

## THE HIGH COURT

[2013 No. 770 JR]

BETWEEN

E. T. K.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL

(CONSTITUTED OF MICHELLE O'GORMAN B.L. TRIBUNAL MEMBER) AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

**JUDGMENT of Ms. Justice Faherty delivered on the 27th day of May, 2016**

1. This is a telescoped hearing in respect of which the applicant seeks leave to apply for judicial review for an order of certiorari of the decision of the first named respondent which affirmed the Refugee Appeals Commissioner's recommendation not to declare her a refugee.

**Extension of time**

2. The applicant seeks an extension of time in which to bring the within proceedings. The decision was notified to the applicant on 24th July, 2013 and these proceedings were issued on 22nd October, 2013. In her grounding affidavit, the applicant avers that the delay in instituting the proceedings arose because although her solicitor received the advices of counsel at the time of the receipt (23rd July, 2013) by the solicitor the decision that there were grounds for judicial review, neither the applicant nor her solicitor were able to arrange an appointment prior to her solicitor going on holidays during the Summer vacation. The applicant avers that she contacted her solicitor on the first available occasion after the latter's return from holidays. However, a further period of time was required to gather the cost of the stamp duty for the proceedings. The respondents submit that the applicant's explanation for the delay in issuing the within proceedings is not satisfactory. While the Summer vacation intervened, that was not a sufficient excuse particularly when the applicant had a history of moving between Ireland and the United Kingdom which included travel to the UK even after the application for asylum in this State was made.

3. At the time of the initiation of the proceedings, the time limit for the commencement of judicial review proceedings was governed by s. 5 of the Illegal Immigrants (Trafficking) Act, 2000. It provided that the decision of the Tribunal shall not be challenged other than by way of judicial review within a period of 14 days commencing on the date on which the person was notified of the decision, unless the High Court considers there is good and sufficient reason for extending the period within which the application shall be made. It is thus clear that the applicant is out of time by some months in issuing the proceedings. However, having regard to what is set out in the applicant's Affidavit, and as I am not persuaded that the grounds put forward by the respondent are sufficient to debar the granting of an extension of time (in the absence of any application made by the respondent between the initiation of the proceedings and the date of hearing), the court grants the applicant the requisite extension of time.

**Background**

4. The applicant's circumstances are said to be as follows:

She states that she was born in Blantyre, Malawi. She is single and has two children. From 2007 to 2010 she lived in the UK on a student visa. She studied at a named university. At that time her then boyfriend was also in the UK. The applicant states that while in the UK she also had a secret relationship with a woman which lasted approximately two years. She broke up with her boyfriend and he found out about the relationship she had with the woman. In or about 2008 or 2009, her boyfriend was deported from the UK back to Malawi and the applicant states that on his return there he told her family, friends and people in the community about the relationship she had with the woman in the UK. The applicant also states that while she was in the UK she discovered that her brother in Malawi was gay. She heard from her aunt that he had been "beaten up and left lifeless".

5. The applicant herself returned to Malawi in 2010. She stated that on her return to Malawi people started treating her differently as being gay is considered taboo in Malawian society. On her return to Malawi she became involved in human rights and gay rights activities. Her involvement in human rights activities caused her problems in that she became the subject of attack and harassment. She stated that she was one of a group of people who were attacked by people claiming to be police while returning from a meeting in Zomba in February or March, 2011. She was accused of preaching gay rights. In the course of this encounter the applicant was beaten and sexually assaulted. She was left unconscious at the side of the road until her friends took her to hospital where she remained for a week. Her friends advised her that she remained under threat because of her activities and during this time her house was vandalised. She stated that she went to the police and they said that they would try to find out who attacked her but as the applicant could not give them the names of those who attacked her they could do nothing. The applicant's friends advised her to leave Malawi.

6. The applicant arrived in the State on or about the 30th April, 2011 on foot of a student visa and she was granted permission to remain in Ireland to study until the 15th June, 2012.

7. Shortly thereafter the applicant left the State and went to the UK. On 21st July, 2011, she attended the asylum screening unit in Croyden, UK claiming that she had two children that she last saw in Malawi on the 29th April, 2011 before she travelled to Ireland via Ethiopia. A request was duly made by the UK on 8th August, 2011 that Ireland would take charge of the applicant's asylum application pursuant to the Dublin II Regulation and she was duly returned to the State.

8. On the 9th November, 2011, the applicant applied for asylum in the State citing persecution on grounds of membership of a

particular group and political opinion.

9. The applicant claimed a fear of persecution on the basis that she had in the past had a lesbian relationship and that her boyfriend had told her friends and community in Malawi about this and she was thus at risk. The political ground was based on her fear of persecution from the authorities in Malawi on the basis that she was involved in campaigning for human rights.

10. She underwent a s. 8 interview on 9th November, 2011 and completed a questionnaire on 16th November, 2011. Her section 11 interview took place on 30th November, 2011.

11. A negative recommendation against the applicant was made on the 12th January, 2012 and a recommendation was also made that she be denied an oral appeal to the Tribunal by reason of s. 13(6)(c) of the Refugee Act 1996, as amended, namely that the applicant had failed to make an application for asylum as soon as was reasonably practicable after arrival in the State.

