THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 1059 J.R.]

BETWEEN

L.A.A. (BOLIVIA)

A.L. (BOLIVIA)

C. A. (BOLIVIA)

(a minor suing by his mother and next friend L.A.A.)

APPLICANTS

AND

THE REFUGEE APPEALS TRIBUNAL,

THE MINISTER FOR JUSTICE AND EQUALITY AND

THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 12th day of January, 2016

1. This is telescoped hearing for judicial review seeking, *inter alia*, *certiorari* to quash a decision of the Refugee Appeals Tribunal dated 4th October, 2011, notified to the applicants by cover letter dated 14th October, 2011, and remitting the appeal of the applicants for *de novo* consideration by a separate member of the Refugee Appeals Tribunal.

2. An extension of time of two days was required at the outset of the hearing. No objection was raised by the respondents in relation to the necessary extension and given the amount of time that has elapsed since the commencement of these proceedings, and the explanation offered on affidavit by the first named applicant, I am satisfied that it is appropriate to grant an extension of time in respect of these proceedings.

Background

3. The applicant is a Bolivian national, born on 20th April, 1973. She was married in 1994. The second named applicant is the first named applicant's daughter. She was born on 6th February, 1995. The third named applicant is the first named applicant's son. He was born on 20th June, 2008. The first named applicant studied accounting, and operated her own business in Bolivia. Her stated problems began in 1997 when her husband began to abuse her, both verbally and physically. The applicant stated that her husband is well connected in Santa Cruz where he works as a lawyer. He is also a member of the Union Cruceñista, which she describes as a racist organisation. She further stated that her husband's family were involved in *Acción Democrática Nacionalista,* the political party in power in Bolivia until 2001. The first named applicant left him in 1995 and moved to Cochabamba, with her daughter, when the child was three months old. They remained there for eights months, but when her husband found them, he forced them to return to Santa Cruz.

4. The applicant went to London in 2000 as a student. Her husband came to London in May, 2001, and their daughter joined them shortly thereafter. In 2003, she contacted the police in England because he was threatening her with physical abuse but she did not make a formal complaint. The first named applicant became undocumented in the UK in 2002 and, in 2007, while still working she applied for residency and was apprehended by immigration officers. She and her daughter were subsequently deported to Bolivia on 15th November, 2007. Her husband returned to Bolivia in 2010. They lived together but the problems began again. She stated that she was unable to report him as he is a lawyer and has influential connections, so she believed no action would be taken against him. She left Bolivia with her two children, travelling through São Paulo and Paris, arriving at Dublin airport on 20th April, 2011. The intended destination was the UK but the applicants were apprehended at Dublin airport.

5. The applicants applied for asylum at Dublin airport. The applicants, thereafter, attended at the Offices of the Refugee Applications Commissioner (ORAC), completing the s.11 interview on 27th May, 2011. The ORAC issued a negative decision in respect of the applicants' claim for a declaration of refugee status on 7th July, 2011. The decision summarised the applicants' claim and then made findings regarding the availability of state protection and the feasibility of internal relocation. On the final page, exhibited at p.152 of the booklet, the authorised officer states, under the heading 'nexus to section 2 grounds', as follows:-

> "The applicant is claiming a fear of persecution due to domestic violence. According to the applicant's statements this violence is motivated by her husband's alcoholism, not by the applicant's race, religion, nationality, membership of a particular social group or political opinion. Therefore there is no nexus to section 2 grounds in this case."

6. The applicants appealed the decision of the ORAC to the Refugee Appeals Tribunal (RAT) by form one, notice of appeal and attended at the RAT for an oral interview on 13th September, 2011.

The impugned decision

7. The RAT upheld the negative recommendation of the ORAC by decision dated 4th October, 2011. The decision sets out the background to the applicants' claim, the applicable law in the *pro forma* manner, and, under the heading 'analysis of the applicants' claim', at p. 13 of the booklet, sets out as follows:-

"According to the Human Rights Reports on Bolivia, violence against women is a pervasive and under-reported problem. 70% of Bolivian women suffer some form of abuse. There is apparently a Police Family Protection Brigade but this lacks financial support and sufficient personnel to follow up and pursue unreported cases.

