

THE HIGH COURT
JUDICIAL REVIEW

[2010 No. 40 J.R.]

BETWEEN**M. C. A.****APPLICANT****AND****REFUGEE APPEALS TRIBUNAL AND MINISTER FOR JUSTICE AND EQUALITY****DEFENDANTS****JUDGMENT of Mr. Justice Anthony Barr delivered the 1st day of October, 2014****1. Background**

1. The applicant is a Nigerian national, who was born on 10th January, 1977. He is a homosexual. He claims that he suffered persecution in Nigeria because of his sexuality and he fears further persecution if he is returned to that country.

2. The applicant claims that in December 2004 he attended a wake. At the wake, he went with a friend in a van and was having sex when they were discovered by the night security guard. They were brought out of the van and were beaten. The assailants left the applicant for dead and ran away. The applicant had some bruises as a result of the assault. After this incident, the applicant left Onitsha and went to Lagos in January 2005. He obtained a job in a pharmacy as a sales assistant.

3. In August 2005, he started a relationship with a man called U.A. U. was born in 1982. He told the applicant to be careful because he did not want his father to know about the relationship. The applicant rented a room in Lagos and his partner visited him. They also went to his friend's house.

4. In December 2006, the applicant claims that he sent Christmas gifts to his partner, to his parents' home. The partner was living with his parents. He claims that on that night his partner came with his father and three men to his residence. He told them about the relationship. They returned the gifts and threatened him not to see his son again. The men had an axe and a gun. They also threatened to report him to the police. They did not hit him on that occasion.

5. The applicant claims that this did not stop him. They exchanged letters through a friend and carried on with his relationship. The applicant states that in January 2007, close to his house, he saw some people shouting "*here's him your homo misleading our brother, our friend*" and started beating him. This was a serious assault and the plaintiff was taken to hospital on 12th January, 2007. The applicant states that he was unconscious for two days and was hospitalised for a total of twelve days. The applicant states that during his stay in hospital, he was introduced by his friends to a man, who was also a homosexual. This man apparently provided money to pay some of the hospital expenses. On the discharge from hospital, the applicant went to live with this man. Subsequently, the man gave him some money so as to enable him to flee from the country with an agent who was going to take him to Ireland.

6. The applicant states that he travelled by air first to London and then to Belfast. He then proceeded to travel to Dublin. On arrival, he applied for asylum by means of an application made on 2nd April, 2007.

7. Having completed the usual ASYI Form, he attended for interview at the Office of the Refugee Applications Commissioner on 18th April, 2007. A report pursuant to s. 13(1) of the Refugee Act 1996, as amended, was completed by the Office of the Refugee Applications Commissioner in which it recommended that the applicant be refused refugee status. The report was sent to the applicant by letter dated 25th April, 2007. The applicant appealed the said recommendation and a Notice of Appeal was filed on his behalf by his solicitor on 3rd May, 2007. He attended with the Tribunal for his appeal hearing on 18th July, 2007. The applicant's solicitor submitted country of origin information and a previous Tribunal decision at the appeal hearing. The Tribunal issued a decision, which was later vacated. The applicant attended at the Tribunal for a further hearing on 5th August, 2009. His solicitor submitted further country of origin information which will be dealt with later in this judgment. By letter dated 8th December, 2009, the Tribunal issued its decision in respect of the applicant's case in which it refused his appeal. The applicant commenced these proceedings seeking an order of *certiorari* in respect of the RAT decision, by Notice of Motion dated 19th January, 2010. While the proceedings were filed outside the fourteen day statutory time limit, the respondents did not oppose the applicant's application for an extension of time within which to bring the within proceedings. Accordingly, I hereby extend the time for bringing these proceedings up to and including 19th January, 2010, being the date on which the notice of motion issued.

2. The test for persecution on grounds of sexual orientation

8. The applicant's case is that he suffered persecution in Nigeria on account of his sexual orientation. He further states that he has a fear that he will suffer further persecution if he is sent back to Nigeria. In the circumstances, it is necessary to set out the test which ought to be applied by the Tribunal when dealing with cases of this type.