12. The principal findings of the Commissioner were:

Without prejudice to the well-foundedness of her claim, it was accepted that the harm the applicant described could constitute a severe violation of basic human rights and thus may be considered persecutory; it was accepted that she had a nexus to social group and political opinion grounds pursuant to s. 2 of the 1996 Act; it was also accepted that "taking the COI available into account, it is considered that a lesbian, or a person accused of being a lesbian, could face treatment that would amount to persecution in Malawi. However, this is without prejudice to the... analysis of the applicant's claim."; it was also noted that persons who advocate for LGBT rights and human rights may also be at risk of persecution.

13. The Commissioner then embarked on an analysis of the claim. The s.13 report went on to find as follows:

- While the applicant claimed she was treated differently after her ex-boyfriend told people she was a lesbian, she had not provided any evidence to indicate that the level of treatment she received because of this was so severe, by its nature or repetition, to amount to persecution. It was thus considered that the applicant had not suffered past persecution in Malawi in relation to this aspect of her claim;
- With regard to her claim on the political ground, the applicant did not provide the names of any human rights organisations when originally asked and provided the name of one when it was put to her that it was difficult to accept that she did not know any human rights organisations. While the name of one human rights organisation duly given by the applicant was similar to one that did operate in Malawi, it was difficult to accept that the applicant would not be able to provide the correct name for this group. This served to undermine the applicant's claim to be involved in campaigning for human rights in Malawi;
- The applicant had named "Gollira Networks" as a group who organised the meetings and demonstrations she attended in Malawi. Country of origin information consulted by the Commissioner did not mention this group. It was thus difficult to accept that there was no evidence available regarding this group and this served to undermine the credibility of the applicant's claim;
- While the medical evidence available indicated that the applicant might have been suffering from some form of depression, it was considered that she had not provided sufficient evidence why this prevented her from claiming asylum as soon as she arrived in Ireland in April 2011. It was noted that the applicant's ailments did not prevent her from dealing with GNIB in order to obtain a student visa or from travelling to the UK where she duly sought asylum. The fact that the applicant did not claim asylum as soon as reasonably practicable after her arrival to the state on 30th April, 2011 served to undermine her claim to be at risk in Malawi. It was also considered that the fact that she had left Ireland, a safe country, and travelled to the UK to claim asylum served to undermine her claim to be at risk in Malawi. It was considered that those issues served to seriously undermine the applicant's claim;
- Ireland was not the first safe country the applicant arrived in since departing her country of origin;
- With regard to the significant aspects of the applicant's claim as pronounced upon by the Commissioner, the applicant's statements were found to be lacking in coherence and plausibility and her general credibility had not been established. Accordingly, it was considered that the applicant had not demonstrated a well-founded fear of persecution in Malawi.

14. The s. 13 report did find that had the applicant established a well-founded fear of persecution, state protection would not be available to her in the context of her human rights activities or in the context of being someone accused of being a lesbian in Malawi. It was further found that internal relocation would not be available for the applicant in the context of a fear of persecution because of involvement with human rights activities. However, it was considered that internal relocation would not be considered unduly harsh or unreasonable were the applicant to relocate within Malawi to avoid the people who were told about the lesbian relationship she had in the UK.

15. As appears from the affidavit sworn on behalf of the respondents in these proceedings, the applicant appealed the Commissioner's recommendation in February 2012, following which a negative decision of the Tribunal issued. Judicial review proceedings of that decision were instituted which were compromised. Following that a further Notice of Appeal containing submissions and country of origin information was lodged on behalf of the applicant on 12th April, 2013.

16. In the refusal decision dated 16th July, 2013, the Tribunal's salient findings were as follows:

As regards the applicant's role as an activist for LGBT rights and human rights in Malawi, the Tribunal Member noted that while the applicant was familiar with and, according to her appeal submissions, associated with a named high profile activist she was unable to name the human rights groups with which this individual was associated. The Tribunal Member also stated:

"While many LGBT/Human rights organisations work underground in Malawi, information is widely available. For example, the Malawi Gay Rights Movement (MAGRIM) was formed in and about 2002 and has its own centre in Blantyre city centre and in August 2008 had nearly 4,000 members. Indeed it is stated that the Applicant was allegedly a founding member of 'Rhoda's Bosom Foundation Charity Trust'. This trust is stated to interact and collaborate with other regional and national organizations. Were the Applicant the director of this organisation and an LGBT activist who attended meetings and demonstrations, it would be reasonable to expect she would be able to provide greater detail on LGBT/Human rights organisations that exist in Malawi."

17. Insofar as the applicant had proffered the name of a human rights organisation (CHHR) to the s. 11 interviewer, the Tribunal Member found:

"No information could be found on an organisation with the acronym CHHR. Information could be found on 'the Centre for Human Rights and Rehabilitation' (CHRR)... , an organisation accused of promoting self interest in order to try to bring same-sex marriage to Malawi. It is submitted that the applicant provided the incorrect acronym at the interview as she was emotionally unstable, stressed, depressed and not fully in charge of mental faculties. No mention of this instability, stress or depression was mentioned to the interviewer."

