

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2009 582 J.R.

Between:

H. S. [MOROCCO]

APPLICANT

-AND-

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

RESPONDENTS

JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 12th day of June 2013.

1 The applicant is a single woman in her late 30s and a national of Western Sahara. She says she arrived in Ireland by ship hidden in a container. Her application for asylum was refused at first instance by the Office of the Refugee Applications Commissioner who made a major credibility finding relating to her apparent lack of knowledge of an incident referred to in a *Western Sahara Weekly News* account as *Black Friday*. The Commissioner also held against her because her name did not appear on a list of Saharawi prisoners convicted or charged with political crimes or released/pardoned by the Moroccan authorities. The Refugee Appeals Tribunal in turn refused her appeal on similar credibility grounds. The applicant now seeks an order of certiorari quashing the Tribunal decision.

Background

2. The applicant applied for asylum on the 4th December, 2006. She claimed to fear persecution at the hands of the Moroccan authorities if returned to the disputed territory of Western Sahara, formerly Spanish Sahara and since 1976 under Moroccan administration. According to her narrative, she suffered persecution as an active member of a political group called *Nidal Saharou* which advocates for the Saharawi people's right to self-determination. She claimed that her membership of that group since 1998 caused her to be arrested and questioned on numerous occasions and that she was known to the police. She described her activities as going to women's houses distributing leaflets on behalf of the organisation and encouraging people to join and organising "riots" (which the Court assumes were mistranslations of demonstrations). She named the leaders of the organisation which she said operated in secret and in fear which explained why no information could be found on the named group on the internet or otherwise. The events which led her to flee her country of origin commenced in July 2006, when she was found in possession of pro-independence leaflets and was arrested and detained for approximately four weeks during which time she was severely maltreated and raped.

3. The applicant who lived at home with her adoptive mother has consistently claimed that she suffered extreme ill-treatment when she was held. She claimed that the conditions were bad, she was questioned and insulted and on one occasion she was anally raped by the group of her police interrogators. She was released shortly afterwards on condition that she did not disclose that she had been ill-treated or raped. She says that she only told her closest friend of the detention and the rapes and that the friend had persuaded her mother that she was staying with friends during her absence. Following her release, she was in shock, frightened and depressed and thought only of escape from Western Sahara. She fears returning there as she believes that her name is on a government blacklist and that she would be imprisoned on return.

4. Objective country of origin information (COI) relied upon by the applicant clearly states that opponents to the Moroccan government in the self-determination movement are severely suppressed and that demonstrators are treated harshly. Those reports indicate that women are not spared the harsh treatment.

5. In support of her claim the applicant submitted a SPIRASI report which found her current mental and physical symptoms to be "consistent with" the history she gave of her experiences while in detention in Western Sahara and the examining doctor referred her for counselling, group therapy and psychosocial support.

The Tribunal Decision

6. The Tribunal Member seems to have taken no issue with the applicant's asserted identity or country of origin. She approached the appeal on the basis that the US Department of State *Country Report on Human Rights Practices in Morocco* provided the backdrop to the assessment of the claim that the applicant was a member of *Nidal Saharou* and that for this reason she had suffered persecution.

7. The Tribunal Member stated that the applicant had not satisfied her "at any level" that she had a well-founded fear of persecution for the following reasons:

(1) The applicant had been unable to provide any information on the *Nidal Saharou* organisation to the Commissioner or to the Tribunal Member although she had been specifically questioned on the issue, apart from saying that it was a secret organisation which worked in secret.

(2) Her name did not appear on the list of political prisoners who were either pardoned or released between 2002 and 2006. Her explanation that the government does not always publish the names of all prisoners and that she had not informed her organisation of her arrest and detention because she could not face them after what had happened to her was considered not credible.

(3) The Tribunal Member found that her ignorance of the event labelled as *Black Friday* defied belief. Her evidence that there were a lot of demonstrations in 2005 but that she knew nothing of the name *Black Friday* was not considered credible. When the Tribunal Member reminded her that she said there had been a peaceful riot on the 16th December,

2005, the applicant queried the ability of the translator at the interview.