9. In *EPA v. Refugee Appeals Tribunal* [2013] IEHC 85, Mac Eochaidh J. set out the tests in the following terms:-

"11. The applicant claims that the Tribunal is not entitled to say, as it appears to be suggesting in the passage quoted, that a gay man can avoid problems by living discreetly. The applicant refers to the decision of the Supreme Court of England and Wales in HJ & HT v. Secretary of State for the Home Department [2010] UKSC 31. That case raised the question as to the test which is to be applied when a decision maker is considering whether a gay person who is claiming asylum is entitled to protection. Following a lengthy review of the law, Lord Rodger came to the following conclusions:-

The Approach to be followed by Tribunals

82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

- i. If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.
- ii. If so, the Tribunal must go on to consider what the individual applicant would do if he were returned to that country.
- iii. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well founded fear of persecution - even if he could avoid the risk by living 'discreetly'.
- iv. If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so.
- v. If the tribunal concludes that the applicant would chose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g. not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.
- vi. If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect- his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him. "

10. The UNCHR has issued guidelines on Refugee Status based on Sexual Orientation and/or Gender Identity guidelines on International Protection No. 9, 23rd October, 2012, it includes the following guidance:-

"31. That an applicant may be able to avoid persecution by concealing or by being 'discreet' about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. As affirmed by numerous decisions in multiple jurisdictions, a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution. LGBTI people are as much entitled to freedom of expression and association as others.

32. With this general principle in mind, the question thus to be considered is what predicament the applicant would face if he or she were returned to the country of origin. This requires a fact-specific examination of what may happen if the applicant returns to the country of nationality or habitual residence and whether this amounts to persecution. The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences. It is important to note that even if applicants may so far have managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetime. The risk of discovery may also not necessarily be confined to their own conduct. There is almost always the possibility of discovery against the person's will, for example, by accident, rumours or growing suspicion. It is also important to recognize that even if LGBTI individuals conceal their sexual orientation or gender identity they may still be at risk of exposure and related harm for not following expected social norms (for example, getting married and having children). The absence of certain expected activities and behaviour identifies a difference between them and other people and may place them at risk of harm.

33. Being compelled to conceal one's sexual orientation and/or gender identity may also result in significant psychological and other harms. Discriminatory and disapproving attitudes, norms and values may have a serious effect on the mental and physical health of LGBTI individuals and could in particular cases lead to an intolerable predicament amounting to persecution. Feelings of self-denial, anguish, shame, isolation and even self-hatred which may accrue in response to an inability to be open about one's sexuality or gender identity are factors to consider, including over the long-term. "

11. The guidelines also had the following to say in relation to laws criminalising same-sex relations:-

"26. Many lesbian, gay or bisexual applicants come from countries of origin in which consensual same-sex relations are criminalized. It is well established that such criminal laws are discriminatory and violate international human rights norms. Where persons are at risk of persecution or punishment such as by the death penalty, prison terms, or severe corporal punishment, including flogging, their persecutory character is particularly evident.

27. Even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution. Depending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors. They can promote political rhetoric that can expose LGB individuals to risks of persecutory harm. They can also hinder LGB persons from seeking and obtaining State protection. "

12. On the topic of State protection, the guidelines state as follows:-

"36. In scenarios involving non-State agents of persecution, State protection from the claimed fear has to be available and effective. State protection would normally neither be considered available nor effective, for instance, where the police fail to respond to requests for protection or the authorities refuse to investigate, prosecute or punish (non-State)

perpetrators of violence against LGBTI individuals with due diligence. Depending on the situation in the country of origin, laws criminalizing same-sex relations are normally a sign that protection of LGB individuals is not available. Where the country of origin maintains such laws, it would be unreasonable to expect that the applicant first seek State protection against harm based on what is, in the view of the law, a criminal act. In such situations, it should be presumed, in the absence of evidence to the contrary, that the country concerned is unable or unwilling to protect the applicant. As in other types of claims, a claimant does not need to show that he or she approached the authorities for protection before flight. Rather he or she has to establish that the protection was not or unlikely to be available or effective upon return. "

3. Additional country of origin information submitted by the applicant's solicitor

13. The applicant's solicitor submitted a significant volume of additional country of origin information to the RAT. In particular, the following documents were submitted for consideration by the Tribunal:-