The decision-maker went on to state:

"The Applicant failed to provide the name of any human rights organisations when originally asked and only provided the name of one of them when it was put to her that it was difficult to accept that she did not know any other human rights organisations. While the name of the organisation given by the applicant (CHHR) is similar to the one that does operate in Malawi, it is not credible, considering her human rights/LGBT activism and directorship, that she could not provide a correct acronym for the CHRR or that she could not provide the names of a number of other human rights/LGBT organisations..."

18. As regards the "Rhoda's Bosom Foundation Charity Trust" Facebook document submitted by the applicant with her appeal and in respect of which she claimed to be a founding member, the Tribunal Member noted that this document could not be authenticated. It was also noted that the document relating to the trust made no mention of LGBT rights. It was considered that the name of the founder of the group as stated on the document did not match the applicant's name. It was also found that "significantly, the applicant made no mention that she was the founder of this organisation prior to April 2013 despite the submission that the applicant was the founder and director of this organisation". Ultimately, the Tribunal Member found that "this document does not assist the Applicant's claim; rather it raised the question of why the Commissioner was not informed previously about the Applicant's purported founding and association with this women's organisation."

19. On the issue of the applicant's travel to the state and asylum application, the decision-maker opined:

"The Applicant states that she arrived to this state on the 30 May 2011... and she states that she was given a three month student visa. The GNIB have recorded the Applicant's arrival date as the 30 April 2011... The applicant then travelled to the UK in and about the 18 July 2011. The Applicant states that she was ill and depressed on her arrival to this state. While there is some medical documentation on file, there is no evidence that the Applicant's condition prevented her from seeking asylum in this state in 2011. The Applicant was able to register with the GNIB on the 22 June 2011 to obtain a student visa – and given her stated activism – it is difficult to understand (particularly when she states she could not study – Q 94, Interview) why she did not seek [advice] or asylum when interacting with the GNIB. If the Applicant feared the serious persecution which she alleges, it would be reasonable to expect that she would have sought asylum as soon as practicable after her arrival to this state rather than travel onward to the UK and then seek asylum. The foregoing issues seriously undermine the Applicant's claim to be at risk of persecution in Malawi."

#### **The submissions advanced on behalf of the applicant**

20. The first and perhaps principal contention is that the Tribunal Member did not consider the sexual orientation ground of the applicant's claim at all. Thus, the decision-maker did not consider the core of the applicant's claim for asylum, nor did she apply the necessary forward-looking test. The applicant had advanced two grounds for refugee status, particular social group on the basis of her sexuality or imputed sexuality and the political opinion ground by reason of her political activism in relation to LGBT and human rights issues in Malawi. It is submitted that the Tribunal Member did not engage at all with the applicant's fear of persecution on the particular social group ground. This was in the context where the Commissioner appeared to accept the applicant's claim for refugee status was based on those two grounds. More particularly, in her Notice of Appeal the applicant had indicated, inter alia, that unless notified by the Tribunal to the contrary, she would take it that no issue arose "as regards her nationality, her s. 2 nexus, internal relocation, state protection or that the harm may amount to persecution." The Tribunal was also advised that the applicant took it that it was accepted that the country of origin information on file supported her case that lesbians and lesbian activists are persecuted in Malawi and it was proposed therefore not to revisit those issues in any great detail in the appeal submissions. Furthermore, the applicant had advised the Tribunal that "should the Tribunal consider that a different view is available of the COI, such view should be communicated to the appellant forthwith so that she can comment upon same."

21. Specifically, the applicant had put the issue of her claim for refugee status on the particular social group ground in issue in her appeal.

22. It is submitted that against this backdrop, the Tribunal Member did not deal at all with the applicant's fear of persecution by reason of her lesbianism and/or having been "outed" as a lesbian in Malawi. The applicant claimed asylum on the basis of the persecution suffered by her on foot of her activities as an LGBT activist, and also on the basis of the fact that her ex-boyfriend had told people in Malawi that she was involved in a lesbian relationship. No finding was made by the Tribunal in relation to her sexual orientation. The Tribunal was required to consider the case made by the applicant and make a determination on the issue. Even if it were to be assumed that the Tribunal Member accepted that the applicant was a lesbian/bisexual woman, she would still have had to consider the level of persecution in Malawi and whether state protection and/or internal relocation would be available for the applicant. None of this was considered. As such, the Tribunal Member ignored a significant aspect of the applicant's claim and made no specific finding as to whether the applicant was a lesbian or not. Insofar as the Tribunal Member made credibility findings, she never said that those undermined the applicant's core claim on the particular social group ground. Insofar as counsel for the respondent cites *P.D. v. Minister for Justice* and seeks to distinguish it from the applicant's circumstances, it is submitted that the example given by MacEochaidh J. at para. 48 of his judgment in *P.D.* is not comparable to the applicant's circumstances. Country of origin information shows that lesbianism is unlawful in Malawi. The applicant's circumstances are such that it was incumbent on the decision-maker to consider her claim in this regard.