(4) The applicant was found to be evasive.

(5) The Tribunal Member noted that in her asylum questionnaire she omitted details about her adoptive mother, her employment and the name of her political group.

(6) Her core claim was not supported by COI and these issues cast serious doubt on her overall credibility.

(7) Finally, the Tribunal Member considered the medical report from SPIRASI which was furnished after the oral appeal hearing. The view expressed by Dr Bastible that the findings of a decreased range of shoulder movement and erythema of her anal area were "*consistent with*" the account given by the applicant in respect of her treatment at the hands of the Moroccan police, was considered to be from a medical practitioner who was not in any better position than the Tribunal Member to say how or when the findings came about. "*Consistent with*" was at the lower end of the Istanbul Protocol scale and the SPIRASI report had to be considered in the light of the applicant's overall testimony which included a lack of travel documentation or information of how she arrived in the State.

The Applicant's Submissions

8. The main thrust of the applicant's written and oral submissions is that the Tribunal Member failed to have regard to 'a wealth of country of origin information' which was capable of supporting her case and chose instead to rely on an extract sourced by the Commissioner's authorised officer which was of dubious provenance. Further, the SPIRASI report was not considered as part of the overall evidence or given sufficient weight and the Tribunal decision was grounded on credibility findings relating to matters peripheral to the core claim of persecution as an independence movement activist. Further, the Tribunal Member appeared to adopt the Commissioner's finding on an event which is said to have occurred on the 16th December, 2005, called *Black Friday*, which was given undue importance.

The Respondents' Submissions

9. The respondents argue that the Tribunal decision should be read as a whole and that the difficulties found in the applicant's claim where she was very vague were extensive and outlined in the decision. Ms Fiona O'Sullivan B.L. on behalf of the respondents urged that the important and indeed central finding was that the applicant had little knowledge of the incidents of 'Black Friday' which were stated to have occurred on the 16th December, 2005 and involved a demonstration where 120 persons were arrested and 10 persons were brought before the courts. On the basis of this finding, Ms O'Sullivan argued that the Tribunal was justified in rejecting the applicant's claim.

The Court's Analysis

10. The all important issue in this case is undoubtedly the manner in which the objective part of this applicant's claim was considered. Going back to absolute basic principles, the assessment of an asylum seeker's claim involves first the receiving of the details of why the applicant has fled his/her country and fears returning there. The next part of the assessment is the setting of the subjective claim against what is objectively known of that country to ascertain whether the claim could be true, whether (if true) effective state protection is available or whether internal relocation might be a reasonable alternative to a refugee claim. This exercise is now set out in Regulation 5 of the *European Communities (Eligibility for Protection) Regulations 2006* (SI No. 518 of 2006) ("the Protection Regulations"), the relevant parts of which provide:-

"Assessment of facts and circumstances

5 (1) The following matters shall be taken into account by a protection decision-maker for the purposes of making a protection decision:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the protection applicant including information on whether he or she has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the protection applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

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

11. The much quoted extract from para. 21 of the decision of the UK Immigration Appeal Tribunal in *Milan Horvath v. Secretary of State for the Home Department* [1999] I.N.L.R. 7, delivered by Pearl J. and frequently cited with approval in this jurisdiction, remains relevant today and is worth repeating:-

"It is our view that credibility findings can only really be made on the basis of a complete understanding of the entire picture. It is our view that one cannot assess a claim without placing that claim in the context of background information of the country of origin. In other words, the probative value of evidence must be evaluated in the light of what is known about the conditions in the claimant's country of origin."

12. It is unfortunate that these basic principles- adeptly summarised by Pearl J. and essentially codified in the Protection Regulations- were not applied in Ms H.S.'s case. The Commissioner who is the initial and primary decision maker simply failed to properly investigate the claim by considering all relevant facts as they relate to Western Sahara, the applicant's country of origin. The Tribunal Member, in turn failed to have regard to relevant documentation presented to her in the form of the US Department of State Report on Western

Sahara. The decision-makers seem instead to have set out to disprove the claim by relying on COI of unexplored source and reliability. Although the extracts relied upon are attributed to *Western Sahara Weekly News* in the Tribunal decision, such provenance does not appear on their face nor are the politics and purpose of that English-language publication known. The Tribunal Member's reliance on these two documents and in particular, the extract with regard to "Black Friday", has infected the appeal decision now impugned.

