Judgment Title: E. -v- Refugee Appeals Tribunal & Ors

Neutral Citation: [2011] IEHC 149

High Court Record Number: 2008 1036 JR

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Judgment by: Smyth J.

Status of Judgment: Approved

Neutral Citation Number: [2011] IEHC 149

THE HIGH COURT

JUDICIAL REVIEW

2008 1036 JR

IN THE MATTER OF THE REFUGEE ACT, 1996 (AS AMENDED)

IN THE MATTER OF THE IMMIGRATION ACT, 1999

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000

AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003 (1)

BETWEEN

O. E.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

ATTORNEY GENERAL

IRELAND

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT OF MR JUSTICE E. SMYTH, delivered on the 30th day of March 2011

1. This is an application for leave to seek judicial review of the decision of the Refugee Appeals Tribunal (RAT), notified to the applicant on 15 August 2008, to affirm the recommendation of the Refugee Applications' Commissioner (RAC) that the applicant should not be declared a refugee. The hearing took place on 15 February 2011. Mr Mel Christle S.C., with Mr Garry O'Halloran B.L., appeared for the applicant and Ms Sinéad McGrath B.L. appeared for the respondents.

Factual Background

2. The applicant, a national of Nigeria, claims to be of homosexual orientation. He claims that he suffered a physical assault by members of his community in Nigeria when his sexual orientation was discovered. The applicant claimed that following this incident, he was sent to a spiritualist to be 'cured'. He sought asylum in the State on 16 April 2008 on the basis of a fear of persecution in Nigeria from the community, society and government on account of his sexual orientation. Following a negative recommendation from the RAC, the applicant filed an appeal with the RAT. The Tribunal rejected the applicant's claim and made a number of adverse credibility findings.

Summary of submissions

3. Counsel on behalf of the applicant submitted that in reaching the impugned decision, the Tribunal Member applied the wrong legal test. It is claimed the RAT held that the applicant could avail of internal relocation in Nigeria if he concealed his gender identity. The applicant submitted that the correct test is whether the applicant would be exposed to persecution if he did not keep his gender identity hidden. In support of this argument, the applicant cited the decision of Cooke J. in M.A. v MJELR, (Unreported, High Court, Cooke J., 17 December 2009), where the learned judge granted leave to argue that the Minister erred in law in failing to consider whether the requirement to conceal the applicant's sexual orientation constituted a form of persecution. In the substantive hearing of the same case, Ryan J. held "the principal question for the Minister to consider … was whether it was reasonable or legitimate in light of the Convention to conclude that the applicant could avoid trouble from the authorities by living discreetly." (M.A. v MJELR, Unreported, High Court, Ryan J., 12 November 2010). The applicant further relied on the decision of the UK case of HJ (Iran) & HT (Cameroon) v SSHED [2010] UKSC 31 as supporting the proposition that the Tribunal could not require the applicant to return and live discreetly in his country of origin to avoid persecution.

4. The applicant addressed three adverse credibility findings of the Tribunal Member. It was submitted that a discrepancy in his evidence, in respect of time spent receiving 'treatment' for his homosexuality from a spiritualist, was the sole finding against his evidence and was not of sufficient cogency to lead to a dismissal of the entirety of the applicant's claim. The applicant argued that he was entitled to a presumption that the remainder of his evidence was accepted as accurate (see Muia v RAT & Others, (Unreported, High Court, Clarke J. 11 November 2005), and Da Silveira v RAT [2004] IEHC 436). The applicant referred to two findings of the RAT in respect of the applicant's travel to Ireland. It was claimed that the RAT's finding in relation to the applicant's ignorance of the name on the passport he used to enter the State was a peripheral finding and not central to the claim as a whole. Further the RAT relied on the applicant's failure to seek asylum in the Netherlands, the first safe country the

applicant had arrived in, without providing a reason for discounting the applicant's explanation for this failure: his inability to speak the language of that country.

5. Finally, the applicant sought an extension of time of nine days in order to bring proceedings. To facilitate this application, the Court allowed time for counsel on behalf of the applicant to obtain an affidavit from the relevant solicitors explaining the cause of the delay.

6. The respondent submitted that the Tribunal Member's decision was based primarily on the rejection of the applicant's credibility. In addition to the issues referred to in the applicant's submissions, the respondent claimed that the RAT had two further credibility difficulties: the fact that the applicant had no difficulty with regard to his sexual orientation from the age of 17 until he was discovered in 2007; and the ability of the applicant to move freely to his partner's house despite the stigma attached. The respondent submitted that these two issues, taken in conjunction with the discrepancy in evidence regarding time spent with a spiritualist, were material findings, central to the Tribunal Member's rejection of this account. The respondent argued that the Court must not substitute its own views for that of the Tribunal in that respect (I.R. v RAT [2009] IEHC 353).