The file discloses that [first named applicant's husband] has a criminal record. Apparently there are two convictions, the first follows an incident when [first named applicant's husband] was involved in what is termed 'indecent conduct on a public highway'. He was involved in a fight and caused damage to a restaurant. He was apparently under the influence of alcohol. This happened on the 26th December 2010.

There is then a reference to a further arrest for a period of 6 hours, having caused "slight injuries" to his friend Mr. [named] while they were both intoxicated. This incident happened in February 2011. There is another reference to a case of drunken driving. His licence was suspended for a period of some months.

There is also on file a medical certificate which informs that [first named applicant] suffered physical abuse with evidence of haematomas on her right upper eyelid, on the anterior and posterior thorax and on the arms and forearms.

The gist of this case is that the Applicant fears that in Bolivia, she would be denied the protection of the State because of the violent activities of her husband who has connections in the government and the police force.

[First named applicant] told the tribunal of a number of incidents when she suffered from her husband's violence. There is a medical report exhibited on her behalf. [ORAC officer] asked questions regarding the authenticity of this document.

The case brought to the Tribunal is the [husband] is a man who is to be feared because of his connections with the police and public servants. The documents on file do not support this claim. What the documents show is that [husband] has criminal convictions because of his drunken violence. While this supports that claim brought by [first named applicant] (i.e., that her husband is drunken and violent) it indicates that [husband] is not a man of great influence. He was convicted of separate offences in 2010 and 2011. It does not make sense to suggest that [husband] would be prepared to tell police to look the other way in the event of his wife's complaint of violence while at the same time not using his influence with the police when he himself was facing criminal charges.

Country of origin reports refer to the fact that the Family Protection Brigade handled in excess of 3,500 cases in 2008. The US State Department Report on Bolivia for 2009 points out that the police lacked financial resources to pursue all reported cases but the important point is that there is a police unit that is prepared to take action when it is appropriate. The protestations made to the Tribunal, i.e. that the police would be of absolutely no assistance, are not well founded. It is a long established principle of refugee law that if protection is available in a country an applicant should first seek that protection before fleeing overseas to seek surrogate protection in another country.

The evidence is that [second named applicant] is a young lady who has a considerable problem with mental illness.

[…]

The Tribunal is satisfied that the claim brought by [first named applicant] and her children is not well-founded for the reasons stated. It is most regrettable that [second named applicant], at 16 years of age, should suffer from the effects of psychological stress […]. [Second named applicant] may have grounds, based on human rights issues, for not returning to Bolivia but that is not a matter for this Tribunal.

The assessment of all facts and circumstances as required by Regulation 5(1) of S.I. 518 of 2006 has been compiled with."

Applicant's submissions

8. Counsel for the applicants, Mr. Garry O'Halloran, B.L., summarised the decision as follows. It is accepted that the events occurred and there are no credibility issues; however, the tribunal member decided that state protection would be available and the applicant does not belong to a particular social group. The applicants submitted that the finding that the applicants do not belong to a particular social group is an error of law. The applicants submitted that they, as a family unit, can form a social group, and relied upon the decision of this Court in *A.V.B. & ors. v. Refugee Appeals Tribunal & ors*. [2015] IEHC 13. The applicants also submitted that women can also form a social group, as per the UK House of Lords decision in *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah* (A.P.) [1999] 2 A.C. 629, where it was held that women in Pakistan accused of adultery could form a social group for the purposes of the Refugee Convention.

9. The applicants argued that the decision-maker had preferential regard for certain country of origin information over other such information, and the decision does not comply with the test as set out by Edwards J. in *D.V.T.S. v. Minister for Justice, Equality and Law Reform & anor.* [2008] 3 I.R. 476. The applicants submitted that country of origin information, which showed that police protection would not be available, was disregarded in favour of information that did not support the applicants' claim without reasons for the preferment given by the decision-maker.