13. It is clear that there was a paucity of reports on the Western Sahara before the Tribunal Member. The entire bundle of COI before her consisted of:-

- A 2005 US Department of State report entitled *Human Rights Practices Morocco* which contains occasional references to events in Western Sahara [sourced by the Commissioner]
- A Human Rights Watch report entitled *Morocco/Western Sahara Events of 2006* [Sourced by the Commissioner]
- A further US Department of State report entitled *Western Sahara Human Rights Practices* dated the 6th March, 2007 [Sourced by the applicant's legal representatives]
- An internet article published on www.arso.org purporting to be a Western Sahara Intifada list of Saharawi prisoners convicted, awaiting trial and former prisoners released or pardoned [Sourced by the Commissioner]
- A short extract from *Western Sahara Weekly News* also published on www.arso.com [Sourced by the Commissioner]

14. It would not have been difficult to read that COI and to note that conditions in Morocco, a democratic kingdom, may not be relevant to Western Sahara which is a large desert region whose ownership is disputed by Mauritania, Morocco and Algeria and where the indigenous people, the Saharawi, seek self-determination. There is no therefore no evidence to justify the confidence expressed in the Tribunal decision that the statement: "*effective control of the security forces was maintained by the civilian authorities*", quoted from a report on conditions in Morocco is applicable to Western Sahara. The reports relevant to Western Sahara indicate that the International Court of Justice found that no country could legitimately claim sovereignty rights over the region and that the local people had a right to determine their future. To date, a recommended referendum on self-determination has not been held and in the meanwhile the Moroccan authorities have populated the area with very large numbers of Moroccan settlers. The dispute continues and the border conflict between Morocco and Algeria has not been resolved while the State of Morocco has colonised the northern region by maintaining a large army there. The UN has been involved in preserving a ceasefire and in trying to move the self-determination process forward and it maintains a peacekeeping force there while the UNHCR operates a permanent office. The Moroccan Government is secretive about the area and access to the region is limited. None of this appears in the s. 13 report or in the Tribunal decision which both treat Western Sahara as Morocco.

15. The COI reports indicate that the languages used in Western Sahara include Spanish, French, Arabic and Berber. English does not appear to be one of the languages used and the area has no apparent connection with the English language. The applicant does not speak English and required an interpreter. She complained in the appeal submissions that she had difficulty understanding the interpreter who spoke Algerian Arabic as opposed to her Moroccan Arabic. It was submitted on her behalf that this difficulty may explain her delay in answering questions which led to the negative findings in the s. 13 report on "reluctance" to answer.

16. Again, on the issue of language and source documents, the generally reliable COI sources such as the US Department of State, Amnesty International and Human Rights Watch all publish their reports in the English language and are generally directed to an Anglophone audience. The question must therefore arise as to the identity of the authors of the English-language articles on the Arso website relied upon by the Tribunal Member and their intended audience, if English is not the language of Algeria or Morocco or the Polisario Front who appear to be the main opposition to Moroccan rule. In the circumstances it is unclear why so much reliance was placed on the Arso reports to the exclusion of the US Department of State report on Western Sahara which cites and indexes all of its sources.

17. Against this background, it seems to the Court that the two internet extracts were called upon not to establish that the applicant's description of a strong independence movement and frequent demonstrations which are suppressed by the Moroccan authorities is true, but rather, to reject the applicant's credibility because her knowledge of events did not embrace information contained in those reports.

18. As noted above, the Tribunal decision suggests that the US State Department report on Morocco was the backdrop against which the applicant's claim was measured. Valuable as that source document was, the choice was unwise as its focus is Morocco and not Western Sahara and it contains very little information specific to Western Sahara. It contains nothing of any event known as "*Black Friday*" or any list of prisoners in Western Sahara. The only conclusion that can be drawn is that the Tribunal drew its conclusions on the Black Friday incident from the two articles on the Arso website and not from the COI which she stated was her guidance report.

