Neutral Citation [2015] IEHC 440

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 603 J.R.]

BETWEEN

N.S.M. [ZIMBABWE]

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 9th day of July, 2015

1. This is a telescoped hearing for judicial review seeking an order of certiorari quashing the decision of the Refugee Appeals Tribunal (RAT) of 19th February, 2010, which affirms the recommendation of the Offices of the Refugee Applications Commissioner (ORAC) that the applicant should not be declared a refugee. Further, the applicant seeks an order remitting the appeal of the applicant for full reconsideration by a different tribunal member.

PRELIMINARY ISSUES

2. There was a preliminary issue at the outset of the hearing in regard to a necessary extension of time. The applicant was five weeks outside the statutory period of fourteen days within which to initiate judicial review proceedings in cases of this nature. At hearing, counsel for the applicant provided an explanation in that the applicant was in the process of changing solicitors. In the circumstances and with regard to the explanation, the necessary extension of time was granted.

BACKGROUND

3. The applicant is a Zimbabwean national born on 6th November, 1979. She states that she does not have any political affiliation. Her claims of alleged persecution arose from the fact that she took part in a demonstration with other market traders on 11th November, 2008. The demonstrations that day are well documented in the country of origin information and the occurrence of such demonstrations in Zimbabwe is not disputed.

4. The applicant states that she was arrested in the course of the demonstration and maltreated while in custody. She was released after three days, either on bail or on the payment of a fine: the applicant was uncertain of the nature of the payment, and had to report back to the police station regularly. A court date was set. While in custody she was questioned extensively about the demonstration organisers and their political aims, which she claimed to have no knowledge of. She did not attend court on the assigned date. Instead, she moved to a different part of Zimbabwe. She then travelled to South Africa on 3rd January, 2009, and thereafter, departed through Mauritius and France, arriving in Shannon airport on 17th July, 2009. She paid 18,000 rand for her travel and travelled on a false South African passport.

5. The alleged persecution stems from the imputed political opinion, which she asserts government forces believe her to have, because she participated in the demonstration and since she did not turn up for her court date, she states that this is severely punishable. She states that she is further at risk because she has sought asylum in another country. This, the applicant states, is punishable upon return to Zimbabwe.

6. The applicant attempted to enter Ireland using the passport provided by the agent on 17th July, 2009, and claimed asylum at the airport when questioned regarding the authenticity of her travel documentation. She attended the Office of the Refugee Applications Commissioner on 20th July, 2009, and was provided with accommodation and returned on 21st July, 2009, to complete an ASY1 form. The applicant completed a questionnaire on 30th July, 2009, and the s.11 interview was held on 18th August, 2009. A s.13 report was prepared and dated 31st August, 2009, recommending that the applicant should not be declared a refugee.

7. A notice of appeal was issued in respect of the commissioner's decision on behalf of the applicant on 1st October, 2009. The oral hearing in relation to the applicant's appeal took place on 11th February, 2010, at the offices of the Refugee Appeals Tribunal.

IMPUGNED DECISION

8. By decision dated 19th February, 2010, the Refugee Appeals Tribunal affirmed the negative recommendation of the Refugee Applications Commissioner not to declare the applicant a refugee. The tribunal member referred to s.11A of the Refugee Act 1996 (as amended), stating that the burden of proof rests solely on the applicant.

9. The tribunal member gave reasons to conclude that the applicant had not discharged that burden of proof. The evidence that the applicant gave in regard to her lack of knowledge regarding the overall political purpose of the demonstrations on the 11th November, 2008, and the concurrent rallies in four other areas was stated as being implausible to the tribunal member. It is stated in the tribunal decision that "[t]he thrust and substance of her evidence is entirely implausible to this Tribunal" (p.36 booklet). The tribunal member stated that it was unlikely that the applicant took part in the demonstration at all because of the errors and inconsistencies in her evidence, and her lack of knowledge of the specifics of the charges against her.