23. It is submitted that even if the findings on credibility as regards the applicant's political activism are valid, a finding on her sexuality was still required to be made so that a full assessment of her claim could be carried out. In this regard the applicant relies on the decision of Cooke J. in *M.A.M.A. v. RAT* [2011] 2 I.R. 729

24. In her s. 5 analysis, the Tribunal Member concentrated solely on the political activism ground. Some of the credibility findings can at best be described as peripheral. Yet, in as much as she concentrated on this ground, the Tribunal Member failed to address an egregious error of fact made by the Commissioner to which the Tribunal Member had been specifically alerted in the appeal

submissions. The Commissioner found as a fact that the applicant claimed to belong to a group called the "Gollira Network". The Tribunal Member was alerted that this was a misunderstanding on the part of the interviewing officer with the consequence that the s. 13 report found that the applicant's credibility was in part undermined by wrongly attributing to the applicant that she had given the name of a human rights group in respect of which no information could be found by the interviewer. The point was specifically made on appeal that the applicant's intention at the s. 11 interview was to convey that the groups she associated with were underground or "guerrilla" groups. The Tribunal failed to address this complaint.

25. Furthermore, in the course of her appeal submissions, the applicant had addressed the Commissioner's adverse findings regarding her knowledge of human rights groups operating in Malawi. It was put forward to the Tribunal that the applicant had given a credible explanation at interview in that while she did not know the precise names of the human rights groups she knew the people involved. The applicant provided an explanation as to why she had misstated the acronym for the organisation CHRR. However, the Tribunal Member failed to assess the explanation objectively or freshly. Thus, it was impossible for the applicant to succeed in her appeal before the Tribunal Member because the latter was content to reject anything that had not been put before the Commissioner. Furthermore, the Tribunal Member while finding it not credible that the applicant would not know the organisations involved in human rights in Malawi did not consider the applicant's position that because of the illegal nature of her activities she was not a member of these organisations. Additionally, the Tribunal Member erred in not properly considering the Facebook document concerning the "Rhoda's Bosom Foundation Charity Trust" which the applicant had submitted with her appeal. The Tribunal Member's duty to was effectively side-stepped by the assertion that anything that was submitted to the Tribunal which was not before the Commissioner went against the applicant's credibility. It is submitted that this approach is an indication that there was no effective remedy for the applicant on appeal. The applicant's claim had been rejected by the Commissioner because she did not provide sufficient supporting documentation. She provided same on appeal. Yet the response of the Tribunal Member was apparently to suggest that the very provision of documentation by the applicant on appeal only served to undermine her credibility.

26. The applicant gave a detailed and reasonable explanation of her travel to the State. She was depressed upon arrival and therefore did not claim asylum. She went to the UK because she had relatives there and accordingly claimed asylum there. She was then returned to Ireland. It is submitted that the applicant's circumstances were unusual but the Tribunal Member failed to have regard to them and rejected her explanation by stating that it would be reasonable to expect that she would have sought asylum as soon as practicable after arrival in the State. It is submitted that the Tribunal Member failed utterly to consider the applicant's excuse for not claiming asylum on arrival in Ireland or whether her explanation, namely that she had relatives in the UK, was a reasonable excuse. Her explanation did not have to be based on a legal right, instead the test for reasonableness is an assessment of the person's state of mind and thought process at the time.

27. It is contended that insofar as the Tribunal Member addressed the applicant's appeal, the issues identified by the decision-maker by and large related to issues which gave rise to doubts as to whether the applicant knew other human rights organisations in Malawi and how she travelled to the State, all of which were peripheral matters. The Tribunal Member did not consider the assault perpetrated on the applicant nor was her narrative in relation to having been exposed as a lesbian in Malawi adverted to. While doubts as regards one aspect of the applicant's claim could lead to a conclusion on her overall credibility, this must be done in the context of the core claim being addressed, which was not the case here. While the findings in relation to the applicant's knowledge of human rights organisations could, if upheld, be used to support a more general finding on her credibility, the Tribunal Member does not state that in the decision. She merely found certain aspects of the claim not to be credible and then rejected the claim. She did not state how she went from the particular findings to her ultimate determination. It is thus not clear that the Tribunal Member has in fact extrapolated the specific findings into a more general finding. Accordingly, the credibility findings cannot amount to reasons for the rejection of the applicant's claim. Pursuant to the jurisprudence as set out in *Meadows v. Minister for Justice* [2010] 2 I.R. 701, *Rawson v. Minister for Defence* [2012] IESC 26, *Mallak v. Minister for Justice* [2012] IESC 59 and *EMI v. Data Protection Commissioner* [2013] IESC 34, the applicant is entitled to reasons in the decision.

28. It is submitted that in the present case it is not clear where the reasons for the rejection of the applicant's claim are to be found. The decision maker does not give reasons, either by adopting the Commissioner's findings or otherwise.

### **The submissions advanced by the respondents**

29. It is submitted that the starting point for the consideration by the court of the issues raised by the applicant must be the claim as initially made by the applicant at the commencement of her asylum application and the manner in which that claim has evolved. It is submitted that a perusal of all of the material which was before the Tribunal Member shows that her decision to reject the applicant's claim was fairly assessed and the conclusions arrived at rational.

30. The thrust of her claim as set out in the s. 8 interview, in particular in the manuscript note attaching to the interview, is that the applicant feared persecution in Malawi on account of her political/human rights activism. Nowhere in that interview does the applicant state that she is a lesbian or that she fears persecution as a lesbian in Malawi. In essence, her core claim relates to her asserted fears regarding her political activism in Malawi. That claim was duly considered by the Tribunal Member and it was fairly and properly rejected on grounds of credibility. It is submitted that the respondents' arguments in this regard are augmented by what the applicant set out in her questionnaire. The applicant completed her questionnaire as a highly educated person and a business woman, with English as her first language. Yet in the questionnaire she does not allege the core claim which it is now being asserted the Tribunal Member did not deal with. Nor is the matter raised or pursued by the applicant in the s.11 interview.

