Neutral Citation [2015] IEHC 470

THE HIGH COURT

JUDICIAL REVIEW

[2011 No 443 J.R]

BETWEEN

O.J. [NIGERIA]

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL

MINISTER FOR JUSTICE AND LAW REFORM

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 15th day of July, 2015

1. This is telescoped hearing for judicial review seeking *certiorari* to quash a decision of the Refugee Appeals Tribunal dated 3rd May, 2011, and remitting the applicant's appeal for *de novo* consideration by a different tribunal member.

BACKGROUND

2. The applicant is a Nigerian national born on 6th August, 1986. She states that she arrived in the State around 1st December, 2010, after having been kidnapped in Edo state, Nigeria and trafficked to Ireland in a container ship. The applicant states that she was imprisoned in a house in Limerick and repeatedly raped, eventually escaping after two weeks, aided by two Nigerian women. She was arrested in Limerick on 17th December, 2010, having been found with no identity documentation, and then made an application for asylum on 22nd December, 2010. She was directed to attend the Offices of the Refugee Applications Commissioner (ORAC) on 23rd December, 2010.

3. The applicant was interviewed by an ORAC officer on 4th February, 2011, and notification was sent by the commissioner to the applicant stating that the office would not be making a recommendation for a declaration of refugee status (dated 18th February, 2011). This decision was appealed to the Refugee Appeals Tribunal by way of notice of appeal dated 18th March, 2011. An oral hearing was held in respect of the applicant's appeal on 28th April, 2011.

IMPUGNED DECISION

4. By decision dated 3rd May, 2011, the tribunal affirmed the recommendation of the ORAC, that the applicant not be declared a refugee. The decision sets out the factual background to the applicant's case and then proceeds to set out the general law in relation to refugee status determination. Subsequently, beginning at p.16 of the decision, under the heading 'analysis of the applicant's claim', the tribunal member scrutinises the applicant's claim over the following nine pages. The tribunal member first states that the applicant, as a victim of trafficking, could satisfy the requirement to belong to a particular social group. She then observes that belonging to a particular social group is not sufficient to warrant international protection. Next, the tribunal member states, "there must be serious harm and a failure of State protection".

5. The first finding made by the tribunal member is in relation to the availability of state protection. The tribunal member notes that this protection does not have to be "perfect protection" and relies on the fact that Nigeria is designated by the United States' Department of State Trafficking Report 2010 as a tier one country. The designation system is defined as follows:

> "Tier 1
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> Countries whose governments fully comply with the Trafficking Victims Protection Act (TVPA) minimum standards
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> Tier 2
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> Countries whose governments do not fully comply with the TVPA minimum standards, but are making significant efforts to bring themselves into compliance with those standards.
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> Tier 2 watch list
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> Countries whose governments do not fully comply with the TVPA minimum standards, but are making significant efforts to bring themselves into compliance with those standards, and: a) the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; b) there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or, c) the determination that a country is making significant efforts to bring themselves into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.
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> Tier 3
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> Countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so."
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> The tribunal member further details efforts made by the Nigerian federal government and notes that there has been sustained progress in combating trafficking, citing convictions of traffickers and care provided for victims as well as legislation that has been enacted to combat trafficking in human beings.

6. The tribunal member continues at p.18:

> "Victims could theoretically seek redress through civil suits against traffickers, or claim funds from a Victims' Trust Fund set up in 2009 through which assets confiscated from traffickers are transferred to victims. Traffickers are prosecuted and convicted in Nigeria and therefore were the Applicant to fear any threats from her traffickers she could seek the assistance of the authorities."

The tribunal member goes on to summarise: "Sustained efforts are being made by the authorities to combat trafficking and the general thrust of the country of origin information on file is to the effect that state protection against traffickers is available in Nigeria". Lastly, on the point of state protection, the tribunal member recites regulation 2 of European Communities (Eligibility for Protection) Regulations 2006 (S.I. no. 518 of 2006), which states, *inter alia*:

> "'protection against persecution or serious harm' shall be regarded as being generally provided where reasonable steps are taken by a state or parties or organisations, including international organisations, controlling a state or a substantial part of the territory of that state 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, where the applicant has access to such protection"

The tribunal member concludes: "I am satisfied that the Nigerian authorities would be willing and able to protect the Applicant against her traffickers were she to return to Nigeria".