7. The respondent denied that the decision in M.A. v MJELR was of any relevance. It was argued that in M.A., the decision-maker referred to country of origin information on Nigeria which leads to the conclusion that "if Nigerian homosexuals are discreet, they are unlikely to run foul of the law." At a later stage in proceedings, the applicant in that case submitted the UNHCR Guidance Note on refugee claims relating to sexual orientation and gender identity, 21 November 2008, and particular issue was taken with the said conclusion. The applicant made specific submissions in relation to the conclusion requiring discretion. In the substantive decision, Ryan J. held that the Minister had failed to consider those submissions, which he considered constituted a "fatal omission." In the instant case, the respondent disputed the applicant's submissions and argued that the Tribunal Member did not, in fact, make a finding that the applicant could return to Nigeria and live discreetly. It was submitted that the issue of concealing his sexual orientation was not an issue that arose in the oral hearing before the RAT, and the Tribunal Member did not seek to rely on the possibility of living discreetly as a reason for affirming the RAC recommendation.

8. The respondent accepted that the Tribunal Member had concluded that internal relocation was an option in this case. However, this was on the basis that the applicant was not subjectively credible, that the objection he gave at oral hearing to relocation was that he didn't have anybody to stay with in another part of Nigeria, that country of origin information gave some guidance in relation to the possibility of gay men living in larger cities and that the government does not actively pursue homosexual men. In respect of the latter point, the respondent relied on the judgment of Irvine J. in Abus v RAT [2009] IEHC 281, where it was noted that although homosexual activity was criminalised in Nigeria, there was no evidence that prosecutions were taken in such cases.

The Court's Assessment

9. The premise on which the applicant's legal submissions was based in this case and the main complaint against the respondent's decision, is that the Tribunal made a finding that the applicant could relocate in Nigeria if he kept his gender identity hidden. In contending that this is the finding that the Tribunal made, the applicant described this finding, in his written submissions, as "pivotal", and, it is this finding that forms the basis upon which the applicant relies on the decision in M.A as a main plank of his submission in this case.

10. The respondent, on the other hand is quite adamant that no such finding was made by the Tribunal.

11. However, that is not the only point in this case; the credibility of the applicant was an issue as well. In that regard, it may be helpful to reiterate that the function of the Tribunal is to consider and decide appeals from a negative recommendation of the Commissioner. In O.A. v. The Refugee Appeals Tribunal and Another [2009] I.E.H.C. 296 Cooke J. held that the purpose and function of the appeal is:-

“To afford an applicant an opportunity to persuade a second administrative officer, the Tribunal member, to reach a different conclusion as to credibility based upon a full reappraisal of the totality of the collected information and a fresh assessment of the applicant’s own personal testimony. That is not the function of the court on judicial review”

12. The sequence of events leading up to the consideration of the matter by the Tribunal member followed the usual course of an application for asylum.

13. The applicant completed the initial questionnaire on 20th April, 2008, and subsequently, a detailed interview with the applicant was held on 29th April, 2008. In the course of the initial interview, the applicant revealed inter alia, the following information: -

1. That he was born on 13/12/1982 in Benin City, Nigeria, and that he had lived in his home address since birth;

2. The applicant stated that he is gay, that the society/community, family relatives, and the government in general did not wish him to live, and that his father had disowned him because homosexuality is a taboo and a crime against the criminal code of Nigeria;

3. The applicant stated that his brother was also gay and that he used to have a girlfriend who cheated on him and that his brother turned gay; was beaten in public and made an outcast, as a result of which his brother had no choice but to commit suicide;

4. He claimed that his fear of persecution was on account of his sexuality and that he did not report his fears to the authorities because the law enforcement agencies would arrest and kill him;

5. He stated that his parents took him to a remote village in Ogun State, (Nigeria) to stay with a spiritualist between November 2007 and January 2008;

6. He stated that if he returned to his country of origin he would be killed by the government/community/parental and maternal family because homosexuality is a crime and taboo, and that when he asked his mother to send him on his documents his mother informed him, “that the community wishes to see my dead body”;

7. The applicant claimed that he never intended to leave Nigeria. He stated that he was still in school (in university). He furnished certificates that he obtained a merit in a diploma in social works which he obtained from the University of Benin;

8. The applicant claimed that he was brought to Ireland by an agent, but travelling from Ghana to Holland, where he stayed at the airport before leaving for Ireland on 16th April, 2008.

14. In the s. 13 report the authorised officer outlined the facts as set out by the applicant in his application and interview, noting the applicant’s claim that he was beaten after it was discovered that he was gay and his claim to fear his community, society and the government in Nigeria.

