

**THE HIGH COURT
JUDICIAL REVIEW**

[2008 No. 1365 J.R.]

BETWEEN

E.P.A.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL

RESPONDENT

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 27th day of February 2013

1. This is an application for leave to seek judicial review in respect of a decision of the Refugee Appeals Tribunal.
2. The applicant is a national of Ghana who came to Ireland in March 2008 and claimed asylum on the basis of persecution related to being gay. The applicant is married and has children and his family remain in Ghana.
3. It is argued that the decision of the Tribunal is unlawful because it makes no finding on the applicant's sexual orientation and because negative credibility findings were made unlawfully.

4. The Credibility Issue

5. The applicant claimed that he was involved in a gay rights organisation which was assisting the Gay and Lesbian Association of Ghana in organising an international conference in Ghana in 2006. The Tribunal Member notes that country of origin information refers to a denial by the Gay and Lesbian Association of Ghana that any such conference was ever planned in 2006. The Tribunal Member says:

a. "The applicant's claim to have been involved in organising this conference is not capable of belief, and this tends to raise some doubts about the veracity of his testimony as a whole."

6. The country of origin information contained details about the international conference referred to by the applicant. A document prepared by the Bureau of Democracy, Human Rights and Labour dated 6th March 2007, contains the following reference:-

"There was widespread public outcry during the year against an international lesbian and gay conference scheduled to take place in Accra in September. Strong public opposition to the event and to homosexuals more generally was reflected in vehement letters to the editor, radio call-in shows, comments posted on the Internet, and in public speeches given by government officials. The government banned the conference after local religious leaders united to protest the planned event."

7. It is regrettable that the Tribunal Member did not refer to this evidence which seems to corroborate the version of events given by the applicant. Where country of origin information contains conflicting details, the decision maker is not entitled to rely on one version of the evidence without saying why the version of opposite effect is rejected. (See *T O. v. Refugee Appeals Tribunal* [2012] IEHC 576 and *D.V.T.S. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 305)

8. Substantial grounds have been advanced in support of claims related to unlawful credibility findings.

9. The Tribunal Member refers to the fact that he believes the applicant is a happily married man, -not language indicative of an acceptance that the applicant is gay. It seems to me that the Tribunal Member does not accept that the applicant is gay. A clear and reasoned finding on this central issue was required of the Tribunal and a failure by the Tribunal Member to decide this critical part of the applicant's claim in express terms establishes a substantial ground that the decision is unlawful and leave to pursue this complaint is granted.

10. A complaint is also raised in relation to the suggestion by the Tribunal Member that internal relocation is available to the applicant. The Tribunal Member expresses the matter thus:- "The Applicant was asked if he could have moved elsewhere within Ghana to escape his alleged problems. He replied "If I should leave my place, if they later find out that I am gay there would be problems". However there is nothing to suggest that the Applicant's sexuality would be discovered if he left his home area. Given that the problems the Applicant allegedly experienced were local in nature, it is concluded that he would be able to live safely were he to relocate elsewhere within Ghana."

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 *H.J. & H.T. 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 give effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

12.. I endorse the conclusions of the Supreme Court of England and Wales and find that a substantial ground has been advanced that the Tribunal should have followed a similar approach when faced with an asylum seeker who claimed persecution because of sexual orientation. It is immediately apparent on reading the decision of the Tribunal Member in this case that nothing approximating that approach was attempted by the Tribunal Member. I grant leave to the applicant to claim that the Tribunal failed to determine the asylum application in accordance with law, the relevant lawful approach being that set out by Lord Rodger above. In this regard, I note the decision of Cooke J. of 17th December 2009, in a decision entitled *Adams v. The Minister for Justice, Equality and Law Reform* (Unreported). Leave was granted on that occasion on a broadly similar ground.

13. Two other issues were of concern to me at the hearing of this action. It was apparent that a considerable proportion of the text of the Tribunal Member's decision is a word for word replication of the decision of the Refugee Applications Commissioner. No complaint in relation to this is pleaded by the applicant . I note in passing that such replication could give rise to a concern that the Tribunal Member did not fully and independently consider the appeal, but overly relied on the first instance decision. In an appropriate case, an occurrence such as this might indeed warrant an order of *certiorari*. As this was not pleaded, the matter goes no further.

14. The other matter which caused some concern was the provisions of Regulation 9(2)(b) of the European Communities (Eligibility for Protection) Regulations 2006, which provides that:

"(2) Acts of persecution as qualified in paragraph (1) can, *inter alia*, take the form of (a) acts of physical or mental violence, including acts of sexual violence; (b) legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner."

15. I raised the question as to whether the criminalisation of homosexuality in Ghana could constitute persecution *per se* for the purposes of Regulation 9. The Ghanaian code is probably an administrative measure or a legal measure which is discriminatory.

16. In relation to matters not pleaded but raised by the Court, I was referred to the decision of *JK (Uganda). v. Minister for Justice and Equality* (Hogan J. Unreported, 6th December 2011), where the learned judge concluded that the Court could, in certain circumstances raise grounds at the leave stage. As in *JK.*, the court itself identified the issue in Regulation 9(2)(b). However, it does not seem appropriate to add this to the grounds in respect of which I have already granted leave. In the first instance, it is a pure legal point which was not pursued as part of the applicant's claim, either at first instance or on appeal. This is not a case where the Tribunal has decided that the criminalisation of homosexuality does not constitute discrimination and is not *per se* a form of persecution. A decision on this point must await full argument following the raising of the matter ideally at first instance and on then on appeal.

17. I grant leave to pursue the reliefs sought at D(I) on the grounds set out at section E of the (intended) statement required to ground application for judicial review.