19. An unsatisfactory feature of the *Western Sahara Weekly News* report entitled *Black Friday* is that it is clearly an extract from a calendar of events involving either human rights violations by the Moroccan authorities or events organised by an anti government organisation and is an incomplete document. It refers to a large demonstration on the 16th December, 2005, where 120 participants were arrested. There is however no support for those facts asserted in any of the other reports before the Tribunal. The list of prisoners furnished on the Arso website does not refer to a single arrest from the 16th December, 2005. Additionally, there was no reference to any such demonstration on that date in the more detailed US Department of State Report on Western Sahara which was furnished to the Tribunal and specifically addressed in the written appeal decision. The Human Rights Watch article on Morocco/Western Sahara which was sourced by the Commissioner deals almost exclusively with Morocco but it contains one relevant paragraph relating to a delegation sent by the UN High Commissioner for Human Rights for the following purpose:-

"The UN High Commissioner for Human Rights dispatched a delegation in May to examine human rights conditions in the Moroccan-administered Western Sahara and the Polisario-administered Sahrawi refugee camps in Tindouf, Algeria. After negotiating the easing of a tight Moroccan security presence, the delegation was able, in its own words, "to meet with whomever they deemed useful." It concluded, "The Sahrawi people are not only denied their right to self determination but equally are severely restricted from exercising a series of other rights, and especially rights of particular importance to the right of self determination, such as the right to express their views about the issue, to create associations defending their right to self-determination and to hold assemblies to make their views known." The delegation said it was unable to collect sufficient information about human rights conditions in the Tindouf camps, but called closer monitoring of rights conditions there and in the Moroccan-controlled areas "indispensable."

20. There is no reference to that paragraph in the Tribunal decision and no reference in the Human Rights Watch report to any event

known as "Black Friday".

21. The 2007 US Department of State report on Western Sahara runs to almost six closely typed pages. It records that political activists in Western Sahara have been maltreated and persecuted and that detained persons have been sexually abused. It can therefore be concluded that objectively speaking, events such as those described by the applicant could have occurred. The report is highly informative in that it outlines the various claims to the territory and the reports from NGOs with regard to the claims and counterclaims made against the Moroccan government and the Polisario Front on human rights abuses. As is usual, the report details events of human rights interest throughout the previous year - in this case 2005 and 2006. There is no mention of any event on the 16th December, 2005 and no reference to any Black Friday. The major events of the year are reported to have occurred in May, 2005 when many demonstrators were arrested and in October, 2005 when a demonstrator died of wounds received. The arrests and trials of named demonstrators referred to in the report are not found on the 'list' taken by the Commissioner and relied upon by the Tribunal Member from the Arso website. The absence of the names of the persons identified as government opponents or demonstrators who were held, tried, convicted and sentenced according to the US Department of State report lends some support to the applicant's evidence that not all names were released and to the fact- brought to the Court's attention- that the Arso "list" declares itself to be incomplete.

22. However, what is notable is that the information contained in the 2007 US Department of State Report on Western Sahara is otherwise consistent with the dates provided by the applicant when she enquired whether "Black Friday" was the day when a named demonstrator died in October, 2005. Had that report been properly and fully considered in accordance with the respondents' obligations, it is likely that it would not have been dismissed with the sentence; *"While the Applicant has documentation relating to her country of origin, this has to be considered in light of the Applicant's overall testimony to the Tribunal."*

23. In the light of that examination of relevant COI it is difficult to accept the respondents' submission that it was reasonable for the Tribunal Member to find that the applicant's ignorance of the events of the 16th December,, 2005, or the name 'Black Friday' *"defied belief"*.