31. It is contended that there was no suggestion in any of the documentation which was before the Tribunal Member that the applicant was a practising lesbian. Furthermore, in response to being asked about the problems she had as a human rights activist, the applicant gave a long and detailed answer referencing that she was physically targeted and assaulted because of her activism on the gay rights issue. However, she did not there allege that she was targeted because she was a lesbian.

32. While it is accepted that in some cases it may be essential for a decision-maker to determine the question of an applicant's sexual orientation, the applicant's circumstances do not constitute such a case. She has not said that she is a lesbian or that she wishes to follow that sexual orientation in Malawi; she has no such relationship in Malawi. Her fear is centred on her fear of being targeted as a human rights activist. It is submitted that the Tribunal Member properly understood the applicant's claim as that which related to her human rights activities. That claim was assessed and reasons were given for rejecting it.

33. In summary, when one reads the submissions made on appeal by the applicant, it is clear that the applicant alleges that the physical persecution and assaults perpetrated on her were as a result of her activism and campaigning rather than due to her one secret previous lesbian relationship while in the U.K. Thus, the claim that the applicant had a lesbian relationship was therefore not the central matter in her claim, as her fear of persecution stemmed from alleged activism rather than from any relationship. Accordingly, the Tribunal Member was not obliged to come to any conclusion on whether the applicant had a lesbian relationship while in the U.K. In this regard, counsel relies on the dictum of Mac Eochaidh J. in *P.D. v. Minister for Justice, Equality and Law Reform*

34. It is submitted that the applicant's arguments regarding the Tribunal's finding on the applicant's political/human rights activism are without merit. Firstly, while the applicant points to the Tribunal Member's failure to address the "Gollira/guerrilla" issue, account nevertheless has to be taken of how this issue was addressed by the applicant herself in the s. 11 interview. Her recorded response to the question as to what were the names of the groups and organisations with which she said she associated was "Gollira Networks". Thus, this entity was first mentioned by the applicant herself and it was not one that was invented by the interviewer.

35. The Tribunal Member properly concluded that the applicant's claim to be a human rights activist was undermined by the paucity of her knowledge of human rights groups in Malawi and by her mis-stating the acronym associated with a particular human rights group. Even if the benefit of the doubt was to be given to the applicant on the "Gollira/guerrilla" issue, the other failures and inconsistencies in her account regarding her human rights activities were sufficient for the Tribunal Member to conclude that her credibility was undermined.

36. Contrary to the applicant's counsel's arguments, the Tribunal Member did have regard to the Facebook document which was submitted with the appeal submission. Thus, it was not correct to say that the Tribunal Member confined herself to looking only at the material which was before the Commissioner. It is submitted that the decision maker's conclusion as regards the Facebook document was entirely rational.

37. The Tribunal Member also properly concluded that the applicant's failure to seek asylum in this State as soon as practicable after her arrival seriously undermined her claim to be at risk of persecution in Malawi. Nowhere in the s. 11 interview is it suggested that the applicant was so ill in 2011 that she could not make claim for asylum in Ireland. Thus, the Tribunal Member's finding on this issue was rationale and reasonable and was made after she looked comprehensively at all relevant factors, including that the illness/depression alluded to by the applicant in the appeal submissions. However, the decision-maker properly and reasonably concluded that such illness had not prevented the applicant from approaching GNIB in 2011 to obtain a student stamp.

38. Furthermore, subject to the obligation to comply with fair procedures, the Tribunal Member was at large regarding findings of credibility and was not confined by the credibility findings made by the Commissioner. The applicant had a full opportunity to address the inconsistencies in her account as found by the Commissioner, yet no proper explanation for same were furnished to the Tribunal in the appeal submissions. Her lack of fundamental knowledge in relation to activists and human rights organisations in Malawi was barely addressed despite the applicant admitting that she was a "well known activist that has participated in demonstrations against the government."

39. The Tribunal Member gave clear reasons for her findings. She was entitled to make findings concerning the applicant's lack of knowledge in relation to her claim of persecution and was entitled to take the applicant's lack of knowledge into account in making credibility findings against her.

40. It is submitted that the decision accords entirely with the principles set out in *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 353 in *R.O. v. Minister for Justice, Equality and Law Reform* [2012] IEHC 573.

#### **Considerations**

41. The first issue to be determined is whether the applicant's core claim was assessed by the decision-maker.

42. It is suggested by the respondents that the height of the applicant's claim on the sexual orientation issue as set out in the asylum process is not sufficient to indicate that she fears persecution by reason of her sexual orientation.

In her response to question 21 the applicant states:

"I was so scared of my life from anything bad to happen to me from my same sex relationship and my human rights activities."

Later (in response to question 25(a) and (b)) she states, inter alia, that "being something of same sex is taboo in my country and people will not care what happens to you".