7. The second finding made by the tribunal member, resulting in the negative recommendation, was regarding the feasibility of internal relocation. The tribunal member notes that there is freedom of movement, protected by the Nigerian constitution and continues over the following paragraphs, at p.23 of the decision, relying on country of origin information, to state "it is possible for any adult woman to relocate and look for jobs to sustain themselves". Relying upon regulation 7 of European Communities (Eligibility for Protection) Regulations 2006 (S.I. no. 518 of 2006), the tribunal member finds that: "internal relocation is a complete answer to a claim for refugee status…" An urban area such as Abuja is suggested as a potential location for the applicant.

EUROPEAN COMMUNITIES (ELIGIBILITY FOR PROTECTION) REGULATIONS 2006 (S.I. NO. 518 OF 2006)

8. In assessing the facts and circumstance pertinent to each case, decision-makers are obliged to take into consideration the following factors, which are set out in the RAT decision and are worth reciting at this juncture.

> "Assessment of facts and circumstances
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> 5. (1) The following matters shall be taken into account by a protection decision-maker for the purposes of making a protection decision:
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> 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;
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> 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;
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> 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 5 applicant has been or could be exposed would amount to persecution or serious harm;
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> d) whether the protection applicant's activities since leaving his or her country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for protection as a refugee or a person eligible for subsidiary protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;
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> e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he or she could assert citizenship.
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> (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."

APPLICANT'S SUBMISSIONS

9. Counsel for the applicant, Mr. Michael Conlon S.C. with Mr. Garry O'Halloran B.L., submitted that there was a lack of fair procedures in that the ORAC finding in relation to internal relocation was effectively overturned by the RAT. The ORAC finding states the following at p.54 of the booklet furnished to the Court: "As this fear relates to the whole area of Nigeria, it is not possible to internally relocate away from it". The applicant contended that she was not on notice of this and was not given the opportunity to address this in the notice of appeal or otherwise, since the applicant was not aware of the investigation of same. The applicant pointed to s.16(16) of the Refugee Act 1996 (as amended), which requires that the tribunal, before deciding upon an appeal, must take into account the following:

> a) "the relevant notice under subsection (3),
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> b) the report of the Commissioner under section 13,
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> c) any observations made to the Tribunal by the Commissioner or the High Commissioner,
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> d) the evidence adduced and any representations made at an oral hearing, if any, and
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> e) any documents, representations in writing or other information furnished to the Commissioner pursuant to section 11."

10. The applicant further submitted that the notice of appeal was ignored by the tribunal member. Counsel argued that the notice of

appeal is very well prepared and addresses all necessary issues; however, the tribunal member does not, the applicant submitted, have appropriate regard to the document, as is required. Counsel submitted that the tribunal member did not have adequate regard to the notice of appeal nor did the tribunal member gives adequate reasons for the rejection of the ORAC finding that internal relocation was not open to the applicant. Counsel relied upon the decision of the Supreme Court in *M.A.R.A. (Nigeria) (An Infant) v. Minister for Justice and Equality & ors.* [2014] IESC 71. The applicant submitted that if it is open to the tribunal member to make this finding, without it having been addressed in the notice of appeal, it should be put to the applicant before the final decision is made, although there is no provision for a cross-appeal in the relevant legislation.