10. The applicant submitted that the tribunal member erred in law in making findings in respect of state protection without making any assessment of the adequacy of such protection in light of the applicants' particular circumstances, and failed to have regard to the connections of the applicants' husband and father. The applicants relied upon the decision of Clarke J. in *Idiakheua v. Minister for Justice, Equality and Law Reform & anor*. [2005] IEHC 150, where at p. 7 therein, the test is set out as 'reasonable protection in practical terms'.

11. The applicants submitted that the reasoning within the decision is inadequate, particularly referring to the statement that because the husband had been arrested on occasions, he does not appear to be a man of influence, as quoted above. The applicants relied upon the decision of MacEochaidh J. in *B.O.B. v. Refugee Appeals Tribunal & ors.* [2013] IEHC 187.

12. The applicants further argued that there is no evidence of any consideration given to the situation of the third named applicant in the decision.

Respondent's submissions

13. Counsel for the respondents, Ms. Fiona O'Sullivan, B.L., submitted that the claims of the minor applicants were advanced on their behalf by their mother and were the same as their mother's to the extent that all of the applicants feared domestic violence at the hands of the husband/father and she claimed that she had not sought state protection because the father had good connections. Further, regarding the applicants' submission that no consideration was given to the third named applicant, the respondents submitted there was no individual claim put forward on behalf of the third named applicant, separate and distinct from that advanced by the mother in whose application he was included.

14. The respondents submitted that the tribunal decision must be read as a whole and should not be deconstructed or parsed, and when read as a whole, the respondents submitted, it is clear that the tribunal member fully understood and assessed the applicants' claim. The respondents submitted that the appeal was filed on the basis that the applicants were members of a particular social group and on the facts this was the only convention nexus applicable. The respondents argued that there is no evidence that the tribunal failed to consider this issue, but rather the decision is based on the availability of state protection. Counsel relied upon the decision of *A.W.S. v. Refugee Appeals Tribunal* [2007] IEHC 276, where at p. 14 Dunne J. states that it is not the function of the courts to engage in minute analysis of tribunal decisions. The respondents argued that the tribunal considered the claim on the basis that the applicants had a fear of persecution due to domestic violence at the hands of her husband and considered whether state protection would be reasonably forthcoming if sought. The respondents submitted that there is no evidence that the tribunal failed to assess the facts in this case in accordance with law, as per, *inter alia, A.W.S. v. Refugee Appeals Tribunal* [2007] IEHC 276 and *G.K. v. Minister for Justice, Equality and Law Reform & ors.* [2002] 2 I.R. 418.

15. The respondents contended that, contrary to what is asserted by the applicants, the tribunal assessed the issue of the availability of state protection and whether it would be reasonably forthcoming. The applicants claimed that the husband had 'good connections' and this claim constituted the applicants' particular circumstances; moreover, it was argued, the tribunal referred specifically to the contents of the country of origin information on file, the documents submitted to it, including the police record, and the 'good connections' that the husband was alleged to have. The respondents submitted that the tribunal referred to the contents of the medical report submitted in respect of the second named applicant and had regard to its contents, which is evident from the decision.

16. The respondents argued that the tribunal rationally assessed the contents of the country of origin information on file and specifically referred to the contents of the Human Rights Report on Bolivia (2008), which stated that violence against women was a pervasive and under-reported problem, and that 70% of women suffered some form of abuse; there was a Police Family Protection Brigade which lacked financial support and sufficient personnel. But, the respondents argued, the applicants did not demonstrate an inability on the part of the state to protect them.