15. Under the heading “well founded fear”, the officer summarised the applicant’s claim as follows:-

“The applicant claims that he realised he was gay when he was seventeen or eighteen. He claims that people suspected that he was gay because he did not have any girlfriends and because it was discovered that his brother, who he claims had since committed suicide, was gay, in 2005. He stated

that people broke into his partner's house, beat him and his partner up and took them onto the street. He claims he went to his parent's house and his mother organised for him to go to a spiritualist in Ogun State in order to try to cure him of his homosexuality. He claims that he then went to Ghana to stay with his mother's friend. He claims that his mother's friend, would insult him and he fought with her son. He stated he then decided to go to Europe."

16. The officer then dealt with the credibility of the applicant's account. He stated that the applicant based his case on a fear of his community, society and the government in Nigeria and he referred to issues with the applicant's account which would "undermine the credibility of the claim". These can be summarised as follows:-

> (i) The applicant stated that he travelled to Holland enroute to Ireland. He claims that he was told by the agent to claim asylum there but found "I was not comfortable with the language". The officer did not consider this to be a valid reason for failing to claim asylum in the first safe country the applicant arrived in since departing his country of origin.
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> (ii) The applicant did not know the name listed in the passport he claims to have used to travel to Ireland. The officer said that it was difficult to accept that the applicant would not know such a detail which could prove important if questioned by immigration officials.
>
> (iii) The officer referred to paragraph 204 of the UNCHR Handbook on Procedure and Criteria for Determining Refugee Status which states: "[t]he benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to general known facts". The officer went on to state, "it has been established there are discrepancies in the applicant's account which would undermine the credibility of the claim".

17. The officer then considered the availability of internal relocation and referred to Regulation 7 of the European Communities (Eligibility for Protection) Regulations 2006, which provide inter alia, that a protection decision-maker may determine that a protection applicant is not in need of protection if the applicant can reasonably be expected to stay in a part of his or her country of origin where there is no well founded fear of being persecuted or a real risk of suffering serious harm, and that in examining whether a part of the country of origin accords with these provisions, the protection and decision-maker shall have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.

18. The officer also drew attention to the need to have regard both to safety, in the sense of an absence of persecution, and to reasonableness, in the sense of whether conditions are unduly harsh. He noted the decision in Thirunavukkarasu case, 109 DLR (4th) 682, 687, where Linden JA giving the judgment of the Federal Court of Canada said "Stated another way for clarity … would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?" The same judge went on to observe in that case, that while claimants should not be compelled to cross battle lines or hide out in an isolated region of their country, like a cave in the mountains, a desert or jungle, it will not be enough for them to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there.

19. On the issue of state protection, the officer concluded that the applicant had not demonstrated that he was targeted by the authorities because of his sexual orientation. The officer noted that given the legal position of homosexuals in Nigeria, that it was reasonable to accept that a homosexual man would not approach the Nigerian police for assistance. The officer noted from the country of origin information which he cited, that in areas in the south of the country, and in particular larger cities such as Lagos, that the government does not actively pursue homosexuals, and that taking this, along with the availability of internal relocation, into account, the officer deemed that the applicant could live in

one of the larger cities in Nigeria such as Lagos.

20. In his conclusion, the officer reiterated that the applicant's claim lacked credibility and that the applicant had the ability to relocate with safety within his country of origin. Under the heading "Forward Looking Fear", the officer noted that while homosexuality is illegal in Nigeria, country of origin information to which the officer referred, states that there is stigmatisation and discrimination directed towards homosexuals but the laws against homosexuals are rarely applied in practice. The officer opined, that while it is accepted that state protection may not be available to homosexuals in Nigeria, internal relocation to avoid any possible threat would be an option, because COI (country of origin information) indicated that the applicant would be able to live in one of the larger cities such as Lagos or Abuja. The officer therefore deemed that the applicant does not have a well founded forward looking fear of persecution in Nigeria. The officer's conclusion was that the applicant had not established a well founded fear of persecution as required by s. 2 of the Refugee Act 1996 (as amended). The officer reported her findings pursuant to Section 13(1) of the Refugee Act 1996 (as amended).

The Decision of the RAT

21. In the contested decision, the Tribunal member outlined how the appeal came before the RAT. He stated that the applicant's claim was based on the documentation on file together with the country of origin information, additional information submitted at the hearing, all of the evidence and counsel submissions.

22. Having outlined the factual basis of the appeal, the Tribunal member set out the statutory and legal principles to which he had regard in his consideration of the matter. He then proceeded to an analysis of the applicant's claim which is set out in para. 6 of the decision. In the course of this analysis, the Tribunal member referred to the applicant's asylum questionnaire, and the replies given in response to questions in the course of the detailed interview and oral evidence.