11. The applicant submitted that the principles set out in *K.D. [Nigeria] v. Refugee Appeals Tribunal & anor.* [2013] IEHC 481, were not complied with in the tribunal member's assessment of the viability of internal relocation, particularly para.28 where Clark J. sets out as follows:

> "The following principles can be said to apply to an assessment of the internal relocation alternative:
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> (1) An inquiry into the availability of internal relocation is only appropriate where a protection decision-maker accepts that the applicant has a well-founded fear of persecution for a Convention reason in his country of origin but that risk is localised and does not extend to the whole of the state.
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> (2) Internal relocation has no logical part to play in a decision if no well-founded fear of persecution is accepted or if it is found that the persecution feared has no Convention nexus;
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> (3) A large number of decisions refer to the relocation option notwithstanding a finding that there is no well-founded fear of persecution on credibility grounds. In such cases, what the decision maker really means is, 'if what you say is true, which is not accepted, you have given no credible explanation for coming to Ireland instead of moving elsewhere away from the claimed danger'. These 'even if' findings are not internal relocation alternative findings requiring adherence to Regulation 7 but are part of a general examination of whether an applicant has a well-founded fear of persecution.
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> (4) Localised Risk: Where it is accepted that an applicant has a well-founded fear of persecution for Convention reasons but that fear is localised and confined to a particular area, it is relevant to consider the possibility of internal relocation as an alternative to refugee status. In such cases, Regulation 7(1) of the Protection Regulations requires the protection decision maker to identify (if only in general terms) a place or area within the country of origin where the risk of persecution does not exist and where the applicant might reasonably be expected to stay. Security from persecution or serious harm and meaningful state protection in the proposed area of relocation are key.
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> (5) Where there is a well-founded fear of persecution and a general area has been identified as an alternative to refugee status then the protection decision-maker must pose two questions: (i) is there a risk of persecution / serious harm in the proposed area of relocation? If not, (ii) would it be reasonable to expect the applicant to stay in that place?
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> (6) Absence of Risk: Where the persecution feared is of a general or public character such as a religious or tribal conflict or oppression by a political regime which controls a particular region or city, it will be necessary to consult appropriate up-to-date COI to determine whether the risk of persecution / harm is genuinely absent from the proposed area of relocation. In such cases the decision maker must engage in a detailed and careful enquiry as to the general circumstances prevailing on the ground in the proposed area, in accordance with Regulation 7(2).
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> (7) If the persecution feared emanates from private or domestic actors, such as a threat from a particular family member, and a Convention nexus has been established, the protection decision-maker must make an objective, common sense appraisal of the reality of whether the risk faced by the applicant could be avoided by moving elsewhere, having regard to the applicant's own evidence.
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> (8) Reasonableness: It is not enough for the protection decision-maker to determine that the risk of persecution is absent from the proposed area of relocation. He or she must go on to consider whether it would be reasonable to expect the applicant to stay in that place, having regard to his / her personal circumstances and the general conditions prevailing on the ground, in accordance with Regulation 7(2) of the Protection Regulations. The reasonableness assessment is not concerned with assertions such as 'I won't know any one' , but rather with matters of substance such as whether the applicant is old, infirm, ill, has many small children or is without family support and other real issues.
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> (9) The UNHCR Guidelines on International Protection: Internal Flight or Relocation Alternative (2003) indicate that consideration should be accorded to whether the applicant could lead a relatively normal life in the selected place of relocation without undue hardship, in the context of the country concerned . Unless there is objective evidence that the general circumstances prevailing in the proposed area are harsh – for example if the proposed area is the site of a conflict or a humanitarian crisis – there is in general no obligation to seek out a specific town or detailed information on economic and social conditions in the proposed location. However, if a specific objection is taken by the applicant to the location this objection must be examined.
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> (10) Burden of Proof: There is a shared burden of proof. The protection decision-maker who accepts a well-founded fear of persecution but determines that refugee status is not appropriate because internal relocation is available must conduct a careful enquiry to identify a safe relocation area, having regard to up-to-date objective evidence about that area and also to the applicant's own evidence in that regard.
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> (11) Fair procedures: As a matter of fair procedures the proposed safe area should be notified to and discussed with the applicant to establish whether he/she could reasonably be expected to stay there. The applicant is obliged to cooperate, to answer truthfully, to provide all relevant information available to him / her to determine the reasonableness of the relocation area and to provide information on any personal factors which would make it unreasonable or unduly harsh for him / her to relocate rather than being recognised as a refugee;
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> (12) No state is obliged to consider the internal relocation alternative even when the Convention-related persecution feared is confined to a particular part of the applicant's state. States can recognise an asylum seeker as a refugee solely on the basis the criteria under Section 2 of the Refugee Act 1996, without ever turning to the relocation alternative.
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> (13) The threshold to be reached before internal relocation is considered is high. The applicant would be recognised as a refugee but for the fact that he can safely relocate. The inquiry is commensurately careful."

