Neutral Citation [2016] IEHC 491

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 396 J.R.]

BETWEEN

T.S.S.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL (CONSTITUTED OF CONOR GALLAGHER) AND MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of July, 2016

1. The applicant was born in Zimbabwe in 1987. He was the victim of a kidnapping and beatings by government supporters in the Misulongo area.

2. He came to the State in June, 2008, and applied for asylum. This was refused by the Refugee Applications Commissioner on 20th October, 2008. He appealed to the Refugee Appeals Tribunal, which refused the appeal on 12th October, 2009.

3. He then applied for subsidiary protection, which was refused by the commissioner on 24th February, 2014. This was appealed to the tribunal, which in a decision issued by tribunal member Conor Gallagher B.L., refused the application on 20th May, 2015.

4. The essentials of that decision were that:

(a) the applicant's credibility was accepted;

(b) it was considered that there was no sufficient forward-looking risk of serious harm;

(c) internal relocation to Bulawayo was available;

(d) state protection did not need to be considered; and

(e) there were no compelling reasons arising from past serious harm such as to warrant the grant of subsidiary protection.

5. It is agreed between Ms. Sunniva McDonagh S.C. (with Mr. John Noonan B.L., who also addressed the court) for the applicant, and Ms. Silvia Martinez B.L. for the respondent, that s. 5 of the Illegal Immigrants (Trafficking) Act 2000, does not apply to the application, and that the limitation period is therefore three months. The application was made within time.

6. Leave was granted for the application by Mac Eochaidh J. on 13th July, 2015,.

7. Ms. Martinez is not standing over the finding of no risk of serious harm. However she submits, in the course of a very able submission for the respondents, that because the tribunal found that internal relocation was available, that constitutes a free-standing ground on which the application was properly refused.

Was the decision maker entitled to give independent grounds for refusal?

8. While it is true that in *K.D. (Nigeria) v. Refugee Appeals Tribunal* [2013] I.R. 448, Clark J. was of the opinion that the Tribunal should not go on to consider internal relocation unless it had made a positive finding of a risk of persecution or serious harm, I have held in *M.N. v Refugee Appeals Tribunal* [2015] IEHC 831 (Unreported, High Court, 21st December, 2015) (see para. 31), and again in *S.I. v. Minister for Justice and Equality* [2016] IEHC 112 (Unreported, High Court, 15th February, 2016) at para. 19 that I did not consider it such an approach be correct (see *A.M.G. (Pakistan) v. Refugee Applications Commissioner* [2014] IEHC 379 (Unreported, High Court, Barr J., 25th July, 2014, *E.I. v. Minister for Justice and Equality* [2014] IEHC 27 (Unreported, High Court, Mac Eochaidh J., 30th January, 2014); *A.N. v Refugee Appeals Tribunal* [2015] IEHC 699 (Unreported, High Court, Faherty J., 16th October, 2015). A decision maker is entitled to give independent grounds for refusal of a claim.

9. The consequence of that is that the applicant must knock both legs of the decision, namely risk of serious harm and availability of internal relocation, if he is to succeed, with the important qualification that both legs of the decision must be genuinely freestanding. If an error in one part of the decision contaminates the decision overall, then the result cannot stand (see, for example, para. 41 of my decision in *I.E. v. Minister for Justice and Equality* [2016] IEHC 85 (Unreported, High Court, 15th February, 2016)).

Is the applicant entitled to complain about the finding of internal relocation to Bulawayo where he did not take issue with this in the notice of appeal to the Tribunal?

10. Ms. Martinez submits that the notice of appeal does not specifically challenge Bulawayo as a safe location, and therefore the applicant is disentitled from raising this as an issue in the judicial review. She relies on the decision of Charlton J. in *M.A.R.A. v. Minister for Justice and Equality* [2014] IESC 71 (Unreported, Supreme Court, 12th December, 2014) at para. 15, where reference is made to the procedure whereby the notice of appeal to the tribunal sets out the matters of fact or law "*in respect of which he or she disputes the earlier decision*", and that matters in respect of which issue is not taken will remain undisturbed on appeal.