APPLICANT'S SUBMISSION

10. Counsel for the applicant, Mr. Colm O'Dwyer S.C., submitted that the tribunal member relied on peripheral issues when she stated that it was not believable that the applicant had taken part in the demonstration because the applicant did not know anything about the demonstration organisers or their aims. The applicant argued that the manner in which the tribunal member discounts the applicant in this regard is based almost entirely upon speculation. The applicant further submitted that the issues in relation to mistakes with various dates that she gave to the tribunal are illogical and peripheral findings.

11. The second strand of the applicant's claim is in relation to her having sought asylum in another jurisdiction and being at risk if returned to the country of origin because of that. The tribunal member relied on an operational guidance note (OGN) from the UK

Home Office in the decision, which states that nationals who present at Zimbabwean airports as failed asylum seekers are only at risk if they have political affiliations. The applicant submitted that there are serious issues in regard to fair procedures and that this is not country of origin information and, therefore, only guidance; all OGNs begin with the statement that they must be read in conjunction with country of origin information. The applicant asserted that the OGN was not before the tribunal until after the oral hearing with the applicant. The applicant submitted that there is a breach of fair procedures because the applicant never had the opportunity to respond to the information contained in the OGN.

12. The applicant submitted that the RAT decision only deals with the risk at the airport and not the risk from Zanu PF when resettling into the country proper, not just passing through security at the airport. The applicant at all times maintained that the threat she faced was not from airport security services but from the Zanu PF political grouping and their associated militia. Therefore, the applicant argued, the second named respondent fails to deal with the facts of the case. This, counsel submitted, is in an error of fact in the applicant's case. Counsel stated that credibility is not at issue with regard to the second limb of the claim. It is not disputed that she is Zimbabwean and therefore, any doubt regarding her credibility are not related to the indication of the likely persecution if she were to be *refoul*-ed to her country of origin as it is a fact that she has claimed asylum.

13. Counsel relied on Mr. Justice Clarke's decision of *Idiakheua v. Minister for Justice, Equality and Law Reform & anor.* [2005] IEHC 150 in that if the tribunal is going to seek out further information, then the applicant should be given the opportunity to respond to such information. Counsel further submitted the UK Upper Tribunal decision of *MD (Women) Ivory Coast CG* [2010] UKUT 215 (IAC) in relation to the use of OGNs by immigration officials where that tribunal held that these documents are only to be used to provide guidance along with country of origin information.

RESPONDENTS' SUBMISSIONS

14. Counsel for the respondents, Ms. Elizabeth Coogan B.L., in regard to the applicant's submission on the OGN from the UK Home Office, submitted that the OGN point was not pleaded and, thus, the respondents were not on notice of this ground of challenge. The respondents argued that this OGN was only used in the impugned decision insofar as it references a case the applicant had submitted to the tribunal and this is a *verbatim* quote from that case. The respondents argued that the information contained in the OGN was not put to the applicant because this was information put to the tribunal by the applicant in the first place; therefore it is impossible that there could be a breach of fair procedures in this regard. The respondents pointed to p.11 of the *Idiakheua* case (*supra*) where Clarke J. states that information of which an applicant is on notice is entirely distinguishable in an argument attempting a claim of breach of fair procedures.

15. The respondents submitted that the political situation had changed since the applicant left Zimbabwe and the introduction of the power-sharing government; the applicant put an article from the Guardian newspaper before the tribunal in relation to the power-sharing government now in operation in Zimbabwe. From an examination of the decision, it is clear that the applicant was questioned in regard to the danger she believes she would be in if returned to Zimbabwe after having claimed asylum internationally, according to the respondents. It was put to the applicant that since there is a shared government, it would now be different if she were to return. She answered that she did not agree but, the respondents submitted, she did not provide any explanation in this regard.