- (a) Nigeria: Treatment of Homosexuals by Society and Government Authorities; recourse and protection available to homosexuals who have been subjected to ill-treatment (2005 - 2007) by the Immigration and Refugee Board of Canada.
- (b) Nigeria: Current Treatment of Homosexual Men (17th June, 2002) by the Immigration and Refugee Board of Canada.
- (c) Border and Immigration Agency: country of origin information report -Nigeria (25th May, 2007).
- (d) Refugee Review Tribunal of Australia: Nigeria (5th December, 2007).
- (e) Nigeria: treatment of homosexuals by society and government authorities: recourse and protection available to homosexuals who have been subject to ill-treatment (2008 - 2009) Immigration and Refugee Board of Canada.
- (f) BBC news report- Nigeria Moves to Tighten Gay Laws, Nigeria's House of Representatives has held a public hearing on a new Bill seeking to outlaw gay relations (14th February, 2007).
- (g) Internet report- Nigerian mob attacks gay activists (24th March, 2008).
- (h) US State Department report on Nigeria.

4. Findings of the Refugee Appeals Tribunal

(a) Finding that internal relocation was available to the applicant

14. It is submitted that in reaching this finding, the Tribunal did not take account of the country of origin information submitted on behalf of the applicant, to the effect that there was a risk of persecution of gay men throughout Nigeria. The applicant argued that the finding of the Tribunal that the applicant was "*unlikely to face persecution from State agents in Nigeria*" ran contrary to the country of origin information submitted on behalf of the applicant which referred to police abuse of homosexuals and criminalisation of homosexuality. The country of origin information described a risk of persecution of homosexuals throughout Nigeria. It was submitted that there was no evidential basis on which the Tribunal could find that it was reasonable and safe for the applicant to relocate to another part of Lagos. On the contrary, there was clear evidence that homosexuals did not live openly in Lagos for fear of persecution if they did so. The applicant had relocated to Lagos on a previous occasion, but was severely beaten by persons connected to a young man with whom he was in a relationship.

15. I note that in an earlier case bearing reference 69/1817/06, it was held by David Andrews, S.C., that where one was dealing with State laws which criminalised homosexual acts, that relocation within Nigeria was not a realistic option. In addition, I note that the country of origin information states that in the northern States in Nigeria, where Sharia law is practiced, that homosexual acts are outlawed and the punishment therefore is death by stoning.

16. The RAT decision found that the applicant could relocate to Lagos in safety. Given that the applicant had received a severe beating there, this would not seem to be a viable option. Furthermore, country of origin information submitted suggested that even in a city the size of Lagos, the applicant would still face persecution there. He did not report the matter to the police as he felt that they would not do anything to help him as he was a homosexual. In making the finding that internal relocation was a viable option for the applicant, it would appear that the decision maker did not have regard to the country of origin information submitted on behalf of the applicant, or if he did, he completely disregarded it such that his decision in this regard was irrational. There was no evidence that the applicant could live openly anywhere in Nigeria without fear of persecution. The RAT appears to have ignored the country of origin information submitted on behalf of the applicant. There is no reference to this information on this aspect of the RAT decision. In the circumstances, I must quash this part of the RAT decision dealing with internal relocation.

(b) Finding in relation to the applicant's travel to Ireland

17. The applicant maintains that after he had been beaten in Lagos, he was befriended by a man who lived there. He states that the man discharged some of his hospital expenses. The applicant says that he went with the man when he was discharged from hospital. He says that the man gave him extra money so that he could pay an agent to bring him to Ireland. The applicant gave an account of travelling first to London and then to Belfast, from where he travelled to Dublin.

18. The Tribunal provided no reasons as to why it held that the applicant's account, that a man who shared the applicant's sexuality and who knew of the assault perpetrated on the applicant decided to help the applicant by putting up the money that was required by the applicant to leave Nigeria, was not credible. It has been submitted that there was nothing incredible about a man, who felt solidarity or sympathy for the applicant, choosing to help the applicant in this way.

19. The Tribunal went on to hold that the applicant's account of his journey to Ireland was not credible. In addition, the Tribunal held that the applicant's reason for not claiming asylum in the United Kingdom was not plausible. The applicant had stated that he was following the direction of the agent who had led him out of Nigeria. This was a plausible reason for his failure to seek asylum in the United Kingdom.