24. The Court finds that the treatment of COI in this case was selective and incomplete and has created a very distinct possibility that many of the findings based on those selected extracts of unknown provenance were unfair to the applicant. It is disturbing that disproportionate weight was placed by both the Commissioner and the Tribunal Member on an event referred to as *Black Friday* to the exclusion of her core claim and it is unacceptable that so much weight was attached to one isolated reference in COI to an event known as *Black Friday* to the exclusion of more reliable and objective information capable of supporting the applicant's claim.

25. It is instructive to refer to the original questioning at the s. 11 interview on what became a key issue of the assessment of the applicant's credibility:- *"What was Black Friday and What happened on Black Friday?"*. While the applicant had never heard of the description she seemed to wonder if that was the day when a correctly named activist was "martyred" when there were riots all over the country, or on the day of his funeral when no arrests took place as there were too many demonstrators. The applicant supplied further accurate information saying that the authorities permitted the use of the Western Sahara flag for his body; that the demonstration ("riot") was peaceful and that the two events occurred on the eve of the fasting month of 2005 (October). It is also to her credit that she did not change her evidence on her ignorance of the day or event described as "Black Friday" at the appeal hearing.

26. As previously outlined, the only source for this event was a short excerpt from an internet printout in English where the author entitles the *"events on the 16.12.05"* as *"Black Friday"*. There is nothing to suggest this nomenclature was known to the non English speaking people of El Ayoun where the events were stated to have taken place. The decision-makers appear to have assumed that the events of 16th December, 2005 in El Ayoun were commonly known in Western Sahara as *Black Friday*, in the same way as the events of 11th September 2001 in New York are commonly known as 9/11. There was no evidence before the Tribunal to support that assumption. If the author of the extract is correct - and some doubt arises as to the correct date of the demonstration or if it happened in Al Ayoun at all- it may have been fairer and more productive if the applicant had been asked if she knew anything about a major demonstration in 2005 where 120 demonstrators were arrested, rather than asking her if she knew anything about "Black Friday" and condemning her as not credible "at any level" because she was unaware of the event.

27. The Court does not overlook the undoubted frailties surrounding the applicant's asserted failure to notify the leaders of the movement of her arrest and detention immediately after the event. Her evidence was that her arrest was witnessed by her best friend who was also an activist. While her failure to report the detention to her movement when she was released may be explained by her trauma and probable cultural shame at the gang anal rape, the failure on the part of her friend and co-activist to report her unlawful detention lacked a cogent explanation. There is also the issue of the lack of objective information about the organisation of which the applicant says she was an activist. However, the Court has some concerns about language, spelling and translation which may be relevant to whether information exists on the applicant's claimed organisation. It is notable that in the COI which was before the decision-makers, the capital where the applicant lived is spelled in a variety of ways in English including El Ayoun, El Aaiun, Laayoune and by the Commissioner as Al Ayon. Even the spelling of the people of Western Sahara differs between Saharawi / Sahrawi / Saraoui. Bearing in mind the lack of information on Western Sahara and the wide divergence in the English spelling of place names and the names of people, it appears to the Court that it would not have been impossibly burdensome for the Commissioner to have used an Arabic speaker to investigate the availability or otherwise of information in Arabic of the Arabic version of *Nidal Saharou*. The Commissioner's very distinct finding (adopted by the Tribunal) that no such information exists might be unfair to the applicant. On the other hand, the Court feels obliged to comment that the applicant was represented by an experienced solicitor who should perhaps have sought out this information for the Tribunal Member or invited the Tribunal to seek the assistance of the Commissioner in investigating this core aspect of the applicant's claim further.

28. However, these matters fade into insignificance in light of the earlier findings on the manner in which COI was treated. As was submitted by Mr Robert Houghton S.C. on behalf of the applicant, the Tribunal Member simply ignored relevant and reliable COI and chose a minor internet entry to counter the applicant's claim and the objective and generally supportive contents of the other reports.

29. In the circumstances it is not necessary to address the treatment of the SPIRASI report and the concentration on peripheral and minor defects in the applicant's narrative.

Decision

30. The decision will be quashed and the matter will be remitted for fresh consideration before a different Tribunal Member who should be served with a copy of this judgment.

