Neutral Citation: [2015] IEHC 267

THE HIGH COURT

JUDICIAL REVIEW

[RECORD NO. 2010/1481/JR]

BETWEEN

N.B. AND O.C.B. (AN INFANT SUING BY HER MOTHER AND NEXT FRIEND N.B.)

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 29th day of April 2015

1. This is a telescoped application for judicial review wherein the applicants seek an order of *certiorari* quashing the decision of the second named respondent made on the 20th October 2010, affirming the recommendation of the Refugee Applications Commissioner to refuse them refugee status, and notified to the applicants on the 5th November 2010.

Background

2. The first named applicant is a Nigerian national born in Benin City, Edo State, on the 9th December 1980. The second named applicant was born in this State on the 10th March 2007. The first named applicant's account of events is as follows:

From the age of three years she lived with her aunt in a named city in Nigeria, being orphaned at the age of three years after her parents were shot during a robbery. She received no formal education, having never been sent to school. Her aunt taught her to read and write by buying books for her. The first named applicant was kept in her aunt's home to work. When aged approximately 23 or 24, she began to learn the rudiments of hairdressing from a local salon. However, her aunt did not want her to do this and insisted she work for her as a housemaid. As a consequence, the first named applicant was not able to learn her skill on a daily basis but went whenever she could. However she was frequently beaten by her aunt when she was found working in the salon.

3. The first named applicant claims to have left Nigeria in February 2006 in the following circumstances: A friend of her aunt, J.O., told the applicant that she could arrange work for her in Ireland, either in a factory or as a hotel receptionist. Wanting a better life, and in view of her home circumstances, the first named applicant was happy to go to Ireland with J.O. She had no parents in Nigeria and was effectively a housemaid for her aunt and feared being put out of her aunt's home at any time, with a result that she would have nowhere to go.

4. Before she left Nigeria with J.O. she was made swear the "JuJu" by J.O. Part of her hair was taken and she was informed that if she said anything against J.O., she would die. J.O. made arrangements for her travel and the first named applicant duly travelled to Lagos with J.O. After two days, they travelled to Ireland via Amsterdam. On arrival in this State, she was taken to a house by J.O.'s boyfriend. She was then told by J.O. that she owed her €25,000 for bringing her to Ireland. From there on in, she was kept locked in the house and forced to work as a prostitute. She was often beaten by J.O. There were other girls in the house also, three of them in the same room as the first named applicant. Some of the men who came to the house did not wear condoms. As a result the applicant became pregnant and when J.O. found out she wanted the pregnancy terminated. The first named applicant was taken from the house for this purpose and while she and J.O. were travelling by bus, J.O. fell asleep, allowing the first named applicant to effect an escape. Following this, she was assisted by a woman who found her in a distressed state and who paid a taxi driver to take her to offices of ORAC.

Procedural history

5. The first named applicant's asylum process commenced on the 19th February 2007, the day of her escape. An ASY1 form was completed on the 20th February 2007 and the first named applicant duly completed a questionnaire on the 1st March 2007. An ASY1 form was completed in respect of the second named applicant on the 2nd April 2007. The first named applicant claimed refugee status on the basis of being trafficked into Ireland and forced into prostitution in order to repay money to the trafficker. She underwent a section 11 interview on the 28th May 2007 and the report of the Refugee Applications Commissioner dated 29th May 2007 was notified to her on the 1st June 2007 denying the first and second named applicants refugee status.

The Commissioner found:-

> *"The applicant's alleged problems in Nigeria are not related to any of the Convention grounds of race, religion, nationality, membership of particular group or political opinion, Her problems are with her aunt and with her aunt's friend who brought her to Ireland.*
>
> *This report has had regard to section 11 (B) of the Refugee Act 1996 (as amended)"*

6. Notwithstanding the foregoing, the Commissioner found that state assistance could be sought by the applicant on her return to Nigeria. It was further considered that the applicant's contention that she could not relocate within Nigeria lacked credibility.

7. The first named applicant duly appealed the Commissioner's recommendation and an oral hearing of her appeal before the Refugee Appeals Tribunal took place on the 12th July 2010.

8. The decision of the Refugee Appeals Tribunal affirmed the recommendation of the Refugee Applications Commissioner.

The Tribunal's findings

9. The account of events given by the first named applicant was found to be credible, the Tribunal Member expressing her view in the following terms:-

> *"It is difficult to assess the credibility of the applicant's account due to the vagueness of the account and the lack of detail provided by the Applicant. However, having reviewed the report of Dr. Sarah Levis dated July 2010, the correspondence from the Rape Crisis Centre, the Ruhama Report and the correspondence from the Sexual Violence Centre, the Applicant is entitled to the benefit of any doubt I may have. "*

She found that the applicant, as a victim of human trafficking "*could come within the rubric of 'particular social group'* for the purposes of the Convention.

10. The Tribunal Member went on to determine that state protection in Nigeria was available to the applicants and, additionally, they could avail of internal relocation.

11. As regards state protection, much of the Tribunal Member's focus was directed to the contents of a US Department of State Trafficking Report 2010. The Tribunal Member stated:-