20. In the course of its reasoning, the Tribunal quoted a short passage from Prof. Hathaway's textbook, *The Law on Refugee Status*. In that textbook, the learned author stated that an asylum claimant was not obliged to claim refugee status in the first safe country.

In *Gioshville v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 31st February, 2003), Finlay Geoghegan J. in the course of an ex tempore judgment granting leave, stated as follows:-

"In doing so I have considered what is stated by Prof Hathaway in the Law of Refugee Status at p. 46 in relation to the choice of the country of asylum where he states:-

There is no requirement in the Convention that a refugee seek protection in the country nearest her home or even in the first State to which she flees. Nor is it requisite that a claimant travel directly from her country of first asylum to the State in which she intends to seek durable protection. The universal scope of post protocol refugee law effectively allows most refugees to choose for themselves the country in which they will claim refugee status. This basic premise flows from the universal declaration of human rights and was confirmed subject to minor qualifications by conclusion 15 of the executive committee of the UNHCR:

"The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account. Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State."

21. Prof. Hathaway then concludes at the bottom of p.47:-

"At present, then, the only claims to refugee status which may be deflected under international law remain those from the narrow category of persons defined in Conclusion 15 and then only insofar as the state with which they are affiliated agrees to extend protection. Otherwise, unless the refugee secures the actual or de facto nationality of another state, she is entitled to have her claim to refugee status determined in the country of her choice. "

22. It is not enough to simply state that the applicant's version of events was implausible. The Tribunal must state reasons as to why this finding was made. Mac Eochaidh J. in *M.J. v. Refugee Appeals Tribunal & Anor* (Unreported, High Court, 21st June, 2013), stated as follows in relation to the duty to give reasons:-

"In this regard, I wish to refer to my own judgment in a case called R.O. v. Minister for Justice and Equality [2012] IEHC 573. Having reviewed case law on the duty to give reasons, I summarised some of the principles which apply, and I said as follows as para. 30:

'30. In view of the foregoing, I approach the review of the adequacy of reasons in this case by asking the following questions:

(i) Were reasons given or discernible for the credibility findings?

(ii) If so, were the reasons intelligible in the sense that the reader/addressee could understand why the finding was made?

(iii) Were the reasons specific, cogent and substantial?

(iv) Were they based on correct facts?

(v) Were they rational? "

23. In the circumstances, I find that the decision of the RAT on the aspect of the applicant's travel to Ireland and his failure to seek asylum in the United Kingdom is unsupported by reasons and will have to be quashed.

(c) Finding that the applicant had not suffered past persecution

24. The RAT found as follows on the issue of past persecution:-

"It is clear from the information provided by the applicant that he has not suffered any persecution for a Convention reason in Nigeria, nor is he likely to face persecution upon returning to his country of origin."

25. No reasons were given by the Tribunal for this finding. The applicant has submitted that without reasons, the finding cannot stand. They also point out that the finding is at total variance with the Tribunal's analysis that the applicant is a homosexual who should relocate to Lagos due to past persecution. I am of opinion that the objections raised on behalf of the applicant in this regard are well founded. The applicant is entitled to have the decision quashed on this ground as well.

(d) Requirement of treatment contrary to Article 3 of the European Convention on Human Rights

26. In the RAT decision it was stated as follows:-

"The availability of a viable internal relocation alternative also indicates that gay men in Nigeria would be able to escape this threat. It is therefore unlikely that such individuals will encounter mistreatment in breach of Article 3 of the ECHR and the grant of humanitarian protection in such a case is not likely to be appropriate. "

27. This portion of the decision impliedly required the applicant to show a likelihood that he would suffer treatment in breach of Article 3 of the ECHR i.e. torture or inhuman or degrading treatment. This is an error of law. The applicant was required to show a well founded fear of persecution, not that he was likely to suffer torture, inhuman or degrading treatment. The Tribunal here proceeded on an incorrect basis in reaching its decision. The applicant is entitled to an order for *certiorari* under this heading.

5. Conclusions

28. In the circumstances, I find that the Tribunal fell short of its duty to give a clear, reasoned and rational decision. Accordingly, I will grant leave to the applicant to seek *certiorari* of the Tribunal's decision and I will make an order quashing the decision of the RAT and direct that the matter be referred back to the RAT for a further decision before a different Tribunal Member.