16. This decision, the respondents maintained, was solely based on the issues of credibility: she has not discharged the burden of proof; evidence was given in a wholly inconsistent way and she never dealt with these issues. The respondents argued the issues were not peripheral and her inability to submit corroboratory documents is central. Counsel submitted, on behalf of the respondents, that the claim that she partook in the demonstration action is not credible. As an educated woman she should have known about the reasons for the demonstration having taken place and the aims of the group organising the demonstration. Her answers were held to be vague and hesitant, and the tribunal is in a special position to make this kind of demeanour assessment of the applicant; this is crucial to the assessment of an applicant's claim, as per *F.E.A. v. Refugee Appeals Tribunal & ors*. [2013] IEHC 106. The respondents argued that the applicant was not cumulatively credible in that she has no personal political opinion and she has offered no information that she is in serious harm if she is returned to Zimbabwe now.

17. The applicant stated that she claimed asylum immediately at the airport; however, it was only when she was questioned regarding the false passport that she sought asylum. The respondents submitted that she had intended to enter the State illegally but was discovered and then brought an asylum claim. The respondents argued that the tribunal was entitled to find that this was not characteristic of a *bona fide* refugee.

18. The respondents submitted that the ASY1 form and the s.11 questionnaire contain stark discrepancies that the tribunal was entitled to determine undermine her credibility, *inter alia*, in regard to the dates she travelled to South Africa; the dates in relation to court appearances; the date of her leaving her country of origin: in the ASY1 form she says she fled before the court appearance and in her s.11 she says she fled the day after the court date because she saw a news report regarding her not showing up to court.

19. Further, the respondents contended, because of her level of education, it lacks credibility that she would not be aware of the purpose of the demonstration and the overall aims. The respondents submitted that because the alleged persecution stems from her having attended this demonstration, a lack of credibility in this regard goes to the very core of her claim. The respondents submitted that the assessment of evidence is a matter for the tribunal and it is not open to the Court to substitute its own findings for that of the tribunal. In this regard, counsel relied on the cases *M.E. v. Refugee Appeals Tribunal & ors.* [2008] IEHC 192; *Kikumbi & anor. v. Refugee Applications Commissioner & ors.* [2007] IEHC 11. The respondents maintained that she was not cumulatively, generally credible and it is not accepted that her story is one of persecution in her country of origin or that she is fleeing harm as alleged. She has no politicial affiliations or associations in Zimbabwe and her account of past persecution is not accepted. The respondents relied on the decision of McDermott J. in *F.E.A. v. Refugee Appeals Tribunal & ors*. [2013] IEHC 106 at para. 18, where it is stated that the tribunal is in a special position to assess the credibility of an applicant.

DECISION

20. The applicant gave evidence before the tribunal that she is not a member of any political party but is at risk by reason of imputed political opinion due to her participation in a demonstration on 11th November, 2008, organised by the National Constitutional Assembly (NCA). She claims that she had nothing to do with the NCA nor did they have anything to do with her and she was demonstrating by reason of a local issue between market traders and the police in Bulawayo where she resided. Her legal advisor submitted to the tribunal member that it was plausible that she did not know about the demonstrations held on that date at Bulawayo and other venues around the country for the purposes of calling for a three-point action plan. The tribunal member found that the probative substance of her evidence was implausible and held that, if the applicant, as an educated woman, was taking part in the demonstration then she would have known about demonstrations that had taken place elsewhere. He accordingly held that her claim, that she did not know, was not credible. The tribunal member also found inconsistencies in the applicant's evidence which was held to be inaccurate and inconsistent as to certain matters, such as when she left the country, whether she was due in court, whether she was charged by the police or not. The tribunal member contrasted these inconsistencies with the detailed evidence in her six-page,

typed, written account, submitted with her application in respect of the personal circumstances of the claim, and with her knowledge in respect of Amnesty International's position regarding returnees to Zimbabwe. The tribunal member was not persuaded as to the applicant's credibility on a large number of grounds and I think it is worthwhile setting them out in detail as follows:

> (i). The applicant stated in cross-examination that in detention she was searched and her national identity card was not taken from her, yet claims she was detained for three days, interrogated and beaten;
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> (ii). She claims that one of the detainees died at 3am and the police arrived at 6am but could not explain how she could tell the time and her answers were vague and hesitant;
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> (iii). She claimed in the questionnaire that she had no time to say goodbye to her "mom", crossed this out and referred to her as "daughter". She claimed that this was a mistake. She said in the questionnaire that her mother is deceased and produced evidence of this to the tribunal. She claimed at interview that she would produce both her and her daughter's birth certificates but has produced neither nor provided a reasonable explanation;
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> (iv). She was able to produce a purported national identity card, which was implausible to the tribunal member given that she claims she was in detention for three days. The probative value of the documentation was doubted, particularly given the cumulative inconsistencies in her primary evidence;
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> (v). She claims she was fleeing systematic harm from which there was no state protection. However, she travelled from South Africa to Mauritius, and France to Ireland. Whereas, it is accepted that no asylum seeker must apply for asylum in the first safe destination country, it is considered that anyone claiming as such might do so without delay upon reaching the first safe country. This was France, and the fact that she did not seek to make an asylum application questions the *bona fides* of her claim, the genuineness of her suggested plight and undermines the veracity of her claim. Her actions are not the actions of a bone fide refugee and the tribunal refers to s. 11B (b);
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> (vi). The tribunal refers to s. 11B(a) in respect of failure to produce the birth certificates as indicated at interview without reasonable explanation, which runs counter to the thrust and spirit of the said provision. A date of birth had not been given in respect of the child. The applicant's claims that she left her daughter in Zimbabwe, if she was at risk of serious harm, was implausible;
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> (vii). The applicant attempted to enter the state on a false passport until questioned at immigration and prevented from going through. Subsequently, she claimed that she disclosed her entire story to the authorities. However, it is clear that she intended to access this country illegally and did not intend to make an application for asylum. These are not the actions of a *bona fide* refugee;
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> (viii). She was not cumulatively generally credible and it is not accepted that her story is one of persecution in a country of origin or that she is fleeing harm as alleged. She has no political affiliations or associations in Zimbabwe and her account of past persecution was not accepted;
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> (ix). The tribunal refers to the country of origin information submitted by the applicant's advisor, the country of origin information submitted by the commissioner and noted case law referred to in the OGN on Zimbabwe dated 5th March, 2009, in particular the case referred to by the applicant's legal advisor *R.N. (Returnees) Zimbabwe CG* [2008] UKAIT 00083 and the H.S. case, which is referred to therein. The tribunal quotes two paragraphs. The first referred to repeats *verbatim* the content of a paragraph in the *R.N.* case submitted by the applicant's legal representative concerning the treatment of returnees by the Zimbabwean authorities at the airport. [The second refers to the finding in *H.S.* on the same matter, which is also referred to in the case law extract in *R.N.,* referred to in that document];
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> (x). On the testimony of the applicant it was concluded that her application, based on her political opinion and/or imputed political opinion, is not credible. She has offered no testimony that the state authorities might have an interest in her and/or that she has a fear of serious harm if returned to Zimbabwe in the context of the objective elements of this case;
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> (xi). As the applicant does not satisfy cumulatively the credibility criteria, the matter of internal relocation does not arise for consideration;
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> (xii). The existence of difficulties in the applicant's country of origin is recognised, but the applicant's suggested evidence that she is at risk or persecution if returned on the Convention grounds claimed is not accepted.

21. The written submissions filed on behalf of the applicant, and which are undated, set out in very broad terms the grounds of appeal. At the oral hearing before the Court the grounds were distilled somewhat and, effectively, the applicant contended that the tribunal member ignored same. The applicant complained that the tribunal member made finding in relation to credibility, in particular, in relation to her participation in the march and further, suggested that the tribunal member relied on peripheral issues to find that the applicant was not credible. The applicant complained of the tribunal member's findings in relation to her not being credible on the basis that they are made against a background that it is established that a march did take place on that day; that people were arrested; and that some of the people arrested were beaten up. The applicant asserted that the tribunal member's findings were based on speculation.