12. The applicant submitted that the tribunal member did not have appropriate regard to certain country of origin information, having preferential regard to country of origin information that did not corroborate the applicant's claim over information that did support the applicant's claim. The applicant relies upon the decision of Edwards J. in *D.V.T.S. v. Minister for Justice, Equality and Law Reform & Refugee Appeals Tribunal* [2007] IEHC 305 wherein it was held that the tribunal member must conduct a rational analysis of conflicting country of origin information and justify any preferment of one piece of information over another. The applicant maintained that the internal relocation finding is not logical based upon the country of origin information (p.69 of booklet of pleadings).

13. The applicant submitted that the tribunal member must take into account personal background of the applicant and it did not appropriately apply the forward-looking test. In this regard, the applicant contended that the provisions of European Communities (Eligibility for Protection) Regulations 2006 (S.I. no. 518 of 2006), namely 5(1) (a) (b) (c) and (e) and 5(2), as recited in full above, have not been complied with by the decision-maker.

14. The applicant argued that that the finding in relation to state protection does not have proper regard to the actual situation occurring in Nigeria. The tribunal decision states that Nigeria is designated as a tier one country by the United States state department meaning that it is actively seeking to combat trafficking. The tribunal member relied upon the test in the *Canada (AG) v Ward* [1993] 2 S.C.R. 689, case. The true test, the applicant submitted, is the effective protection test: do the state authorities implement the policies to provide an applicant with actual state protection?

15. Counsel opened a section from the seminal text in the area refugee law, Hathaway, J., *The law of refugee status* 2nd Ed., (Michigan, 2014) relying on the text in relation to the measure of state protection. At pp.303-323, Hathaway explains why due diligence is not the appropriate standard but rather, it should be a standard of the reality, namely, whether the state is in fact capable of providing effective protection rather than whether has simply taken steps to provide some form of protection.

RESPONDENTS' SUBMISSIONS

16. Counsel appearing on behalf of the respondents, Ms. Ann Harnett O'Connor B.L., stated at the outset of her submissions that the applicant's story regarding her having been kidnapped and trafficked to Ireland for sexual exploitation was believed. The respondents submitted that it is clear that the applicant was subjected to serious harm and that she is a member of a social group, as was set out in the tribunal decision. The respondents contended that the tribunal member is responsible for determining serious harm plus a failure of state protection. The applicant was randomly selected from the street and to state that there is a failure on the part of the Nigerian authorities in this regard, the respondents submitted, is a fallacy.

17. The respondents contended that any state could have failed in regard to protecting a citizen when something like this occurs. Therefore, the respondents argued, the forward-looking test has been satisfied because of the nature of persecution; it was a once-off random occurrence and the chances are minimal that something of this nature might occur again, particularly if the applicant were to internally relocate.

18. The respondents submitted that it is incumbent upon the tribunal member to consider only relevant country of origin information. When country of origin information submitted to a tribunal is not relevant to applicant's claim, the tribunal member is not obliged to consider that information in the decision, according to the respondents.

19. Counsel, at hearing, opened the country of origin information that, the respondents submitted, shows that the Nigerian government are providing effectual protection for persons that might be the victim of trafficking. The respondents submitted that there are quite high levels of conviction of those charged with trafficking.

20. Counsel for the respondents submitted that the tribunal member has performed her task in accordance with law, relying on the *M.A.R.A.* judgment *(supra)*, by weighing up the evidence available before the tribunal, and particularly the country of origin information, and deciding on its probative value, which is open to the tribunal and not this Court. The respondents opened the *D.V.T.S.* case, relied upon by the applicant, and stated that the tribunal member had discharged her duty to weigh up conflicting country of origin information and make an informed decision.

