

**THE HIGH COURT  
JUDICIAL REVIEW**

**2008 1059 JR**

**BETWEEN**

**B. S.**

**APPLICANT**

**AND**

**THE REFUGEE APPEALS TRIBUNAL (SUSAN NOLAN)**

**RESPONDENT**

**AND**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**NOTICE PARTY**

**JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 20th day of January, 2010**

1. The applicant seeks leave to apply for an order of certiorari quashing the decision of the Refugee Appeals Tribunal ("the Tribunal"), dated the 21st July, 2008 which affirmed the decision of the Refugee Applications Commissioner ("the Commissioner") to recommend that the applicant should not be declared a refugee.

2. The applicant, who was assisted by a solicitor when filling in her questionnaire, claims that she was born in 1963 in Nigeria, is separated from her husband and is the mother of four children two of whom are adults. She claims that she arrived in the State in April, 2007 having been brought here by an agent using a false passport. She came to take up employment as a child minder for a Nigerian couple who later abandoned her. At or around that time she became ill and was admitted to hospital and was diagnosed as HIV positive. She applied for asylum at the end of November, 2007 and on her ASY 1 form she stated that she came to the State to claim asylum as she had no money and could work here. In her questionnaire she claimed that she would suffer stigma, hostility and a persecutory denial of medical treatment in Nigeria. Her solicitors made written submissions on her behalf prior to the interview, claiming that she feared persecution on grounds of membership of two particular social groups being (i) individuals and / or women suffering from HIV in Nigeria and (ii) women and / or single women in Nigeria. At interview she claimed that she was molested, beaten and robbed many times on her way back from the market in Nigeria. She also claimed that she would be isolated in Nigeria because she is HIV positive and would not receive treatment. Two days after the interview her solicitors made further written submissions clarifying her fears.

3. Her application for refugee status failed before the Commissioner. In the s. 13 report the Commissioner, relying on paragraph 54 of the UNHCR Handbook, concluded that any discrimination asserted would not reach a level which would amount to persecution. Paragraph 54 of the Handbook states:-

*"Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities."*

4. The applicant appealed the Commissioner's recommendation before the Tribunal but was unsuccessful and the recommendation was affirmed. In her decision the Tribunal Member noted that the applicant's evidence had been that when she was diagnosed with HIV, she knew that she would get good medical treatment in Ireland and she might not get medical treatment in Nigeria because she did not have the money and that persons living with HIV are usually isolated in Nigeria because everyone is afraid of them. The Tribunal Member considered country of origin information (COI) furnished by the applicant and by the Commissioner on the treatment of AIDS in Nigeria and concluded that while there was some evidence of discrimination against persons living with HIV including from certain healthcare professionals, this was not of such a level as to amount to persecution and was not attributable to any policy taken by the Nigerian government.

5. The Tribunal Member then considered whether the applicant would face discrimination in Nigeria as a single woman if she returned. It was accepted that COI on the attitude of the police towards single women suggested that there were some barriers to single women seeking protection but it was noted that the applicant had a father and brothers living in Nigeria and therefore she had a family support network in the country. The Tribunal Member found that the applicant's own evidence was that other traders, including men, were attacked and vulnerable and therefore the applicant had failed to establish that the attacks were as a result of her being a woman / single woman in Nigeria and therefore no Convention reason was established. It was also noted that her evidence was that she left Nigeria in order to get work and that she wanted to return but that she had no documents.

6. The applicant challenges the validity of the Tribunal decision on the ground that the Tribunal Member erred in her assessment of the applicant's fear of persecution by reason of her HIV status and in particular:

- (i) Erred in her assessment of state protection for persons living with HIV in Nigeria;

(ii) Failed to take into account and / or was selective in her reference to the country of origin information submitted by the applicant relating to the discriminatory treatment of persons living with HIV in Nigeria; and

(iii) Failed to have regard to previous decisions relating to Nigerian nationals living with HIV.

7. At the hearing Ms. Bourached B.L., counsel for the applicant, argued that the applicant had claimed persecution on two distinct grounds: (i) the denial of medical treatment on a discriminatory basis at the hands of the government and (ii) societal discrimination and stigmatisation amounting to persecution by non-State actors. She argued that the Tribunal Member confused these two issues and proceeded in error on the basis that there was a requirement of state complicity in societal discrimination before persecution could be found. As a matter of law, there is no requirement of state complicity in order for non-state persecution to be established.