22. I find this difficult to accept. There is a very detailed, six-page, closely type-set account from the applicant, which is her response to q.21 of the asylum questionnaire – "why did you leave your country of origin?" to which the applicant wrote "please see additional pages, six pages in total". There is a substantial amount of detail in that document. However, the tribunal member noted a contrast between this detailed account and the evidence and responses on cross-examination given by the applicant before the tribunal. It seems to me based on the previous decisions of this Court, in particular *Imafu v. Minister for Justice, Equality and Law Reform & anor.* [2005] IEHC 182; *F.E.A. v. Refugee Appeals Tribunal & anor*. [2013] IEHC 106, where the learned judge in the latter case stated at para.18 thereof:

> "The court is satisfied that the demeanour of a witness in the course of giving evidence is something that may be taken into consideration by the decision maker in assessing the credibility of the witness and may be decisive in determining the outcome of the case. Demeanour may include many aspects of the witness's presentation and its assessment is part of the duty and function of the decision maker. Credibility may be tested in some instances by reference to factors which are independent of the witness, whether that is evidence which is supportive or not supportive of that testimony. It may also include an assessment of how the testimony was furnished by the witness. A witness's apparent frankness,

evasiveness or other reactions to questioning may be considered. The opportunity for the decision maker to hear and see the witness giving testimony in the course of an oral hearing may be a crucial element to the fairness of a hearing. Its importance was acknowledged by the Supreme Court in *Hay v. O'Grady* [1992] 1 I.R. 210, where the Supreme Court determined that findings of fact made by a trial judge bound the appellate court to be supported by credible evidence. McCarthy J. stated:

> 'An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of the those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.'

The court did not accept that an appellate court was in as good a position as a trial judge to draw inferences of fact because:

> 'it may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inferences of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge…'"

23. At para.19, McDermott J. proceeds to state as follows:

> "In the context of asylum law this matter has also been considered by Cross J. in *S.A. & Ors. v. Refugee Appeals Tribunal* [2012] IEHC 101. He held that a demeanour based decision cannot of itself be said to be irrational or unreasonable.

24. The tribunal member's findings in respect of credibility as set out above, in my view, seem to be directly referable to the applicant's own evidence to the tribunal. I accept the submission that this is, and was, a matter for the tribunal and it is not a matter for this Court under judicial review to disturb those findings. I am supported in this view by the decision of Birmingham J. in *M.E. v. Refugee Appeals Tribunal & ors.* [2008] IEHC 192, and further, in the decision *Kikumbi & anor. v. Refugee Applications Commissioner & ors.* [2007] IEHC 11 and, in particular, at p.17 of the said judgment, where Herbert J. states as follows:

> "Once properly admitted, the weight (if any) to be given to any evidence is exclusively a matter for the decider of fact. This generally involves evaluating an account of events in his or her country of origin given by the Applicant for asylum. The probative value (if any), to be given to information or material properly received and considered by the decider of fact may sometimes be ascertained by reference to the cogency of the account itself and the absence of inherent contradictions and errors of substance in that account. Sometimes, it is possible also to compare various elements of the account with extrinsic material which the decider of fact can accept or, which is admitted to be reliable, viz., country of origin information from sources of proven and accepted accuracy and reliability, such as United Nations Reports. Sometimes, however, there is no yardstick by which to determine whether a particular account or part of an account is credible or not, other than by the application of common sense and life experience on the part of the decider of fact in the context of whatever reliable country of origin information is properly before him or her. Also, the decider of fact may have had the advantage of having seen and heard the Applicant for asylum relating his or her story, making all due allowance for the various factors indicated by the UNHCR Handbook as uniquely relevant to such an account giver. The obligation to give reasons, as explained by the Supreme Court in *F.P. and A.L. v. The Minister for Justice, Equality and Law Reform* (above cited), does not, in my judgment, require the decider of fact to give reasons why she or he applying such common sense and life experience found that a particular account or aspects of such an account to be not credible."