> *"The Government of Nigeria fully compiles with the minimum standards for the elimination of trafficking. It demonstrated sustained progress to combat human trafficking during the reporting period. In 2009, the Government convicted 25 trafficking offenders and provided care for 1109 victims, increases over the previous reporting period. It also continued to undertake strong efforts to raise awareness of human trafficking. In addition, its National Agency for the Prohibition of Trafficking in Persons (NAPTIP) ceased the practice of interrogating trafficking suspects at the same Lagos facility housing its shelter for trafficking victims. To better ensure victims' rights are respected, NAPTIP formed a committee in mid-2009 to review victim care policies, aiming to strike a balance between ensuring victims ' safety in shelters and promoting their freedom of movement. The Nigerian government in 2009 pledged over $7 million in annual funds for NAPTIP's operation and activities; all government programs received partial payment pending budget approval by legislative and executive branches. Due to a four month delay in approval of the 2010 national budget, funds were distributed to all federal agencies in April 2010...The Government of Nigeria sustained law enforcement efforts to combat trafficking during the last year. The 2003 Trafficking in Persons Law Enforcement and Administration Act, amended in 2005 to increase penalties for trafficking offenders, prohibits all forms of human trafficking. The law's prescribed penalties of five years' imprisonment and/or a $670 fine for labour trafficking, 10 years' imprisonment for trafficking of children for forced begging or hawking, and 10 years to life imprisonment for sex trafficking are sufficiently stringent and commensurate with penalties prescribed for other serious crimes, such as rape.. Nigeria continued its efforts to protect trafficking victims in 2009. Police, customs, immigration, and NAPTIP officials systematically employed procedures to identify victims among high-risk persons, such as young women or girls travelling with non-family members. Data provided by NAPTIP reflected a total of 1,109 victims identified and provided assistance at one of NAPTIP's eight shelters throughout the country during the reporting period; 624 were cases of trafficking for commercial sexual exploitation and 328 for labor exploitation. Various government agencies referred trafficking victims to NAPTIP for sheltering and other protective services: immigration referred 465; police referred 2 77; Social Services referred I92; and the State Security Service referred nine ... During the reporting period, the government took steps to relocate victims' quarters a considerable distance from detention areas for trafficking offenders, greatly reducing the possibility traffickers could exert undue influence over their victims. Victims were allowed to stay in government shelters for six weeks. If a longer time period was needed, civil society partner agencies were contacted to take in the victim. Officials encouraged victims to assist with the investigation and prosecution of traffickers, and victims served as witnesses in all of NAPTIP's successful cases. Victims could theoretically seek redress through civil suits against traffickers, or claim funds from a Victims' Trust Fund set up in 2009 through which assets confiscated from traffickers are transferred to victims. The Trust Fund committee is chaired by the Minister of Justice and meets four times per year. "*

12. Reference was made to a UK Report on Nigeria, dated 15th January 2010, in the following terms:-

> *"Human trafficking is not tolerated or condoned by the Nigerian State and increasingly efforts are being made to combat the practice and support victims of trafficking. Different opinions are expressed in the country of origin information on file in relation to a trafficker's ability to locate and retaliate against the victims on return to Nigeria (See for example paras. 26.09-26.13 Country of Origin information report 15 January 2010) but the general thrust of information suggests that state protection is available to victims of trafficking. The report quotes Morka from NAPTIP Lagos Zonal Office who states "since 2003, threats of reprisals from traffickers have never resulted in the loss of the life of victims. Before NAPITP was established in 2003, traffickers were able to operate more or less as they wished, but now they are aware of the fact that there is a law on trafficking in humans, and that NAPITP has the will and capacity to investigate and prosecute them. Furthermore, in general there is much more focus on human trafficking in Nigeria now more than was the case some years ago, as a result of enlightenment campaigns and awareness raising activities. "*

13. The Tribunal Member referred to a 2006 UK Case, *P.O. (Trafficked Women) Nigeria CG* [2009] UKAIT 00046, which found that the government of Nigeria was both able and willing to discharge its own duty to protect its own nationals from people traffickers. She went on to note that insofar as the UK Report of 15th January 2010 referred to a report of the Danish Immigration Service (which highlighted the common phenomenon of re-trafficking of trafficked women who return to Nigeria and other risks to trafficked women who returned or were returned to Nigeria), that that information was collected in 2007 and the Tribunal Member noted that since that time, and since the decision in P.O. was rendered in early 2009, "*the Nigerian state has sustained its efforts to protect victims of trafficking and the Nigerian state was upgraded by the US Department of State from a Tier 2 country in 2008 to a Tier 1 country in June 2009 and 2010 reports*".

14. In response to submissions made by the applicants and to country of origin information relied on by them as to the prevalence of police corruption and criminality undermining Nigeria's efforts to prevent trafficking, the Tribunal Member stated:- "*The first half of this report details the arrest of police officers as part of trafficking gangs and other such incidents, but there is no indication that the Nigeria state tolerates the practices of such corrupt officers*".

15. She went on to state:-

"Subsequent to this report the 2003 Trafficking and Persons Law and Enforcement and Administration Act was promulgated and NAPTIP was set up and as already stated, Nigeria in 2009 was designated a Tier 1 country, while Ireland in 2009 retained a Tier 2 designation.

Corruption is a problem in Nigeria as it is in many states, but as previously indicated in the last few years the Nigerian state has made significant efforts to combat human trafficking and the conduct of a single policeman or a group of such persons does not indict an entire force. In a document from the Danish Immigration Service entitled "Allegations against NAPTIP June 2010" it is stated 'Concerning allegations that senior NAPTIP officials have been directly involved in trafficking UNHCR stated that it had no knowledge of irregularities- either corruption or involvement in trafficking- in NAPTIP 's management. UNHCR does not yet cooperate directly with NAPTIP, but a large number of international organisations and Embassies in Nigeria work closely together with NAPTIP, and it would be known if any senior officials in NAPTIP had been involved in trafficking. "

16. She quoted Birmingham J. in *Bamidele v. Minister for Justice Equality and Law Reform* (High Court Unreported, 3rd June 2008) where he stated, when upholding a finding that state protection existed,:-

"I feel I must also have regard to the accepted principles, both domestically and internationally, that absent clear and convincing proof to the contrary, a state is to be presumed capable of protecting its citizens."

17. The Tribunal Member went on to state:-

"While it is undoubtedly the case that the police force in Nigeria is in need of vast improvements, it is also the case that sustained efforts are being made by the Nigerian authorities to combat trafficking and in this respect there is a broad consistency in the country of origin information on file. The general thrust is that the country of origin information on file is to the effect that state protection against traffickers would be available to the applicant and her daughter in Nigeria were they to face a threat from traffickers on return to Nigeria."

18. In response to the submission made on behalf of the first named applicant that J.O., who trafficked her had "*contacts everywhere in Nigeria*", the Tribunal Member opined:-

"[T]here is no evidence that [J.O.] was a member of a large gang in Nigeria or that she employed gang members when duping the Applicant. According to the applicant [J.O.] was assisted by her boyfriend and another "aunty" and [J.O.] wanted to take her to Italy. The fact that it was necessary for the trafficker to take the Applicant on two buses .....in an attempt to access a doctor for a termination suggests that the trafficker was not involved in a powerful trafficking network. I am also reinforced in this view as the applicant has not been contacted by this lady or anyone associated with this lady since her stated escape in February 2007. Had the Applicant been trafficked by a powerful international trafficking organisation it would be reasonable to suggest that they would have had the necessary network to attempt contact with the applicant since the escape, particularly as Ireland is relatively small - in size and population - in comparison to Nigeria."