43. During the course of her s. 11 interview, the applicant stated:

"I had a long relationship[with her boyfriend]. I had a Malawian boyfriend before I went to England to study. It was an off and on relationship... He went to England and I went to England... We tried to be in a relationship again but things were not getting on well. I happened to have another secret relationship which he did find out which was a woman. In the course of the relationship, when things were failing, I dumped him. When he did find out he was all mad about it. Unfortunately he was deported which made the situation worse. He was deported back to Malawi and I was left in England. That's another part. I left England. I lost my aunt, the one that was looking after my children and my young brother and I had issues, like family issues, my brother is gay, which that's what even made by aunt to get worse with her disease and die because there was so many things going on back there when I went to Malawi after my aunt there were so many things that frustrated me. I was so frustrated. That time there were so many things going on in my country, it was not political stable, the gay issue, economic issues. There was a group of young people demonstrating to raise these issues so I joined as a human rights activist. At that time, because of my brother's issue, my ex said I am on about this because she is a lesbian..."

44. In response to the question as to whether she had any other relationship with a woman (other than the two year relationship she had in the UK) the applicant in the course of her s. 11 interview replied in the negative.

In answer to as to what problems her ex-boyfriend caused for her in Malawi, she stated: "he had sold me out, he had told many people and he was continuing. He tried to humiliate and embarrass me....." and told people "She[the applicant] is a lesbian. She is doing all these activities. She is letting her brother be gay because she is the same thing."

45. As to what she believed would have happened to her had she stayed in Malawi, she asserted:

"there is no way you can stay with these issues in Malawi and live a normal life. My friend died. He was killed. I had already run away and was here. These are shocking things. These things are really happening and it's going on right now. It's not like it happened last year. It's right now. And on gay/lesbian issues, there is no way you can put up with that in

my country."

As to what she feared what would happen to her if she returned to Malawi, she stated: "anything can happen to me. I can get killed, life will not be the same. There is no family there, it's just hard. There is no one to protect."

As to who she would fear, she stated:

"Anyone. Gay lesbian/gay issue is a community thing. Most people hear your story and then they decide. Can't explain to them. The African mind is different. They decide what they want to decide."

At question 107 it was put to the applicant:

You had one relationship in the U.K. and your ex boyfriend.. told people you were a lesbian. Would you safe if you moved to another part of Malawi, to Blantyre or Karonga for example where people that know about the lesbian relationship you had in the U.K?"

She replied:

"First thing, Malawi is not that massive country and we always have mutual friends... You can't move without people noticing who you are. It can take years and months for people to know who you are. That's how it is in my community."

46. In *P.D. v. Minister for Justice, Equality and Law Reform* [2015] IEHC 111 Mac Eochaidh J. opines: "it is not the case that "competent authorities must always decide whether they accept that a person is gay when such a claim is presented". He goes on to state:

*"48. It is an over simplification of this jurisprudence to say that a decision maker must decide on the truth of each element of a claim for asylum. The common thread in the judgments is the need for clearly expressed decisions in relation to the core claim. The extent to which the elements of a claim are required to be formally decided depends on the circumstances of each case. As asylum claims require the establishment of a number of elements, for example: membership of a social group or race or religion or nationality and a well founded fear of persecution - it may be possible to dispose of the application where proof of one of the necessary elements fails. Where, for example, an applicant claims to be a Nigerian who suffered religious persecution and it emerged that persons of that faith suffer no persecution in Nigeria, the decision maker could lawfully decide that the applicant did not have a well founded fear of persecution without the necessity of deciding whether or not she was a member of the particular religious faith claimed. In my view, no illegality would attach to such decision. Ideally it should be clearly stated that no decision is needed on this aspect of the claim and that, in my view, would comply with the Meadows inspired comments quoted above as to the need for clarity in administrative decisions. The difficulty which frequently arises is that it is unclear to applicants what is believed and what is not believed or whether any decision has been taken in respect of an important part of a claim and this may be of some consequence for the purposes of an administrative appeal."*

47. In *P.D. MacEochaidh J.* found that the questionnaire which was completed by the applicant in that case indicated that the applicant sought protection "because criminal sanction allegedly applies to homosexuals in Malawi and Zimbabwe." Thus MacEochaidh J. had "no hesitation in finding that the applicant's claim for refugee status was based upon a stated fear of being jailed and being sought by the police because he was gay."

48. In *A.K. v. Minister for Justice* [2015] IEHC 599 MacEochaidh J. reprised the basis upon which it was incumbent on a decision-maker to make a decision on sexual orientation in the following terms:

*"6. In relation to the first ground of challenge this court has given judgment in a case called P.D. -v- Minister for Justice and Law Reform & ors [2015] IEHC 111 dealing with the requirement to make findings on a core part of an applicant's claim. I repeat here what I said in that case which is that it is not necessary for a decision maker to decide every aspect of a claim advanced by an applicant. I said, and again I repeat here, that an application for asylum involves the establishment of a number of different factors. If any one of these factors fails the decision maker is entitled to stop the analysis and say it does not matter if the person is telling the truth about factors x,y,z because there is no Convention nexus between the fear and the events; "the applicant cannot be a refugee so I don't have to decide whether he is a member of that particular church or if he's gay or anything else about him." There is nothing wrong with that approach in my view. It is strange that the law is so well established but the claim is repeated to the point of tedium that there is a requirement on decision makers to decide every aspect of the claim. There is no such requirement in law.*