DECISION

21. It is notable at the outset to state that in this case, the events leading to the applicant claiming asylum in Ireland are not in dispute. This is a significant feature of this case. It is also accepted by the tribunal member that the applicant falls into the category of 'a particular social group' in accordance with the requirements of the Refugee Act 1996 (as amended). The tribunal decision is based upon two factors: the availability of state protection and the feasibility of internal relocation.

22. First, turning to the issue of state protection. The tribunal member at p.19 of her decision, relies on the case of *Canada (AG) v. Ward* [2013] 2 SCR 689; (1993) DLR (4th) 1, for her assertion that a state must be presumed to be capable of protecting its citizens. The distinguishing feature in this case is that the feared persecution claimed by the applicant has occurred in the past and her fear is that this may happen again. Further, the applicant in this case can hardly be criticised for a failure to seek state protection, and as such, the issue of seeking state protection before leaving Nigeria could not form the basis of this case. The applicant was kidnapped from the street and trafficked to Ireland without an opportunity to seek such protection and this is not disputed.

23. The issue of concern is whether the tribunal member adequately assessed the framework in place to protect the applicant from such an occurrence if she were to be returned to Nigeria. The respondents, at hearing, opened numerous country of origin reports, which were stated to support the argument that the Nigerian government is attempting to provide state protection. However, it is not for this Court to decide whether state protection is available in Nigeria but rather whether the tribunal member dealt with the evidence in a lawful manner. Conflicting country of origin information was presented by the applicant at appeal stage. The tribunal member is required to give reasons for preferment of certain country of origin information over other such information. I am supported in this by, *inter alia*, Edwards J. in *D.V.T.S. v. Minister for Justice, Equality and Law Reform & anor.* [2007] IEHC 305, where at para.44, the learned judge sets out as follows:

> "[T]he country of origin information before him contained conflicting information. He gives no indication as to how, or on what basis, he resolved the conflicts in the information before him. Moreover, he gives no indication as to the basis on which he elected to prefer the apparently anecdotal accounts of certain interviewees quoted in the US State Department Report on Cameroon, 2004 and the UK Fact Finding Mission report on Cameroon 2004. While this court accepts that it was entirely up to the Refugee Appeals Tribunal to determine the weight (if any) to be attached to any particular piece of country of origin information it was not up to the Tribunal to arbitrarily prefer one piece of country of origin information over another. In the case of conflicting information it was incumbent on the Tribunal to engage in a rational analysis of the conflict and to justify its preferment of one view over another on the basis of that analysis. The difficulty in the present case is that the second named respondent firstly, does not allude to the fact that the information is conflicting

and secondly, does not give any indication as to why he was inclined to prefer the information contained in the US State Department Report on Cameroon, 2004 and the UK Fact Finding Mission Report 2004 to that contained in the reports submitted by or on behalf of the applicant."

24. Country of origin information presented by the applicant presents a different picture than the information used by the tribunal member. It is open to the tribunal member to decide upon the probative value given to pieces of evidence before her. However, reasons must be given for the preferment. I am satisfied that appropriate reasons were not given in this instance.

25. Turning now to the second finding on internal relocation. The ORAC decision found that the applicant could not safely internally relocate within Nigeria. This was effectively overturned by the RAT on appeal. Counsel for the applicant contended because this was in the applicant's favour in the first instance, internal relocation was not appropriately addressed in the notice of appeal. The issue of internal relocation was addressed in the notice of appeal submitted by the applicant, where at p.158 of the booklet the applicant relied upon the ORAC submission that she would not be able to safely internally relocate in Nigeria. The tribunal member is obliged to consider the s.13 report as *per* s.16(16)(b) of the Refugee Act 1996 (as amended). I therefore accept the applicant's submission that the tribunal member did not give appropriate reasons for overturning the s.13 finding.

26. For the reasons outlined above I grant leave and grant an order of *certiorari* in respect of the decision of the Refugee Appeals Tribunal. I will further make an order remitting the matter for determination by a different tribunal member.