19. Ultimately, the Tribunal Member concluded:-

"As already indicated, the state is not required to provide perfect protection..! am satisfied, having reviewed the substantial country of origin information on file, that the Nigerian authorities would be willing and able to protect the applicant and her daughter were they to return to Nigeria and seek such state protection. "

20. She then turned to the question of internal relocation, stating:

"Notwithstanding the aforegoing and were the applicant and her daughter deemed to be at risk from the trafficker, internal relocation would be a viable alternative to escape any further threat from her trafficker."

21. The Tribunal Member quoted Regulation 7 of the 2006 Regulations and made reference to certain Canadian case law. She continued:-

"Country of origin information indicates that the government and various women's rights organisations in Nigeria provide protection to women on domestic issues within Nigeria."

22. She referred to the April 2009 UK Operational Guidance Note as stating that women, if they chose to do so, would be able to seek assistance from woman's NGOs in the new location. She quoted the following extract from a British/Danish Fact Finding Report (September 2007 and January 2008):-

"WACOL stated that internal relocation for adult victims of domestic violence is an option for women in Nigeria. WACOL added that internal relocation is a common phenomenon in Nigeria for women who are victims of domestic violence... The United Nations Development Fund for Women (UNIFEM) found that in theory, it is not difficult for a woman to relocate within Nigeria and in this way find physical safety. As regards crime rates, Nigeria is a relatively safe country... According to UNIFEM, there are basically four scenarios for women who relocate within Nigeria in order to avoid FGM, forced marriage or domestic violence: She can approach the local church/mosque or religious establishment and seek assistance from the leadership, she can approach friends or relatives who are willing to hide her, she can approach NGOs working on women's human rights. (However, these NGOs may only be known to women in those urban settlements, towns or cities where the organisations are active). She can take to the street. This is a frequent scenario for young women or women who do not have the capacity or the means to do otherwise ... BAOBAB stated that from a legal point of view, internal relocation is an option for any woman in Nigeria because there is full freedom of movement in the country. However, this first step - even to take a bus - can be difficult as women are dependent on their relatives, family or husbands, and may not have the money to allow them to relocate. As a consequence of this, a woman will need relatives in her new location who are ready to accommodate her. It was emphasized that it is technically possible for victims of domestic violence, FGM or forced marriage to relocate in Nigeria, but economically it is not easy. Even language might pose a problem for women who relocate to areas where members of their own ethnic group do not live .... It was emphasized by BAOBAB that a woman can obtain physical protection by relocating to another area in Nigeria. Women who are economically independent, in particular, would stand a much better chance of sustaining themselves than women who are not. BAOBAB added that it is difficult to separate the question of physical protection from the social, cultural and/or humanitarian constraints involved in relocating. However, even women who have access to

economic means couldfi1ce difficulties in finding accommodation or a job as they are often stigmatised. BAOBAB further added that young women and/or single women, in particular, who have relocated within Nigeria, are vulnerable to unscrupulous men that may target these women. Some of them might even end up as commercial sex workers. According to representatives of a UN organisation, many women relocate to escape domestic violence, forced marriage or FGM, even within their local or state area. However, women prefer to go to friends or relatives, rather than to a shelter. The general perception amongst Nigerians is that shelters hide battered women and women with many problems who have no relatives to turn to... "

23. Addressing the first named applicant's fears of being located by J.O., the Tribunal Member stated:-

"The Applicant has not been found in Ireland despite Ireland being considerably smaller in size and population than Nigeria. This would suggest that [J.O.] is either no longer interested in the Applicant or she does not have the motivation or resources to locate the Applicant. Were the applicant to relocate within Nigeria it is difficult to understand how [J.O.] would find her, particularly as her trafficker has not sought to contact the Applicant since her stated escape in 2007. "

24. The Tribunal Member went on to note the educational courses undertaken by the applicant. Regarding the medical reports filed in aid of the applicant's appeal, she stated:-

"Medical reports on file note that the applicant has depressive symptoms and she has been diagnosed with Adjustment Disorder with some elements of PTSD. On the Applicant's return to Nigeria she could, if she wished, be met at the airport and be taken by NAPTIP to a shelter where she would be provided with medical facilities and counselling ....Were the Applicant to relocate with her daughter within Nigeria to a large city such as Lagos or Abuja she could seek employment and she would have access to the relevant NGOs who assist women fleeing the threat of traffickers and NAPTIP who assist victims of trafficking.

Considering the Applicant's age, the size and population of Nigeria, the fact that J.O. has not been in contact with the Applicant since February 2007, the fact that the Applicant is fleeing non-state actors and in light of the assistance available from NAPTIP and NGOs to persons in fear of traffickers, internal relocation to a large urban area such as Lagos or Abuja would not be unduly harsh for the Applicant, with her daughter, in all the circumstances. It is clear from the 2006 Regulations internal relocation is a complete answer to a claim for refugee status, as regulation 7 deals with it as a separate basis for refusing a claim...it follows therefore that the applicant herein is not a refugee. "

The challenge to the decision

25. The statement of grounds set out the challenge in the following terms:-

"(iii) The RAT erred in law and breached the principles of fair procedures and natural and constitutional justice in the manner in which it considered the medical and expert evidence before it and by failing to afford the appropriate weight to the said information.

(iv) The RAT erred in law and breached the principles of fair procedures and natural and constitutional justice in determining the Applicants' claim without having any appropriate regard to the further submissions and country of origin information submitted on the Applicants' behalf

(v) The RAT erred in law and breached the principles of fair procedures and natural and constitutional justice in failing to adequately assess subject to the availability of state protection to the Applicant in Nigeria as it is obliged to do and the decision is therefore invalid.

(vi) The RAT erred in law and breached the principles of fair procedures and natural and constitutional justice in failing to give reasons/adequate reasons for the decisions and in engaging in conjecture in the evaluation of the Applicants' claim.