8. The applicant also argued that COI before the Tribunal Member indicates that there is widespread societal discrimination against persons living with HIV in Nigeria and that the Nigeria government does not provide any method of redress or protection against such discrimination. Such discrimination therefore might amount to persecution within the meaning of s. 2 of the Refugee Act 1996 when read in conjunction with Regulation 9 of the *European Communities (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006). A state is required to have in place an effective legal system for the prevention and punishment of acts amounting to persecution which, it is argued, includes acts of discrimination against persons living with HIV. Reliance was placed on the judgment of Clarke J. in *E.M.S. v. The Minister for Justice, Equality and Law Reform* [2004] I.E.H.C. 398 and on the judgment of the Federal Court of Appeal in Australia in *Kuthyar v. Minister for Immigration and Multicultural Affairs* (2000) FCA 110.

9. Ms. O'Sullivan B.L., counsel for the respondent, submitted that an examination of the COI furnished to the Tribunal Member indicates that it is of variable relevance, reliability or objectivity and that not all of it refers to HIV / AIDS. The particular document relied upon by the applicant as a source of information on state discrimination against persons living with HIV is of doubtful provenance being an internet generated print-out referring to an event in Bangkok at which reference was made to the judgment of an unidentified court in Nigeria where the judge was said to have found that constitutional rights did not extend to persons with HIV. The credentials of the author of the internet article are unknown and the information which appears to be from around 2003 is undated. The court report of the case was not before the Tribunal Member and the value of the internet article is further undermined by another report furnished by the applicant to the Tribunal which indicates that the Nigerian Court of Appeal dismissed the appeal in the case referred to in the internet article on technical grounds because the applicant had consented to the trial judge's ruling.

10. Ms. O'Sullivan pointed out that the U.K. Home Office Operational Guidance Note (O.G.N.) (2007) submitted by the Presenting Officer at the oral hearing refers to the availability of medical treatment for persons living with HIV and notes that while access to quality healthcare in all fields is limited with many people seeking care from traditional healers or those with the means travelling overseas, medical treatment for HIV / AIDS is available. The government has identified that there are approximately 3.6 million people living with AIDS and has targets by 2010 to provide free or cheap treatment to at least 80% of that group.

11. The Tribunal Member accepted that societal discrimination and stigma existed but found that this did not emanate from the State. That conclusion is supported by the COI that was before the Tribunal Member. Of note is that the COI indicates that the Nigerian State was involved in sponsoring education programmes relating to HIV and AIDS. The Court notes that applicant has been diagnosed as HIV positive and suffers from toxoplasmosis. However, she claimed to fear persecution only by reason of her HIV status. The Court notes that the bulk of COI before the Tribunal Member which deals with the medical treatment of AIDS and HIV does not support the contention that treatment is deliberately withheld from persons with HIV or that resources are not made available to such patients. While the COI does not attempt to compare favourably such medical services which are available in Nigeria with those available in Western Europe, that is not the issue that was before the Tribunal Member and it is not the issue before this Court. The Tribunal Member had to determine on the evidence before her whether there was a risk that persons with HIV were denied medical treatment on a discriminatory basis at the hands of the government and / or whether undoubted societal discrimination and stigmatisation could amount to persecution by non-state actors and whether the State offered protection to the victims of such discrimination.

12. It is undisputed that societal discrimination of persons with HIV exists in Nigeria whether it originates from fear, ignorance or prejudice. Sadly that is also the case in many western societies. A 2009 study shows that 66 of the 186 countries for which data was available place limit the right of persons with H.I.V. to enter or reside in their territory See Human Rights Watch "*Discrimination, Denial and Deportation: Human Rights Abuses affecting Migrants with HIV*" (June, 2009). and a great deal of secrecy / protection of privacy surrounds HIV statistics in this State. It is noted that the applicant's medical condition was not actually identified by her treating consultant at St. James's Hospital in the medical report dated the 27th November, 2007 which the applicant submitted to the Commissioner. This was surely an attempt to protect persons with HIV from the stigmatisation associated with the condition referred to frequently as "the virus" even in this State.

13. The issue before the Tribunal Member was whether the stigmatisation / discrimination that the applicant might suffer in Nigeria could amount to persecution within the meaning of s. 2 of the Refugee Act and Regulation 9 of the Protection Regulations 2006. It is instructive to recall the wording of Regulation 9 which states:

(1) The acts of persecution for the purposes of section 2 of the 1996 Act must:

(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in subparagraph (a).