*7. Therefore, I find that there is no legal error of any sort in this case. Insofar as it can be said that the decision maker did not take a decision on whether the applicant was gay or not, this is not unlawful. The decision maker in this case rejected the credibility of the applicant and, therefore, it did not matter whether he was gay or not. His credibility was fundamentally and totally rejected. Whether fairly or not that is now a matter for the R.A.T. but in this case, the case was not made that the rejection of credibility was unfair. Argument was made that illegality attached to the failure to decide whether or not the applicant was gay and there was no illegality in that. Therefore, I reject the first ground of challenge."*

49. I am entirely in agreement with the dictum of MacEochaidh in *P.D.* that the question of whether it is necessary to formally determine elements of a protection applicant's claim will depend on the circumstances of each individual case. However, I do not accept the respondents' contention that the applicant's circumstances fall into the category of case described by Mac Eochaidh J. at para. 48 of his judgment in *P.D.* The respondents assert that there is nothing in the applicant's background which should have put the Tribunal Member on enquiry that the applicant was making the claim that she would face persecution as a lesbian in Malawi. I disagree. I am satisfied that there was sufficient material before the Tribunal Member (as demonstrated by the above-quoted extracts from the s.8 interview, the questionnaire and s.11 interview) to put her on enquiry that the claimed fear of persecution was being advanced on two grounds, namely that the applicant feared being perceived as a lesbian in Malawi and feared persecution on the basis of her involvement in human rights/gay rights activism.

50. Furthermore, and more importantly, the submissions which were before the Tribunal Member on appeal advised:

"The ORAC considered the treatment suffered by her in Malawi when she was outed as a lesbian and found that the

treatment she received was not so severe as to amount to past persecution. However, it appears to be accepted that she was in fact outed as a lesbian. Certainly, no clear decision was made to the contrary. Accordingly, no consideration was given to any risk of future persecution by reason of her being outed for her lesbian relationship in the UK if she were to be returned to Malawi. Furthermore, it was stated in the appeal submissions that no credibility findings were made by the Commissioner as regards the substance of the applicant's claim in this regard. The applicant took specific issue with the Commissioner's failure to assess the risk of future persecution for the applicant on a return to Malawi...."

51. The manner in which the claims were addressed by the Tribunal Member cannot be said to encompass a particular aspect of the applicant's core claim which included a fear of persecution by reason, at the very least, of a sexual orientation which she asserted was imputed to her in Malawi because of what her ex boyfriend has disseminated upon his return to that country. It is not disputed but that homosexuality and lesbianism are outlawed in Malawi. Thus, the applicant's fears required to be assessed in this context.

52. Contrary to the respondent's assertions, there were no shifting sands in the applicant's claim. The very material relied upon by the respondent (the s. 8 manuscript note) and the answers given by the applicant to Question 21 of the questionnaire sufficiently demonstrate that the applicant's claim for asylum related to a fear of persecution by reason of imputed sexual orientation in addition to the claim being advanced on the political ground. While the s. 11 interview may have concentrated on the political activism claim I find that that does not take from the applicant's claim regarding particular social group as made out particularly in the questionnaire and indeed on appeal to the Tribunal. I also accept the applicant's contention that the s. 11 interview was led by ORAC interviewer who, in any event, was live to the fact that the applicant was making the case that because of her lesbian relationship in the UK that sexual orientation was being imputed to her in Malawi, as questions 44-59 and questions 106-107 demonstrate. However, the Tribunal Member simply did not deal with the issue at all. At the very least she was obliged to assess the claim that a particular sexual orientation was imputed to the applicant in light of her knowledge that homosexuality and lesbianism were outlawed in Malawi. I also accept the submission that the fact that the applicant was not in another same-sex relationship in Malawi was neither here nor there.

53. Of course, the assessment of the applicant's subjective fears in this regard is entirely a matter for the Tribunal Member, as is the question of whether her claims are objectively borne out. The frailty which attaches to the present decision is that the matter was not addressed by the decision-maker as it should have been. It cannot be said therefore that there was the careful scrutiny which was required of the decision-maker in this papers-only appeal.

54. However, I am not persuaded by the applicant's submissions that the Tribunal Member acted either unfairly, unreasonably or irrationally in rejecting the applicant's credibility vis a vis her claim to fear persecution on grounds of political/human rights activism.

55. Effectively, the decision-maker made her adverse findings based on the applicant's failure to name human rights organisations active in Malawi, her misstating the acronym of a particular human rights organisation and the Tribunal taking the view that the "Rhoda's Bosum" Facebook document did not assist the applicant as it made no mention of LGBT rights and, more significantly in the decision-maker's view, this organisation was not mentioned by the applicant in either the s.8 interview, questionnaire or s. 11 interview. It seems to me that the findings made by the Tribunal Member were open to her to make and were made entirely within jurisdiction. On the issue of the organisation "Rhoda's Bosum", contrary to the applicant's counsel's contention, I find that it was entirely permissible for the decision-maker to take account of the fact that the applicant had not advanced her membership of this organisation at the earlier stages of her asylum application particularly at the s.11 stage when she was invited to list the human rights groups of which she was a member. It is thus not a question of the Tribunal simply rejecting the applicant on the basis that the material on which she sought to rely was first put before the Tribunal, rather the Tribunal Member reasonably highlights that the applicant was effectively invited by the s.11 interviewer to put such material before the interviewer, or at least allude to an organisation in which the applicant claims to have played a significant role, but did not do so.