(vii) The RAT failed in the decision to properly assess the issue of internal relocation within Nigeria.

(viii) The RAT failed in the decision to appropriately weigh in the balance country of origin information which was before it.

(ix) The RAT erred in law and breached the principles of fair procedures and natural and constitutional justice in failing to have any adequate regard to the Notice of Appeal documents and the further supporting documentation submitted by the Applicants in support of their claims to be refugees and further failing to have any adequate regard to the findings arrived in the section 13 reports compiled by the RAT "

The parties' submissions

26. In oral submissions, the applicants' counsel distilled the challenge to three headings:-

1) The inadequacy of the assessment on the availability of state protection;

2) The failure of the Tribunal Member to consider the issue of internal relocation in accordance with the provisions of Regulation 7(2) of the 2006 Regulations and;

3) The failure of the Tribunal Member to have regard to the provisions of Regulation 5 (2) of the 2006 Regulations.

27. Counsel submitted that in reaching her conclusions on the availability of state protection and internal relocation for the applicants, the Tribunal Member placed selective reliance on the country of origin information before her. While the Tribunal Member relied heavily on the 2010 US State Department's largely positive report as to the efforts being made to combat human trafficking in Nigeria, a less rosy picture was painted by a 2009 UNHCR Report, which was not referred to by the Tribunal Member.

28. Moreover, no account was taken of paragraph 3.10.1 of the UK Border Agency OGN on Nigeria (14th April 2009) which made reference to the "*trafficking in women, most commonly to work as prostitutes overseas, is a widespread and increasing problem in Nigeria. Often victims of trafficking have sworn a blood oath to a "juju Shrine" and to the juju priest of their local community. The victims are most likely in debt to a madam who may have sponsored their travels abroad*". This was the situation in which the first

named applicant found herself.

29. The court was referred to para. 3.10.9 of the aforementioned report which stated, *inter alia*:-

> *"Trafficked women may face serious repercussions upon their return to their home country, such as reprisals or retaliation from trafficking rings or individuals, or discrimination from their community and families and there may be a risk of being re-trafficked Each case should be considered on its individual merits and in the context of the country on which it is based"*

Counsel pointed to the UK January 2010 Report on Nigeria, referred to in the decision, but he contended that significant portions of that report were not considered by the Tribunal Member. In particular, the report referred to a Danish Immigration Service Fact Finding Mission Report concerning the protection of victims of trafficking in Nigeria, published in April 2008, which had highlighted NAPTIP's lack of resources and "*the reality of the criminal justice system*" offering "*little or no protection for victims of crime*".

30. It was also contended that no regard was paid to the Danish Immigration Services findings that "*[r]e-trafficking is a very common phenomenon*" and that it was "*considered that returned victims of trafficking are vulnerable as they face serious dangers in Nigeria. Traffickers will persecute the returnees if they are still indebted to these traffickers and the victims are frightened, as they strongly believe that they are obliged by the oath that they took before leaving Nigeria. The victims fear for the consequences if they do not or cannot pay their debt, and at the same time, many victims are seriously traumatised, from their experiences abroad.*" This, counsel submitted, was the situation faced by the first named applicant. The Danish study had concluded that "*returning victims are exposed to psychological and emotional violence/pressure from their families and it is common that victims who have returned before the debt has been paid are re-trafficked....Some victims may be excluded from their own family if they have returned or have been returned before the debt to the trafficker has been paid*" and the report continued "*that it would be difficult for a victim to relocate to another location in Nigeria in order to avoid reprisals from traffickers."*

31. Moreover, while the Tribunal Member, in the context of the internal relocation assessment, referred to and quoted from the "*Report on Fact Finding Mission to Nigeria- September 2007 and January 2008*" (paragraphs 1.11-1.62) this was a selective process on her part. No reference was made to what was contained at paragraphs 1.83 and 1.84, as follows:-

> *"UNIFEM considered that, in practical terms, if a woman chooses to relocate she could face a number of economic and social constraints depending on her situation. The woman would be in a more favourable situation if she has an economic foundation of her own in the form of savings, which can sustain her until she can get a job. There is no social security system in Nigeria that can support a woman without any means of existence.*
>
> *It will also be easier for a woman to relocate if she has a relative or a friend in the new location who would be willing to support her in the initial phase. Married women may have two families to choose from when it comes to whom they turn to for protection and safety. If the woman has no one to receive or accommodate her she might end up living in the street ...The question of economic and social constraints facing a woman who has decided to relocate very much depends on the specific situation of the woman."*

Nor did the Tribunal Member refer to paragraph 1.88 which stated:-

> *"BAOBAB explained that social welfare structures in Nigeria are not well equipped to perform their statutory and social functions. Accordingly, women who have relocated will find that there are no shelters to protect them, no jobs, no access to justice, and they may find it difficult to be accommodated. In addition, gender stereotyping labels single women as "unattached" and they easily become vulnerable. Finally laws are very often not implemented or not enforced. "*

All of this, counsel argued, should have been considered as a counterbalance to the content relied on by the Tribunal Member.

Counsel relied on the dictum of Clark J. in *K.D. (Nigeria) v. Refugee Appeals Tribunal* [2013] IEHC 481, quoted with approval by MacEochaidh J. in *E.I & Ors v. The Minister for Justice Equality and Law Reform* [2014] IEHC 27 as to the principles to be applied when assessing an internal relocation alternative. In particular, it was argued that the Tribunal Member failed the test set out in principle 7 when she dismissed the potential threat posed to the first named applicant by J.O., on the basis that J.O. was not an international trafficker and when she had not found the applicant in Ireland. Counsel also argued that the country of origin information available to the Tribunal Member highlighted the difficulties for the first named applicant, even without taking into consideration her particular personal circumstances.

32. Furthermore, the Tribunal Member, in concluding the first named applicant could relocate to Lagos or Ahuja, failed to consider whether it would be reasonable for her to relocate, as required under principle 8 of *.K.D. Nigeria.*

33. The Tribunal Member paid no regard to the first named applicant's particular circumstances, as she was required to do pursuant to reg. 7(2) of the European Communities (Eligibility for Protection) Regulations 2006. In particular, the first named applicant's lack of family in Nigeria and her limited education was not considered. Counsel contended that the numerous medical reports put before the Tribunal Member, which highlighted the first named applicant's vulnerability and the mental scars of having been trafficked, should have been considered in the context of what might happen to her in the future.

