seeker has the assistance of experienced legal representatives.

17. In this case, the circumstances were clear and undisputed and the claim made was specific, namely that the applicant was duped into leaving Nigeria voluntarily and her mistreatment and abuse commenced in this country. The claim was that she feared a named individual in this country and that this trafficker might pursue her in Nigeria if she returned. The fact that the guidelines alert decision makers to the possibility that some victims may be traumatised by return to the place in which they had first been trafficked or mistreated does not prove or create a presumption that all victims have the same fear or face the same risk. In the particular circumstances of this applicant, there was no factor which required the Tribunal member to consider that possibility and no such case was actually made. Apart from the fact that the applicant was duped at the age of 16, she was not otherwise persecuted or harmed in Nigeria by the woman, Christina. Given that she would return home to her mother and is now no longer a minor, there was clearly good reason to consider that it was highly unlikely that she would be trafficked again.

18. For all these reasons, the Court is satisfied that no substantial ground is raised to the effect that the reliance on country of origin information in this case was so defective as to be unlawful. It is, in the Court’s judgment, a mistake always to approach country of origin information as a court might approach testimony advanced to prove or disprove particular facts such that where a conflict arises as between the testimony of two witnesses, the Court is required to resolve that conflict. This can undoubtedly arise in asylum cases as, for example, where it is necessary to decide whether ethnic conflict exists in a particular place or whether, as a matter of fact, Muslims are attacking Christians or vice versa in a given region. But the country of origin information employed in the present case is of different character. The documents consulted on these issues are compilations of observations, commentaries, extracts from reports, articles and other publications, drawn from a wide variety of sources with differing levels of authority and often originally written for a particular purpose. The task of the Tribunal member, like the Commissioner’s authorised officer, is not to decide which source is the most reliable or the most likely to be truthful in order to arrive at a finding which resolves a dispute of fact. All of the reports, comments and assertions may well be valid, although some may have been recorded in order to emphasise a specific proposition because the organisation in question is involved in combating a particular problem or mischief or is advocating a particular cause, such as human rights abuses, torture, women’s rights, starvation, and the spread of disease and so on. The task of the decision maker is to weigh such information with a view to reaching, so far as possible, an informed view as to the state of relevant conditions in the country of origin which the asylum seeker will face upon return. The fact that one source emphasises, for example, that a killing has happened does not necessarily disprove another which says that police are making progress in combating killings. The fact that one source stresses discrimination by some health care providers does not necessarily disprove other information to the effect that particular treatments are being made available or are at least available in certain areas or in certain circumstances.

19. The Court is satisfied that this is the type of assessment which the Tribunal member was required to make and has made in this case. It is possibly true that a decision in a completely opposite sense could well be written from the country of origin documentation in this case, using only passages such as those highlighted in the Statement of Grounds, but to argue that this necessarily renders the decision unlawful is in effect to urge the Court to construe the information differently and to reach a different conclusion. That, however, is exactly what the Court must not do, namely to reassess the documentation and substitute its own view for that of the administrative decision maker.

20. The Court is, accordingly, satisfied that in this case the Tribunal member has looked at the information as a whole and this is so, not just because the decision says so, but because of the way in which she has cited it extensively at pages 16 to 18 in relation to the treatment of returning victims of trafficking in Nigeria. The fact that only some parts are quoted does not demonstrate that contrary proofs, as such, have been ignored or disregarded. The Tribunal member has made a judgment as to the likely state of relevant conditions in Nigeria which the applicant may face upon return. That is the function of the Tribunal member and the Court is satisfied that no sustainable case has been made out that the process in this instance was flawed in a way which renders the conclusion unlawful. Leave will therefore be refused.