56. I am also satisfied that contrary to the applicant's submission to this court the Tribunal Member did note the explanation put forward for the applicant having given the wrong acronym for a human rights group in Malawi. That explanation was rejected by the decision-maker for a stated reason which I find was within the parameters of reasonableness and does not warrant interference by this court.

57. It is the case that the Tribunal Member did not address the applicant's appeal submissions on the "Gollira/guerrilla" issue. However, I do not find that anything in particular turns on this. The Tribunal Member did not adopt the Commissioner's finding on this issue or herself make any finding on foot of the questions and answers where this matter is addressed in the s.11 interview. Had she done so without recourse to the applicant's submission on appeal there might be cause for complaint, but that course was not pursued.

58. In her analysis of the applicant's claim to fear persecution on the basis of political/human rights activism, the Tribunal Member also took into consideration the applicant's delay in seeking asylum in this State. While the decision-maker did not specifically allude in her analysis to one aspect of the explanation proffered on appeal for the delay, namely the applicant's decision to apply in the UK given that she had relatives there, it seems to me nevertheless that the Tribunal Member's finding in this regard cannot be impugned. She duly noted the applicant's explanation that a factor which caused the failure to apply in this State on first arrival was her illness and depression but the Tribunal Member rejected this effectively on the basis that the applicant's medical condition did not preclude her from accessing the GNIB for a student visa. That was a conclusion which the decision-maker could reasonably arrive at in my view. I find that the decision-maker also reasonably concluded that given the applicant's claim of activism in Malawi it would be reasonable that she would have sought asylum when interacting with the GNIB. The credibility findings accord with the principles set out in *IR* and *R.O.*

59. Thus, insofar as the Tribunal Member assessed the applicant's fear of persecution on the "political" ground, I find no basis to impugn the decision. While counsel for the applicant asserts that it is not clear why the applicant's claim to fear persecution as a human rights and LGBT activist was rejected, I find no basis for that assertion. Within the parameters in which the claim was considered, I find that the reasons for the rejection of the appeal are sufficiently clear as to comply with the principles set out in *Meadows*, *Rawson*, *Mallak* and *EMI*. As stated by Clarke J. in *EMI*:

*"6.11 It follows that in reasons cases there may well be three questions raised:- 1. Do reasons have to be given and if so what type of reasons; 2. Where can the reasons be found, and by reference to what evidence or materials can the Court objectively ascertain the reasons; and 3. When the reasons given, if any, have been ascertained, are those reasons sufficient to meet the requirements established in the case law?"*

60. Insofar as the claim was considered, I find that the decision accords with the foregoing test. The applicant was left in no doubt as to why her claimed fears as a human rights activist in Malawi were rejected.

As I have earlier determined, this was only one aspect of the applicant's claim for asylum. I have found that the Tribunal Member did not address the claimed fear of persecution in Malawi by reason of the applicant being or being perceived as a lesbian. While I have found that the Tribunal Member's determination regarding the applicant's alleged human rights/LGBT activism cannot be impugned, that is not sufficient in my view to cure the frailty which attaches to the decision, namely the failure to address the particular social group ground. Accordingly, I am satisfied that the challenge to the decision on this basis has been made out.

61. A question arises as to whether the court should exercise its discretion and grant an order of *certiorari*. Counsel for the respondents submits that the court should take account of the applicant's movements to and from the UK in deciding whether to exercise discretionary relief in this case. The court is asked to take account of the applicant's actions in coming to this State in 2011 and obtaining a student visa only to then leave and seek asylum in the UK, thereby rendering her subject to a take-back request pursuant to the Dublin II Regulations to pursue a claim for asylum in this State which she could have made upon first arrival. Furthermore, it is submitted since the issuing of the within proceedings, the applicant again left the jurisdiction and went to the UK in or about December, 2012/ January, 2013. She was arrested and placed in detention in the UK on suspicion of illegal entry to that country on 3rd March, 2014 resulting in a further take-back request made by the UK to Ireland on 24th March, 2014, as a result of which she was returned to this State on 2nd May, 2014.

62. Correspondence which issued from the applicant's solicitors to the respondents on 3rd November, 2014 (headed in the context of the previous judicial review proceedings) and exhibited in Mr Kenny's affidavit in the within proceedings gave an account of the reasons for the applicant's travel to the UK in 2012/2013 and the events leading up to the applicant's eventual arrest and subsequent return by the UK authorities to this State in May, 2014.

63. Overall, I am not persuaded by the respondents' argument that the applicant's travels to the UK should preclude the court from exercising its discretion in the present case. As she claimed asylum almost immediately on her arrival in the UK in July 2012 (whatever the merits of her claim either there or here), in my view her travel to the UK on that occasion of itself cannot be taken to be an indication that she was not in need of international protection. Furthermore, I am of the view (albeit with some reservations) that not to grant relief in this case solely by reason of her subsequent travel to the UK would be unduly harsh.

64. For the reasons outlined in this judgment, I am satisfied that an order of *certiorari* is merited and the matter is remanded to the Refugee Appeals Tribunal for de novo consideration before a different Tribunal Member.