Here, the first named applicant was in the position of someone with a small child, without family support and with her own particular vulnerabilities, as described in the various medical reports.

34. In the present case, a detailed consideration of what would happen to the applicant if she went to Lagos/Abuja was necessary but that was not carried out by the Tribunal Member.

35. In the context ofreg.5 (2) of the 2006 Regulations, counsel argued: the Tribunal Member accepted that the first named applicant was trafficked, thus her case was one where past persecution was established. Not only was this a significant indicator of possible future persecution, but even if the risk of future persecution was no longer present, the Tribunal Member was nevertheless obliged to consider the first named applicant's circumstances in accordance with reg. 5(2).

36. Specifically, the Tribunal Member did not make a finding as to the likelihood of the first named applicant suffering future persecution, as she was required to do.

More importantly, the persecution suffered by the first named applicant was not considered in the context of the third limb ofreg.5 (2). It was submitted that the rationale for this third limb was that the personal circumstances of a person seeking refugee status could be so traumatic that even absent any present or future risk , it would be inhumane not to grant them refugee status.

37. Counsel referred to the supplemental submissions filed with the Refugee Appeals Tribunal on the 12th July 2010, where the following, *inter alia*, was stated:-

> *"3.2 The Appellant and her daughter should be afforded refugee status on the basis of the atrocious past persecution already suffered by the Appellant. Her rights pursuant to Article 2, 3, 4 and 8 of the ECHR have been violated by her traffickers. The Appellant relies on Regulation 5 (2) of the EC (Eligibility for Protection) Regulations 2006.*
>
> *3.3 Past persecution is a serious indicator of a risk of future persecution. This is so even if the fear of future persecution is different inform from that already suffered. "*

38. Furthermore, it was argued that the fact that the first named applicant having to return to Nigeria itself constituted trauma for her and in this regard the court was referred to the contents of the various medical reports which had been submitted on her behalf to the Tribunal.

The respondents' submissions

39. As a prelude, counsel for the respondent emphasised that there was no question but that the Tribunal Member accepted the first named applicant as credible and accordingly, the respondents refuted any suggestion that the Tribunal Member did not have regard to her personal circumstances. It was noted that the Tribunal Member went into considerable detail regarding the applicant's personal history. Furthermore, she considered all of the country of origin information on file and made reference to all of this information in the decision. It was accepted from the broad overview of the information which was before the Tribunal Member that all was not well in Nigeria, but all of the reports acknowledged steps were being taken regarding the combating of trafficking.

40. The respondents submitted that the Tribunal Member properly considered the question of state protection. A state's ability to protect an applicant is a crucial element in determining whether the stated fear of persecution is a well-founded one, and as such, is not an independent element of the definition. In this regard, the issue of state protection goes to the objective proportion of the test of fear of persecution: It is not enough to simply assert a subjective belief that protection is not available. In other words, international protection is only engaged when national or state protection is unavailable to an applicant. Counsel submitted that this was not to be considered in the abstract. The starting point for such a consideration was the presumption that a state (absent a complete a breakdown of the state) is capable of protecting its own citizens. This was of course a rebuttable presumption but one only successfully rebutted by clear and convincing evidence of the state's inability to so protect. Furthermore, the primary burden of proof in a case of this nature was on the first named applicant.

41. The applicants had provided no evidence to rebut the presumption that their country of origin could protect them. The Nigerian authorities had put in place legislative and other active steps to combat trafficking. Furthermore, the applicants did not make the case that the decision of the Tribunal Member on the adequacy of state protection was irrational; at best the case made, which was not accepted, was that the Tribunal Member failed to have regard to certain country of origin information but, that was not the case, the respondents contended.

42. Counsel submitted that it was not for this Court to weigh the evidence; that was the sole preserve of the Tribunal Member. In the instant case, the Tribunal Member referred to both sides of the argument as to the adequacy of state protection in Nigeria and found that such protection was available to the applicants. The Tribunal Member set out the relevant case law and concluded that the facts in the present case were similar to what had been decided in the UK case of *P.O. (Trafficked Women) Nigeria CG* [2009] UKAIT 00046 where the same country of origin information as was before the Tribunal Member in this case was considered.

43. On the question of internal relocation, the respondents argued that there was no merit in the arguments made by the applicants that the Tribunal Member failed to take account of the first named applicant's personal circumstances. In the course of a lengthy analysis, the Tribunal Member outlined those circumstances and found that the first named applicant had suffered. The Tribunal Member went on to detail the potential problems if the first named applicant were to return to Nigeria but concluded that she would not be at risk from J.O. in Nigeria. It was submitted that that was a conclusion open to the Tribunal Member on the evidence. Furthermore, the Tribunal Member tailored the question of internal relocation to the first named applicant's circumstances. In doing so, she took account of all of the first named applicant's evidence and the medical reports and noted the available country of origin information. Counsel referred to the dictum of MacEochaidh J. in *E.I v. Minister for Justice Equality and Law Reform*, as follows:-

> *"The Tribunal Member does not identify a particular place for the proposed internal relocation. No principle of law requires specificity in this regard in every case where internal relocation is proposed. Where a threat is exclusively regional in its source, it may, for example, be adequate to identify a large region located a safe distance from the source of the threat. The nature of the persecution source will indicate what level of specificity is required as to the locale of proposed internal relocation. "*

44. The Tribunal Member found that J.O. was not part of an international gang. Furthermore, in the course of her section 11 interview, the first named applicant was questioned in the context of Lagos and Abuja as possible safe locations for her and she had expressed only a general fear of being found.

45. With regard to the applicant's arguments on reg. 5 (2), while it was correct to say that the Tribunal Member did not formally make a finding of past persecution, she had believed the first named applicant, therefore it was not tenable for the applicants to assert that the Tribunal Member did not consider past or likely future persecution or that she did not have regard to medical evidence.

Considerations

State Protection

46. The ability of a decision-maker to assess the efficacy of State protection (or indeed internal relocation) for a protection applicant necessarily involves, *inter alia*, having recourse to country of origin information. The first issue to be determined is whether the country of origin information which was before the Tribunal Member was properly assessed.

