

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 12 J.R.]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 AS AMENDED

BETWEEN

M.Y.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL IRELAND

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan delivered on the 23rd day of February, 2017

1. The applicant is seeking leave to apply for an order of certiorari to quash the decision of the first named respondent to refuse the applicant a grant of refugee status as notified to the applicant on 27th November, 2016. A consequential order of certiorari to quash the decision of the second named respondent and notified to the applicant on the 1st December, 2016 is also sought.
2. The proposed statement of grounds is dated 9th January, 2017. The application is supported by an affidavit of the applicant of the 3rd January, 2017. Submissions of 15th February, 2017 have been filed.
3. The within matter is governed by s. 5 of the 2000 Act as amended.
4. The affidavit records that following the applicant's arrival in Ireland he made an application for asylum. It was rejected by the ORAC. As a consequence the applicant appealed. An oral hearing took place on 7th November, 2016 and by letter received on or about the 28th November, 2016 he was informed that by decision of 21st November, 2016 the RAT confirmed the decision of the Commissioner.
5. In the statement of grounds (as amended within submissions) the argument is to the effect that the decision of the Tribunal is vitiated by reason of the error which stated:-

"At no stage throughout his asylum claim did he make the case that he could not be openly gay in Morocco."

6. It is also argued that the Tribunal finding that there was no convention nexus is wholly unreasoned.
7. The applicant relies on the decision in *I.E. v. Minister for Justice* [2016] IEHC 85 where at para. 41 Humphreys J. was dealing with an error that occurred in the introductory part of the decision and as to whether or not this could be severed from the balance of the decision. The Court indicated that because the error was in the introductory section rather than a binding part of the analysis in principle it was severable. However where the error in part of the decision could contaminate an otherwise valid decision overall the erroneous part should not be severed.
8. The error complained of is incorporated within para. 5.22 of the decision namely at p. 16 of 18. In following this erroneous statement the decision incorporates:-

"Given the time since this relationship started and ended the appellants claim to have been fearful of persecution by reason of his sexual orientation is not that which motivated the appellant to flee Morocco and seek protection elsewhere."

9. At para. 5.23 on p. 17 of 18, it is recorded:-

"In the instance of the appellant's appeal nothing I have heard and considered has convinced me that the appellant was being truthful."

10. In a further decision of Humphreys J. in *B.W. v. Refugee Appeals Tribunal and Ors.* [2015] IEHC 759 the Court considered whether the relevant decision was tainted by a fundamental error of fact. Included at para. 65 of that decision, the approach followed was as per the line of authority commencing with *I.R. v. Minister for Justice and Ors.* [2009] IEHC 353 where one of the principles identified was:-

"A mistake as to one or even more facts will not necessarily vitiate a conclusion as to lack of credibility provided the conclusion is tenably sustained by other correct facts."

11. The judgment of Cooke J. was that it was for the Court to assess whether the decision can be tenably sustained reading the decision as a whole.
12. In a subsequent decision of Cooke J. in *T.M.A. v. Minister for Justice and Ors.* [2009] IEHC 606 it was held that the Tribunal members finding as to a lack of credibility was sufficiently well grounded in material before him as to be incapable of being quashed by judicial review.
13. In *M.E. v. Refugee Appeals Tribunal* [2015] IEHC 8 Noonan J. took the approach that the question to be asked is whether the impugned credibility decision goes to the core of the matter. In that case he was satisfied that the impugned finding was not a core finding of fact and on that basis refused relief.
14. At para. 5.7 of the decision the Tribunal accepted that Morocco penalises homosexual activity with prison sentences of up to three years and that individuals have been prosecuted and imprisoned for engaging in homosexual activity.

15. At para. 3.1 it is stated that the applicant was born in 1976. At para. 5.19 the applicant gave evidence that his gay relationship was when he was 22 years of age and it lasted for two and a half to three years. At para. 5.19 it is recorded that the applicant told the Tribunal that he had never been involved in any other homosexual relationship in Morocco. Because of the foregoing information the Tribunal found that the gay relationship occurred in or about 1998.

16. Apparently the applicant applied for asylum in Switzerland on 13th September, 2011. Prior to arriving in Switzerland the applicant was in Spain including in a camp for a 41 day period. At para. 5.12 of the decision it is recorded that the applicant gave three different dates for when he arrived in Ireland. Prior to leaving Morocco the applicant met a girl who became pregnant. As a consequence the applicant was attacked by her relatives and it appears that thereafter he fled Morocco. At the time of the interview leading to the impugned decision the applicant's daughter was aged 8 years and this suggests therefore that the applicant left Morocco in or about 2008. In this regard at para. 5.22 it is recorded that the applicant stated that the girl got pregnant when he was 31 – this was in excess of five years following the ending of his gay relationship.

17. Given the foregoing I am satisfied that finding that the applicant was not motivated to flee Morocco and seek protection elsewhere because of his sexual orientation is a rational and reasonable finding and has not been contaminated by the earlier erroneous statement as to capacity to be openly gay in Morocco. By reason of the foregoing I am satisfied that excluding the erroneous statement the conclusion as to lack of credibility is tenably sustained by other correct facts. The erroneous statement can be severed from the rest of the decision on the basis that it has not contaminated an otherwise valid decision – the applicant asserted that he fled Morocco because of his homosexual orientation however entirely independently of the ability to be openly gay in Morocco or not it is clear that the applicant on his own evidence did not leave Morocco for a period of in excess of five years from the ending of his gay relationship with a third party therefore it does appear incontrovertible but that he did not flee Morocco because of his sexual orientation.

18. Insofar as the convention nexus is concerned the finding at para. 5.23 was to the effect that the applicant was unable to give any or any reasonable explanation which would satisfy the Tribunal on the balance of probabilities of the veracity of the applicant's claim. Further prior to such statement an additional statement is incorporated to the effect:-

"Even affording the appellant at the very lowest level the benefit of the doubt in the instance of the appellant's appeal nothing I have heard and considered has convinced me that the appellant was being truthful."

19. I am satisfied therefore that insofar as the convention nexus is concerned when it is stated that *"The appellant has failed to establish to the satisfaction of the Tribunal that what he claims to have occurred would amount to past persecution, the appellant has failed to establish that he has a forward looking fear of persecution"*, this comprises a reasoned statement as to why a convention nexus does not arise in particular reading the decision as a whole as opposed to examining the decision on the basis of isolating various paragraphs.

20. On the basis of the foregoing I am not satisfied that the applicant has demonstrated substantial ground to secure leave and therefore the application is refused.