Decision

17. The applicant argued that the error of law was contained in the determination that the applicants do not form a particular social group. The applicants relied, *inter alia*, upon the decision of this court in *A.V.B. (supra)* to support the proposition that a family could form a social group for the purposes of s.2 of the Refugee Act, 1996 (as amended). However, when the decision is read as a whole, the tribunal member rejected the applicants' claim on the basis that, given the family's particular circumstances, state protection would be available to the family if they were to seek it. The tribunal member was particularly mindful of the difficult circumstance of the second named applicant and referred to the medical evidence before him. Nevertheless, he found that a consideration of those circumstances was not related to the claim of persecution and not within the jurisdiction of the tribunal.

18. The applicant was given the opportunity to have the third named applicant included with her own claim. In *I.N.M. v. Minister for Justice, Equality and Law Reform & anor*. [2009] IEHC 233, Clark J. states as follows at paras. 31 and 32:-

> "When a parent seeks to include a dependent child in a claim for refugee status, then it is up to that parent to establish his/her claim first and to then establish whether the child has a separate and independent fear of persecution in its own right or whether the child's claim depends entirely on that of the parent. This is well trodden ground admirably elucidated by Peart J. in the High Court hearing in Nwole and followed in many judgments since then. His findings on the general principles applying where the parent brings an application on his/her own behalf but does not advance or bring to the attention of ORAC or the RAT any facts or circumstances relevant to that minor that are separate and distinct from the facts of circumstances relevant to the parent's application, were not considered by the Supreme Court in *N. (A) & Ors v Min for Justice & Commissioner of An Garda Síochána* [2007] I.E.S.C. 44. The question for determination by the Supreme Court related to the refusal of an asylum application. Finnegan J. decided that if the head of the family is not a refugee there is nothing to prevent any one of his dependants, *if they can invoke reasons on their own account,* from applying for recognition of their status as refugees. He determined that "there was no application by or on behalf of the minors" and accordingly there could have been no refusal of the minors' applications and that s. 3(2) (f) of the Immigration Act 1999 did not apply to them: "the basis upon which the Minister purported to make deportation orders in relation to the minors did not exist".
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> 32. Nothing in the decision of the Supreme Court in N.A. and others changed the principle that it is entirely appropriate that members of the same family units should make joint asylum claims as clearly, if the parent establishes a well-founded fear of persecution for a Convention reason, then the spouse and dependent children are also at risk and in need of protection. Protection to the family is ensured in section 18 of the Refugee Act 1996, as amended, and Council Directive 2003/86/EC of 22 September, 2003 on the right to family reunification. It will be highly unusual for a parent to fail to establish a fear of persecution and for a dependent minor child to succeed. It will be even more unusual for a toddler to succeed where his mother fails."

Where no separate and distinctive fears are identified on behalf of the children, then the children's case has been considered as predicated on that of the mother's claim.

19. In *Idiakheua v. The Minister for Justice, Equality and Law Reform* [2005] IEHC 150, Clarke J. held "the true test is whether the country concerned provides reasonable protection in practical terms". This is in line with article 7(2) of the 2004 Qualification Directive, which provides the following guidance as to the standard of protection that states are expected to provide:-

> "Protection is generally provided when the actors [of protection] take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection."

State protection can never be perfect protection. The existence of legislation proscribing certain practices is not enough to show the existence of state protection. These laws must also be enforced by the state. An applicant for a grant of refugee status must show

that the state authorities are failing in some way to protect persons, and this will be with particular regard to their claim, region and other such circumstances.

20. According to the country of origin information before the decision-maker, domestic violence appeared to be endemic in Bolivia. The tribunal member then went on to assess whether the first named applicant's husband's connections were such that he could reasonably prevent her securing state protection. The tribunal found that his connections were not so influential so that state protection would not be forthcoming to the applicant. This amounts to an assessment of the adequacy of the state protection given the applicant's particular circumstances and therefore, I reject the applicants' contention that such an assessment was not performed. This assessment is within the jurisdiction of the tribunal and it is not open to this court on judicial review to supplant its own assessment for that of the decision-maker.

21. I would therefore refuse leave.