47. On the issue of state protection, I am of the view that the applicant's have not made out a persuasive case that the Tribunal

Member failed to have regard to country of origin information or that she was selective in the manner in which it was addressed. Counsel for the applicant cited the failure of the Tribunal Member to have regard to the contents of an UNHCR 2009 Country Report on Nigeria, which, he asserted, painted a less rosy picture than the 2010 US Department of State Trafficking Report, quoted extensively by the Tribunal Member. It does not appear to be the case that the contents of the UNHCR Report were specifically referred to by the Tribunal Member in the course of the decision. However, I find that nothing particular turns on this for the following reasons.

48. The Tribunal noted that "*the general thrust of information suggests that state protection is available to victims of trafficking*". That conclusion was available to the Tribunal Member on the evidence. In coming to her conclusion, she had regard, *inter alia*, to the contents of the US State Department Report and to the contents of the UK Border Agency Report of January 2010. The latter report recognised that although prohibited by law, trafficking was practised in Nigeria and was, "*a serious problem*". That observation notwithstanding, and similarly to the US State Department Report of 2010, the UK Report goes on to outline the efforts being made by the Nigerian authorities to combat trafficking. To my mind, the UNHCR report, relied on by the applicants, does likewise. The latter document does not paint so different a picture, compared to the other information which was before the Tribunal Member, such as to persuade this Court that the Tribunal Member's failure to specifically refer to it in the context of her assessment on state protection vitiates the decision she made. With regard to the argument that significant portions of the UK January 2010 Report (which referred to a 2008 Danish Immigration Service Fact Finding Mission Report) were not referred to by the Tribunal Member, I find no merit in this argument since at page 25 of the decision, the Tribunal Member makes specific reference to the Danish Report and effectively discounts it for reasons which are stated in the decision.

49. In the course of his submissions, the respondents' counsel referred the court to *O.A.A v. Minister for Justice Equality and Law Reform* [2007] IEHC 169 where Feeney J. stated, inter alia,:-

> *"4.2 In considering the issue of State protection the Tribunal member relied on a number of quotations from Professor Hathaway's The Law of Refugee Status and extensively on the decision of the Supreme Court of Canada in Canada (Attorney General) v. Ward [1993] 2 SCR 689. These same authorities were considered and approved in the decision of Mr. Justice Herbert in Kvaratskhelia v. The Refugee Appeals Tribunal and Another [2006] IEHC 132. In that case Mr. Justice Herbert identified that the reasoning and conclusions of La Forest J in the Supreme Court of Canada in the Ward case were both persuasive and compatible with the jurisdiction of this State in considering applications for refugee status. Mr. Justice Herbert identified that the onus is on the Applicant for refugee status to establish both a subjective fear of persecution for one, at least, of the reasons specified in s. 2 of the Refugee Act 1996 and, an objective basis for that fear. Mr. Justice Herbert stated (at p. 134), as follows:*
>
> *'I agree with La Forest J, that subject to exceptional cases, the fact that the power of the State to provide protection to its nationals is a fundamental feature of sovereignty and, the fact that the protection forwarded by refugee status is 'a surrogate coming into play where no alternative remains to the claimant', renders it both rational and just for a requested State to presume, unless the contrary is demonstrated by 'clear and convincing proof' on the part of the Applicant for refugee status, that the state of origin is able and willing to provide protection to the Applicant from persecution, even if at a lesser level then the requested State. '"*

In his judgment in *N.O. v. Refugee Appeals Tribunal & Ors* [2014] IEHC 509, Barr J. quoted with approval the approach which had been adopted in the Canadian case and which had been applied with approval by Feeney J. in *O.A.A.*

Irrespective of the burden on the applicants to displace the presumption referred to in the above quoted case law, I am satisfied that the evidence which was before the Tribunal Member in the present case, both in terms of testimony from the first named applicant and country of origin information was such that the Tribunal Member could reasonably and rationally conclude that state protection would be available to the applicants. Accordingly, I am not persuaded that a challenge to the manner in which the finding on state protection was arrived at has been made out.

Internal Relocation

50. The starting point for the court's review of the Tribunal Member's finding that internal relocation was an option for the applicants is principle 5 of the principles set out in *K.D. (Nigeria):*

> *"Where there is a well-founded fear of persecution and a general area has been identified as an alternative to refugee status then the protection decision maker must pose two questions: (i) is there a risk of persecution I serious harm in the proposed area of relocation? Lf not, (ii) would it be reasonable to expect the applicant to stay in that place?"*

51. Principle 7 as set out in *K.D. (Nigeria)* states as follows:-

> *"If the persecution feared emanates from private or domestic actors, such as a threat from a particular family member, and a Convention nexus has been established, the protection decision-maker must make an objective, common sense appraisal of the reality of whether the risk faced by the applicant could be avoided by moving elsewhere, having regard to the applicant's own evidence. "*

52. As to the issue of risk of persecution in the proposed areas of relocation, I am satisfied that the challenge made to the Tribunal Member's assessment that the first named applicant would not be at risk from J.O. if she were to relocate is not sustained. In analysing whether risk would be absent if the applicants were to relocate, the Tribunal Member had regard to the first named applicant's evidence and to country of origin information, as already referred to. The Tribunal Member was cognisant of the risks inherent in a young woman in the first named applicant's situation relocating internally in Nigeria. She referred to the UK OGN (April 2009) and quoted extensively from the British/Danish Fact Finding Report (September 2007 and January 2008), noting the options both positive and negative available to women in situations like that of the first named applicant. Referring to the Report she stated:-

> *"WRAPA emphasized that any woman who is in need of assistance and protection in Nigeria will be given it, irrespective of where she may be in the country, as long as she is aware of a woman's group she can contact ...The Report goes on to state that there are Human Rights Desk Officers in many police stations in Nigeria and the federal government has established a well functioning national Human Rights Commission, which offers free legal assistance and facilitates necessary physical protection of women who are victims of domestic violence. According to the report there are many women, including may (sic) victims of domestic violence who have turned to the government for help and who have been assisted'".*