11. While there is no issue with this general proposition, undue formality should not be required in a human rights context such as an asylum or subsidiary protection appeal. The level of detail in which issue is to be taken with the decision challenged depends on the context: as Posner J. put it in *Autorol Corp. v. Continental Water Systems Corp*. 918 F.2d 689 at p. 695 (7th Cir., 1990), "*[t]he*

degree of precision that can reasonably be demanded of a litigant, unless you want to doom his case from the outset, depends on the nature of the issue". Regard should also be had to the practical reality, namely that solicitors acting for applicants in such matters are providing a service to justice whereby many individuals with either no means whatsoever, or very minimal means, can achieve representation. It would not be appropriate to demand the same level of detail and specificity in a notice of appeal to the tribunal as it would in the context of, say, a statement grounding an application for judicial review.

12. It would be one thing if the notice of appeal specifically acknowledged that a particular finding was accepted and limited the area of dispute to a particular identified matter or matters. But that did not happen here. The real question is whether it could be said that the notice of appeal fairly takes issue with the conclusion of the commissioner. In my view it clearly does. Page 1 of the notice of appeal alleges that the applicant will face persecution in his home country, and para. 6.8 alleges that he "*cannot, in practical terms be afforded protection in Zimbabwe*". While perhaps in some sort of ideal sense it might arguably have been better if, for the avoidance of doubt, it had been specifically stated that the applicant took issue with the proposition that Bulawayo in particular provided a venue for internal relocation, it would be altogether too onerous an extension of the obligations on applicants in such circumstances to require a level of pleading of such laboriousness. This applicant fairly took issue with the commissioner's conclusion and is, therefore, not disentitled from challenging the finding that Bulawayo is a safe venue.

Is the decision on internal relocation independent of the finding of no risk of serious harm?
13. The applicant submits that the decision on internal relocation is predicated on a finding that Bulawayo is a place where the "*risk of serious harm does not exist*" (p. 11 of the decision), and that similar findings are contained in other parts of the decision on internal relocation (pp. 11 to 13). It is therefore submitted that the internal relocation decision is contaminated by an incorrect finding of a lack of risk of serious harm.

14. While this argument is superficially quite attractive, and certainly gave me considerable pause for thought, on considered reflection it seems to me to be based on a misconception. Any finding of internal relocation is a finding that even if a risk of serious harm exists in a particular part of the country concerned, that risk will not exist in the place identified by the decision maker. A finding that there is no risk of serious harm in Bulawayo is not inconsistent with the proposition that there would be such a risk in the applicant's home area in Zimbabwe, and therefore such a finding is not contaminated by any error in the assessment of whether a risk in the applicant's home area exists or not.

15. I therefore conclude that the internal relocation finding (if otherwise valid) can properly be regarded as independent of the risk finding and is therefore capable of being a lawful and freestanding ground of refusal.

16. Ms. McDonagh submits that given the difficulty with the finding that there would be no risk of serious harm if the applicant was returned, "*the rest of the decision cannot proceed on the assumption that there will be no serious harm*". But the rest of the decision does not proceed on that assumption. It provides reasons as to why there would not be such a risk in Bulawayo specifically. That is not an assumption based on a false premise.

Is the decision invalid because of a lack of evidence of the availability of internal relocation in Bulawayo?
17. The applicant submits that there was no, or inadequate, evidence of the availability of internal relocation in Bulawayo. However it seems to me that it cannot be said that there was no such evidence. The applicant's grandmother's house is in Bulawayo, and some reasons are advanced by the Tribunal as to why Bulawayo would be a safe location having regard to its size and population. The assessment of the weight of these factors is a matter for the decision maker.

Is there a contradiction in the Tribunal decision such as to render it invalid?
18. As noted above, the tribunal member decided that State protection "*does not have to be assessed*" (p. 13 of the decision). However, on p. 11 of the decision he found that, as regards Bulawayo, "*meaningful State protection exist[s] there*". Is this a contradiction? It certainly could have been clearer. My reading of the decision is that the tribunal member is of the view that whilst state protection exists in Bulawayo, the question of whether such protection exists *elsewhere* does not need to be considered. To that extent, even if the language appears somewhat contradictory, I do not consider that the decision is invalid on this ground alone.