(2) Acts of persecution as qualified in paragraph (1) can, *inter alia*, take the form of—

(a) [...]

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner [...]."

14. The Tribunal Member determined that the discrimination and stigmatisation of persons with HIV in Nigeria did not fulfil the criteria for persecution. She stated:

*"I believe, having considered the most recent reports made available to the Tribunal and referred to above, that serious attempts are being made to deal with the problems attached to this disease in Nigeria, including preventing the spread of the disease, providing wider access to anti-retroviral drugs and educating people about the stigma attached to it and that HIV sufferers are not, having regard to the level of resources within Nigeria, treated in a discriminatory manner."*

15. As it seems to the Court that this determination was arrived at following a review of the applicant's own evidence and the information contained in the COI before her. There is therefore no convincing argument before this Court to sustain any assertion that in arriving at her conclusion, her treatment of relevant COI was selective, unfair or unreasonable.

16. It is not the law that signatories to the Geneva Convention relating to the Status of Refugees must give refuge to applicants who assert stigmatisation because they are living with HIV / AIDS. Neither is it the law that any applicant who asserts discrimination per se is entitled to refugee protection. The discrimination or stigmatisation suffered or feared must amount to a severe violation of human rights such as cruel, inhuman or degrading treatment before obligations under the Refugee Convention arise. It would impose an unreasonable or impossible burden on the Nigerian government or indeed any other government if they were expected to have in place an effective system to prevent and punish those who avoid social contact with persons with HIV / AIDS or who make moral judgments or have negative attitudes to the condition.

17. The COI before the Tribunal Member notes an imperfect but improving situation on the availability of free or affordable retro-viral treatments in Nigeria and there was evidence of an extended education programme on HIV / AIDS and efforts to reduce stigmatisation due to ignorance.

18. It is difficult to identify anything in the Tribunal Member's decision that would indicate that she took the view that unless societal discrimination was state sponsored, it could not amount to persecution within the meaning of s. 2 of the Refugee Act 1996. The Court believes that by attributing to such a view to the Tribunal Member, the applicant has attributed a contrived meaning to the Tribunal Member's words when she said:-

"The applicant's Solicitor had produced written submissions to which are attached numerous reports on the treatment of HIV patients in Nigeria. I have considered these reports in detail and I decline to find that people suffering with HIV and discriminated by society and isolated by their communities and families in Nigeria to such a level as to amount to discrimination. I accept that there are references in some reports to human rights abuses and discrimination against AIDS sufferers by certain members of society including certain legal and medical professionals, I decline to find having considered these reports that these abuses are due to a policy view taken against AIDS sufferers by the Nigerian authorities."

19. The normal meaning of that passage does not equate with the meaning attributed to it by the applicant. The Tribunal Member dealt first with the issue of societal discrimination, finding that on the evidence such discrimination does not amount to persecution, and then dealt with the issue of persecutory denial of medical treatment at the hands of the government which she found was not due to a policy view taken by the Nigerian authorities. It is clear that her finding on the absence of a state policy related to the applicant's asserted fear of a persecutory denial of medical treatment at the hands of the government but not to her fear of societal discrimination which was dealt with separately.

20. The Court is therefore not convinced that substantial grounds have been established that the Tribunal Member erred in law or was unfair in her assessment of the level of discrimination towards persons with HIV in Nigeria or that she confused the issue of healthcare with non-state discrimination. The Tribunal Member accepted that the available treatment was not perfect and she found that societal discrimination existed but did it reach the level required to amount to persecution. It is well established that failure by a State to provide adequate medical treatment does not, of itself, amount to persecution. Broadly speaking, before such persecution will be inferred or accepted it must be established that resources are available to provide the appropriate health care which is deliberately withheld from an identified group. The Court recognises the distinction between a poor medical service attributable to lack of State resources and the situation where adequate care is available but is withheld on a discriminatory basis from a particular group of people. When the latter is the situation and the State fails to protect that particular group as was alleged in *Kuthyar* (see para. 8 above) then persecution may be established. The same distinction was recognised by the Tribunal Member and by Clarke J. in *E.M.S.* (see para. 8 above), as follows:

"[ ....] the fact that a person may be subjected to a lower level of care in a different country does not, of itself, amount to discrimination. However that is not to say that the standard of health care provided in such country might not be a matter which might lead, in an appropriate case, to a conclusion that there was a degree of discrimination against a social group such that amounted to a sufficient level of discrimination to amount to persecution. Where there is, therefore, in an attempt an inappropriately low level of health care given within that country to a group who form a social group for the purposes of refugee law and where, having regard to the level of health care provided within that country, the treatment of that group from a health perspective may be regarded as discriminatory to a significant degree, it seems to me to be arguable that same amounts to a sufficient level of discrimination to give rise to a claim for persecution."