53. I am satisfied, having regard to country of origin Information available to her and to the evidence given by the first named applicant, that the Tribunal Member's conclusion, namely that the first named applicant's fears could be avoided by her moving to Lagos or Abuja, was the type of objective common sense appraisal contemplated by Clark J. in *K.D. (Nigeria).*

54. However, the absence of risk is only one aspect of the necessary assessment pursuant to reg.? (2). The question remains as to whether the Tribunal Member's finding that the applicants could relocate to Lagos or Abuja met the "*reasonableness*" test set out in principle 8 in *K.D. (Nigeria),* as follows:-

> *"It is not enough for the protection decision-maker to determine that the risk of persecution is absent from the proposed area of relocation. He or she must go on to consider whether it would be reasonable to expect the applicant to stay in that place, having regard to his I her personal circumstances and the general conditions prevailing on the ground, in accordance with Regulation 7(2) of the Protection Regulations. The reasonableness assessment is not concerned with assertions such as 'I won 't know any one ', but rather with matters of substance such as whether the applicant is old, infirm, ill, has many small children or is without family support and other real issues. "*

55. Principle 9 as set out in *K.D. (Nigeria),* provides:-

> *"The UNHCR Guidelines on International Protection: Internal Flight or Relocation Alternative (2003) indicate that consideration should be accorded to whether the applicant could lead a relatively normal life in the selected place of relocation without undue hardship, in the context of the country concerned. Unless there is objective evidence that the general circumstances prevailing in the proposed area are harsh- for example if the proposed area is the site of a conflict or a humanitarian crisis - there is in general no obligation to seek out a specific town or detailed information on economic and social conditions in the proposed location. However, if a specific objection is taken by the applicant to the location this objection must be examined. "*

56. Regard must be had also to principle 13 in *K.D. (Nigeria)*:-

> *"The threshold to be reached before internal relocation is considered is high. The applicant would be recognised as a refugee but for the fact that he can safely relocate. The inquiry is commensurately careful. "*

57. Effectively, counsel for the applicant has argued that the Tribunal Member did not carry out the "*careful*" inquiry into the first named applicant's personal circumstances before arriving at the conclusion that it would not be unduly harsh for her to relocate. I agree. It seems to me that the first named applicant's personal circumstances merited more detailed consideration before a decision was made on internal relocation. On the issue of her medical history, I am not convinced that one sentence in the Tribunal Member's section 5 analysis, namely "*medical reports on file note that the applicant has depressive symptoms when she has been diagnosed with Adjustment Disorder with some elements of PTSD*" does justice to the first named applicant's traumatic circumstances and the contents of the medical and other reports. The circumstances of the case merited a detailed consideration of the health and disability issues and of the first named applicant's particular vulnerabilities, given her background, and given that she remained under the care of a number of health professionals whose reports were before the Tribunal Member. The effect of the past persecution on the first named applicant was set out in the medical and other reports and this was a specific factor which should have been alluded to in the context of determining the efficacy of the internal relocation option for her.

58. Furthermore, the Tribunal Member cited Lagos or Abuja as possible relocation centres for the applicants, but nowhere in the decision is there an *informed* assessment as to how the first named applicant's medical and psychological difficulties would be accommodated in those cities. Having regard to the particular circumstances of this case, the reference to the first named applicant being able to access medical facilities and counselling in "*shelters*" does not to my mind equate with the careful enquiry test mandated by reg.7(2), as enunciated in *K.D. Nigeria*. Moreover, the country of origin information quoted and relied on by the Tribunal Member referred not only to the sources of the physical protection and assistance available for the first named applicant, it also highlighted the potential limitations of the available support in situations where there was an absence of family support or economic means. While the Tribunal Member emphasised the positive aspects of the available supports in concluding that the first named applicant, on her return to Nigeria, "*could be met at the airport ...and taken by NAPTIP to a shelter.....and would also have access (sic) the relevant NGOs who assist women fleeing the threat of traffickers and NAPTIP who assist victims of trafficking*", I do not perceive any substantive weighing exercise having been carried out in the context of the first named applicant's situation as a single mother with limited education and without family support and with the mental scarring and psychological difficulties, including on occasions suicidal ideation, as described in the medical and other reports. Of course, the weight to be ascribed to all of the foregoing factors was a matter for the Tribunal Member but there is no indicator on the face of the decision that that exercise was conducted. The first named applicant's circumstances merited such an approach and the absence of same vitiates the finding that internal relocation was a viable option for the applicants.

Regulation 5(2)

59. I turn now to the applicant's argument that the Tribunal Member erred in not making a finding pursuant to reg. 5 (2) of the 2006 Regulations, which provides:

"*The fact that a protection applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, shall be regarded as a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated, but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection.* "

60. It is noted that the Tribunal Member did not in fact make an explicit finding of past persecution in this case. However, the first named applicant was found by the decision-maker to be the victim of trafficking and she found a Convention nexus in that the applicant, as a victim of trafficking, could come within the rubric of a particular social group. It was argued that the Tribunal Member did not make a finding as to the likelihood of future persecution. On this particular point, I am satisfied that the Tribunal Member's obligation to consider whether the first named applicant might suffer future persecution was fulfilled by the Tribunal Member's analysis as to the likelihood of the first named applicant being at risk from J.O. in the future.

61. As regards the third limb ofreg.5 (2), in *S.N v. Minister for Justice Equality and Law Reform* [2011] IEHC 451 Hogan J. stated:-

> *"25. While Article 5(2) of the 2006 Regulations mirrors Article 4(4) of the 2004 Directive, it goes somewhat further in that the final proviso - "but compelling reasons arising out of previous persecution or serious harm alone may*

nevertheless warrant a determination that the applicant is eligible for protection" - finds no counterpart in the 2004 Directive. Many of these issues were examined by Cooke J in his very important judgment in MST v. Minister for Justice, Equality and Law Reform [2009] IEHC 529 and it may be opportune now to examine this case in some detail. "

He referred to the dictum of Cooke J. in the following terms:-

"29. Having discussed the object of the 2006 Regulations as being to give effect to the 2004 Directive, Cooke J went on to note the possible discordance between aspects of Article 4(4) of the Directive and Regulation 5(2). He first observed that:-

"In the present case, however, Article 4(4) has been fully transposed verbatim by Regulation 5 (2) but the Minister appears to have gone further by the inclusion of the additional wording. The common parts of Regulation 5 (2) and Article 4(4) could be paraphrased as follows:

(i) A claim to face a real risk of suffering serious harm must be regarded as having substantial grounds if the applicant establishes as a fact that he or she has already been subject to serious harm or to direct threats of such harm;

(ii) The claim need not, however, be so regarded if there are good reasons to consider that such serious harm or threats will not be repeated. "

30. Cooke J then continued:-

"29. The ordinary meaning of the additional wording appears to be that, what might be called a "counter-exception" to para (ii) above is created to the effect that, even if there is no reason for considering that the previous serious harm will now be repeated, the historic serious harm may be such that the fact of its occurrence alone gives rise to compelling reasons for recognising eligibility. While that appears to be the ordinary meaning of the additional wording it is not immediately clear how it is to be given effect in the context of the concept of subsidiary protection .....