Did the Tribunal incorrectly fail to have regard to a presumption against internal relocation to where the harm is sponsored by national authorities?
19. Ms. McDonagh relies on the proposition that there is a presumption against internal relocation where a risk of harm exists which is sponsored by the national authorities of the country concerned (relying on Symes and Jorro, *Asylum Law and Practice* (1st ed.), p. 223, fn. 2 citing the *Michigan Guidelines on the Internal Protection Alternative* (9-11 April, 1999) para. 16 (the Michigan Guidelines being an initiative of a colloquium spearheaded by the redoubtable campaigner James C. Hathaway) and the San Remo Expert Roundtable (UNHCR and International Institute of Humanitarian Law) summary conclusions, 8th September, 2001; see also, Symes and Jorro, *Asylum Law and Practice* (2nd ed.), p. 308, fn. 2).

20. To some extent, such a presumption is simply common sense. If the risk arises simply from conditions in a particular locality, moving to a different locality may be a safe alternative. If, however, the risk arises from authorities sponsored by the national government or political or military forces in power at national level then moving to another part of the country would provide questionable benefits in terms of safety.

21. Such an approach is, of course, only a presumption, which can be displaced if it can be shown that, for example, entities loyal to a ruling party do not, in fact, pose a threat throughout the country but only in particular areas.

22. Article 8(2) of the qualification directive (Council Directive 2004/83/EC of 29th April, 2004) does not specifically spell out such a presumption but states that "*Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country [to which internal relocation is proposed] and to the personal circumstances of the applicant*".

23. Article 8(2) of the recast qualification directive (Directive 2011/95/EU) (not applicable to Ireland) also requires Member States to "*ensure that precise and up to date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office*".

24. Hailbronner and Thym in *EU Immigration and Asylum Law* (2nd ed., 2016) comment, in relation to the 2011 recast qualification directive but in terms which seem equally applicable to the 2004 qualification directive, that "*when the feared prosecution or harm emanates from the State, the person is threatened with persecution or harm countrywide unless it is established that the risk stems from an authority of the State whose power is limited to a specific geographical area or where the State itself only has control over certain parts of the country*" (p. 1161, in Part D III, Article 8, by Judge Harald Dörig).

25. By contrast, "*in the case of persecution by non-State actors there is no presumption that their influence extends to the whole country*" (p. 1161).

26. It seems to me that a valid finding that internal relocation is available must consist of a two-step process.

27. Firstly, in a case where the question of state action could arguably arise, it must identify whether the risk of future harm which exists (or in the case of an alternative finding, is alleged to exist) in fact arises from the state or from non-state actors ("state" actors in this sense including political, military, police or factional entities in power at national level rather than merely state institutions in the strict sense). If the harm emanates from the state, it is to be presumed that the risk will exist throughout the country unless the authority of the state does not run throughout the country (see n. 254 on p. 1161 of Hailbronner and Thym citing a decision of the German Bundesverwaltungsgericht (Federal Administrative Court) of 8th December, 1998, No. 9 C 17/98, BVerwGE 108, p. 84).

28. The second step depends on the answer to the previous question. If such a presumption arises due to state-sponsored risk, the decision must go on to consider whether it is rebutted in the particular circumstances of the case. For example, persecution by a local branch of a national ruling party may not be likely to be repeated if the person relocates to the capital city, for example.

29. Alternatively, if the presumption does not arise, because the case relates to non-state action or state action where the state does not control the whole territory, the decision-maker must still be satisfied that the risk will not arise in an identified area of the country to which it is reasonable for the applicant to relocate.

30. As the particular decision under discussion did not conduct an analysis in accordance with this approach, I conclude that it must therefore be quashed. This is not a case where it is desirable to attempt to extract from fragments of the decision elements that could be construed on a perhaps strained basis as meeting these requirements. The decision was tottering from the outset, the State having already conceded that one of the pillars of the decision was flawed. The emergence of a significant flaw in the other pillar means that the whole shaky edifice must come down.

Order

31. The parties agreed that if the decision were to be quashed it should in the particular circumstances of the case be reheard by Mr. Gallagher. For the foregoing reasons, I will order:

> (i) that an order of *certiorari* do issue removing for the purpose of being quashed the decision of the Refugee Appeals Tribunal dated 20th May, 2015, refusing subsidiary protection to the applicant; and
>
> (ii) that the matter be remitted to the tribunal for reconsideration in accordance with the judgment of the court to be heard by Mr. Gallagher, if practicable, with liberty to apply.