21. The applicant did not provide any objective evidence to substantiate her claim that she would suffer a persecutory denial of medical treatment in Nigeria nor did she specify on what persecutory basis the said denial would occur (i.e. whether by reason of her status as a person living with HIV, a woman, a single woman or a single woman who is HIV positive). Her evidence at interview was simply that "there is no medical treatment for HIV in Nigeria" (p.7), "there is a general lack of medical treatment in Nigeria" (p.7) and "They don't have medical treatment for HIV in Nigeria" and according to the summary provided in the RAT decision, the applicant said that "they do not have enough drugs to treat HIV sufferers and even the doctors and nurses do not like to treat HIV patients" and that she "might not get medical treatment in Nigeria because they don't have cash." Thus neither her subjective account nor the objective COI before the Tribunal Member supported the contention that she would suffer a persecutory denial of medical treatment.

22. The applicant's final challenge to the validity of the Tribunal decision was that the Tribunal Member ought to have given reasons for her conclusion that the previous RAT decisions on asylum applicants with HIV were not relevant. It was argued that as a matter of uniformity and equality, reasons should be given for making a decision that conflicts with previous decisions concerning applicants in an equivalent position and that at the very least, the relevance of the previous decisions warranted an express, active assessment. In this case they were relegated to an afterthought. Reliance was placed on *B.F.I. (Izevbigie) v. Refugee Appeals Tribunal* (Unreported, High Court, Clark J., 25th February, 2009).

23. The respondent argued that Tribunal Member did have regard to the previous decisions submitted by the applicant only two of which referred to HIV issues and the Tribunal Member concluded that "given the ever changing facts and circumstances together with the individual nature of the appeals the Tribunal was not bound by the same."

24. The Court has viewed the decisions referred to. Only two of the applications involved persons living with HIV / AIDS in Nigeria. The decision to follow or distinguish the facts of any case or series of cases was within the remit of the Tribunal Member who had before her more recent COI on the AIDS epidemic in Nigeria than was before the Tribunal Member who determined one of the claims involving a Nigerian applicant which is dated 2004. The distinguishing fact between this case and the Court's previous decision in *B.F.I.* (see para. 22 above) is that in this case, the applicant does not complain that the Tribunal Member failed to consider the previous decisions at all but rather that she failed to give reasons as to why she did not follow them. When the Supreme Court in *Atanasov v. The Refugee Appeals Tribunal & Ors* [2006] I.E.S.C. 53 determined that appellants should be furnished with previous decisions of the RAT they did so in the interests of justice for the following reasons:-

*"fair procedures require some reasonable mechanisms for achieving consistency in both the interpretation and the application of the law in cases like this of a similar category. Yet, if relevant previous decisions are not available to an appellant, he or she has no way of knowing whether there is such consistency. It is not that a member of a tribunal is actually bound by a previous decision but consistency of decisions based on the same objective facts may, in appropriate circumstances, be a significant element in ensuring that a decision is objectively fair rather than arbitrary. It is not that a member of a tribunal is actually bound by previous decisions but that consistency of decisions based on the same objective facts may in appropriate circumstances be a significant element in ensuring a decision is objectively fair rather than arbitrary."*

25. It seems to the Court that the determination of whether the same objective facts apply to the case in hand and the previous decisions is a matter for the Tribunal Member. Once the Court is satisfied that the Tribunal Member considered the previous relevant decisions and the finding that they are not relevant is a reasonable conclusion based on an assessment of all relevant facts, then the reason provided by the Tribunal Member that "given the ever changing facts and circumstances together with the individual nature of the appeals the Tribunal was not bound by the same" is an adequate reason for not following previous decisions and no further reasons were required.

26. As no substantial ground for impugning the decision of the Tribunal Member has been established, the application fails.