25. It seems therefore to me that the conclusion and assessment of the evidence by the tribunal member are not to be disturbed by this Court unless it can be demonstrated that the tribunal member erred in law in the manner in which he or she approached the evidence. I cannot find any error or flaw in this approach.

26. Now turning to the tribunal member's finding in regards to the implications of the applicant not having claimed asylum in France. I would refer to a decision this Court, *T.U. (Nigeria) v. Refugee Appeals Tribunal & ors.* [2015] IEHC 61, where at para.22, I endorsed the finding of MacEochaidh J. in *F.T. v. Refugee Appeals Tribunal & anor*. [2013] IEHC 167. The applicant made no claim that Ireland was the first safe country and therefore, s.11B (b) should not have a bearing on the applicant's claim for refugee status. However, the credibility findings made against the applicant are substantial and set out in clear terms in the decision. This erroneous finding in respect of the failure to seek asylum in France in and of itself can not vitiate the decision.

27. With respect to the country of origin information (COI) and the complaint made by the applicant in relation to the manner in which the tribunal referred to same in the decision, it appears that the applicant is complaining that the tribunal member should have put specific parts of the COI to the applicant, presumably to ascertain her views in respect of same. However, the COI was submitted by the applicant's own legal advisor. This was recorded on the face of the documents. Therefore, it is clear to me that the applicant was on notice of the matters contained therein and, in particular, the H.S. decision referred to in the extract from *R.N.* I reject any contention that there was any new or novel argument being introduced by the tribunal member. I fail to see how the tribunal member can be accused of introducing novel information and/or argument in the decision, when the said information and/or argument was advanced by the applicant's own legal advisors at the hearing. There can be no prejudice to the applicant in this regard.

28. In relation to the use of COI by the tribunal member, the respondents relied, *inter alia*, upon the decision of Smyth J. in *O.E. v. Refugee Appeals Tribunal & ors*. [2011] IEHC 149. At paras. 72 and 73 of the said judgment Smyth J. stated as follows:

> "The applicant submitted that the tribunal member's consideration of the country of origin information was selective. In *E. (E.) v RAT and others* [2010] IEHC 135, Cooke J. considered the approach of the Court to the reliance placed on country of origin information by a Tribunal member. He stated:
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> > '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 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.'

The full picture that emerges from the country of origin information which the tribunal member had before him, is that read as a whole, the tribunal member had information before him to conclude that the applicant had not demonstrated that he was targeted by the authorities because of his sexual orientation and that there was information that in areas in the south of the country, in particular larger cities such as Lagos, that the government does not actively pursue homosexuals. The Tribunal member noted that in considering whether it would be unduly harsh for the applicant to relocate to another part of Nigeria such as Lagos the applicant's response was that he didn't have anybody to stay with.

The Court is satisfied in this case that no substantial ground has been raised that the Tribunal member's analysis of the country of origin information reflects a partial or selective presentation or manipulation of the information, or that his interpretation or use of the information is manifestly at variance with the content of the documentation before him."

29. I can find no fault with the tribunal member's use of the COI or anything to suggest that it reflects a partial or selective presentation or use of the information.

30. The applicant complains in relation to the use by the tribunal member of the Operational Guidance Notes (OGN), which had been submitted in the first instance by the applicant's legal representative, the Refugee Legal Services. Operational Guidance Notes are precisely that, i.e., notes for operational guidance. What distinguishes their use in this particular instance, it seems to me, is the fact that the case law referred to, *R.N.* and *H.S.*, were referred to in the context of their recital in the OGN submitted. The actual case reports were not submitted in their own right.

31. For the reasons set out above, I am not persuaded that there is any basis to the challenge to the tribunal member's decision and I accordingly refuse leave.