32. Notwithstanding the difficulties presented by the additional wording, there cannot be any doubt, in the Court's view, that the additional wording can only be construed as intending to permit some limited extension to the conditions of eligibility prescribed in Article 4(4) designed to allow some latitude in according subsidiary protection based exclusively upon the fact of previous serious harm when it is accompanied by compelling reasons. It is relevant to bear in mind that "serious harm" is defined as including "inhuman or degrading treatment" ....It is possible therefore to envisage a situation in which an applicant had escaped from an incident of mass murder, genocide or ethnic cleansing in a particular locality. Even if the conditions in the country of origin had so changed that no real risk now existed of those events happening once again, the trauma already suffered might still be such as to give rise to compelling reasons for not requiring the applicant to return to the locality of the earlier suffering because the return itself could be so traumatic as to expose the applicant to inhuman or degrading treatment.

With regard to the particular circumstances in *S.N.*, Hogan J. went on state:-

"42. So far as the third limb of the test is concerned, it is plain from the decision in MST that the potential application of the counter-exception in Regulation 5(2) must also be considered This means that if the Minister is satisfied that there is no reason for considering that the previous serious harm will now be repeated, he must nonetheless consider, in the words of Cooke J, whether the "historic serious harm may be such that the fact of its occurrence alone gives rise to compelling reasons for recognising eligibility. " In this context, it should be recalled that the second Spirasi letter expressed the view that the forced repatriation of the applicant to Uganda "would serve only to reinforce the negative impressions that she has developed since her traumas.

43. The evaluation of this evidence and the consideration of this counter exception is, of course, entirely a matter for the Minister in the first instance. But consider it he must. Yet an examination of the file does not disclose that the Minister ever gave any consideration to the counter-exception in the original decision. This is a further reason why the decision cannot be allowed to stand."

62. In the case of *K.B. v. Minister for Justice Equality and Law Reform* [2013] IEHC 169, MacEochaidh J. had occasion also to consider the third limb of the test set out in reg. 5 (2) in the context of submissions made on behalf of the applicant in that case that the Refugee Appeals Tribunal, in rejecting the appeal, had not averted thereto. MacEochaidh J. concluded:-

"13. I accept the submissions on behalf of the applicant that the inquiry required to be made under the counter exception in Regulation 5(2) of the E.C. (Eligibility for Protection) Regulations was not carried out and consequently the decision of the Tribunal Member was ultra vires. The respondent has urged that there is no evidence that the past persecution suffered by the applicant would trigger the counter exception and that in the MS.T case (and to a lesser extent in the N v. MJELR case) such evidence was available and the failure to carry out the third task provided by Regulation 5(2) was therefore inexcusable. I don't accept that the facts of this case preclude the possibility that the past persecution, which was accepted by the Tribunal Member, would not trigger the protections of the counter exception. The sufferings were described by the Tribunal Member as 'a severe violation of human rights'. Even if there were no facts which might permit a decision-maker to deploy the protections of the counter exception, the failure to consider the possibility would be fatal to the decision. "

63. With regard to the "*counter exception*" set out in reg. 5 (2), I am satisfied to accept that the import of the wording mandated the Tribunal Member in this case to embark on an inquiry as to whether the circumstances of the first named applicant, who was found to have been the victim of persecution for a Convention reason, met the requirements of the regulation.

64. There is no definition in reg. 5 (2) of what constitutes "*compelling reasons*"; thus the circumstances of any particular case will fall to be considered by the decision-maker in order to determine whether the threshold has been met. To my mind, it is axiomatic that the first named applicant's circumstances, having been a victim of trafficking and forced to work as a prostitute for a sustained period, with the resultant medical and psychological consequences as evidenced by the medical reports, were such as to warrant consideration as to whether the "*counter exception*" conditions were met. Moreover, I echo the words of MacEochaidh J. in *K.B. v. The Minister for Justice Equality and Law Reform*:-

"Even if there were no facts which might permit a decision-maker to deploy the protections of the counter exception,

the failure to consider the possibility would be fatal to the decision."

65. The Tribunal Member did not consider reg. 5 (2) save that under the heading "*Assessment of facts and circumstances*", she quoted the provision and under "*Submissions*" duly recorded the applicants' legal representative's argument on the issue. Under "*Conclusion*" she stated that she had considered, inter alia, the applicants' supplemental submissions. In response to the respondents' argument that the Tribunal Member, in so doing, had considered the issue, counsel for the applicants argued that the mere repeating of the provision in the decision, together with a reference to having considered the submissions, did not constitute a proper consideration. Furthermore, counsel contended that the duty to consider the reg. 5(2) "*counter exception*" was not met merely by the Tribunal Member having found the first named applicant's account of persecution credible. I agree with those submissions. The first named applicant's circumstances merited a detailed consideration under the umbrella of the "*counter exception*". The failure to do so in this case renders the decision unlawful.

66. While this court has found the Tribunal Member's assessment that state protection was available for the applicants to be lawful, this cannot sustain the decision in view of the other findings of this court, in particular, the failure to conduct the reg.5 (2) inquiry. Thus, for the reasons set out above, I formally grant leave to the applicants and given that these are telescoped proceedings, I will make an order quashing the decision of the second named respondent and will make an order remitting the matter for a de novo consideration before a different member of the Refugee Appeals Tribunal.