23. The Tribunal member stated as follows in relation to this evidence:-

"The applicant claims that he realised he was gay when he was seventeen or eighteen years old. He claims that people suspected he was gay because he didn't have any girlfriends and because it was discovered that his brother, who he claims had committed suicide in February 2005, was gay there was a stigma attached to him after the brother's suicide. He stated that in November 2007 several people broke into his partner's house, beat him and his partner, and took them onto the street. He did not go to the hospital after the attack because he had no injury just a 'lash'.

His partner's house was ten minutes walk from his parent's home. It was put to the applicant that since people suspected he was gay since his brother committed suicide in February 2005, why did it take the community over two and a half years to break into his partner's place. The applicant said 'we were hiding it'.

The applicant said they did not move to a place where no one knew them because his partner had the money and 'we thought we were safe'. The applicant had no difficulty from the age of seventeen years until he was caught in 2007. Although a stigma was attached to him since February 2005 he was able to move freely to his partner's house. The beating the applicant claims to have received did not require medical treatment.

The applicant claims that he then went to his parent's house and then he was taken to a spiritualist in Ogun State in order to try to cure him of his homosexuality. He claims that he ran away from the spiritualist after a couple of days. His father disowned him after he left the spiritualist. In the questionnaire (see Q. 26A) and in the section 11 interview, page 6, he states that he stayed with the spiritualist from November 2007 to January 2008. He states the spiritualist told him he was free to go. When it was pointed out to the applicant that at the s. 11 interview, p. 6 he stated that he stayed with the spiritualist from November 2007 to January 2008 and that the spiritualist told him he was free to go, the applicant did not respond.

The applicant claims that in January 2008 he went to Ghana to stay with his mother's friend. He claims that his mother's friend would insult him and he fought with her son. He stated that he then decided to go to Europe.

His mother's friend obtained an agent. On 9th April, 2008, the applicant claims he went with this agent to Lagos to pick up the money from his mother. His mother paid the agent 800,000 naira. He does not know where his mother obtained the money from, she told him she sold her land. He returned to Ghana on 10th April, 2008. The applicant claims that he left Ghana with the agent on a plane. He travelled with a red passport. He did not see inside the passport. He claims he did not know the name listed on the passport. It is difficult to accept that the applicant would not know such a detail which could prove important if questioned by immigration officials.

The applicant claims that when they arrived in Holland he was told by the agent to claim asylum in Holland. He claims he did not apply for asylum because he was not comfortable with the language. This is not considered to be a valid reason for failing to claim asylum in the first safe country the applicant arrived in since departing his country of origin.

Professor Hathaway states in the Law of Refuge Status that:-

'Those who truly to fear to return to their state ought reasonably to claim protection in intermediate countries of potential refuge.'

24. In the course of his submissions, counsel for the applicant drew attention to a further remark from Professor Hathaway's work, The Law of Refugee Status, to the effect that the applicant was entitled to have his claim to refugee status determined in the country of his choice. However, it seem to me, that it is not the case that the Tribunal member went so far as to suggest that the applicant was not entitled to have his claim for refugee status determined in the country of his choice, but rather that, the reason he gave for not claiming asylum in the Netherlands undermined his credibility.

25. In fact, Professor Hathaway addresses this issue, and notes that the dicta from a Canadian case to the effect that:

"There is nothing in the Convention that obliges a person fleeing his country owing to fear of being persecuted to seek refuge in the closest neighbouring country or in the first country he reaches. The Convention refers, simply, to a person who is outside the country of his nationality …" See the decision of the Canadian Immigration Appeal Board 76-1127 in the matter of Juan Alegandro Araya Heredio per J.P. Houle January 6 1977, at 6.

26. Nevertheless, Professor Hathaway went on to note that persons who have spent substantial time in or more countries, who have enjoyed short term status in an intermediate state, and even those who have merely transited through another country have frequently been viewed with mistrust because of their failure to claim refugee status before arriving in Canada. He notes the case of Ghanaian Anthony Appiah Asamoah, Immigration Appeal Board decision T87-9902, January 19, 1988 which, stated inter alia:

"…[T]he applicant's failure to seek asylum in any other country than Canada, although he passed through several intervening countries … is not consistent with an intention to flee from one's pursuers and therefore the concurrent imperative to seek haven wherever one can. Surely it is reasonable to expect one to seek help at the first convenient venue."

Professor Hathaway goes on to state:

"By characterizing the issue as one of credibility, it is possible simultaneously to refuse the claims of persons arriving indirectly while maintaining a formal commitment to the impropriety of a direct flight rule."

He notes the remarks in another Immigration Appeal Board decision in Canada, T81/9476,

September 18th 1981 at 4 per J.P. Houle which was affirmed by a later federal court of appeal decision, that:-

"…[I]f the applicant had experienced a well-founded fear, he had at least two opportunities of expressing and establishing it … It is hard to believe that a person in the grip of an uncontrollable fear … does not make any effort to eradicate this fear when the opportunity arises. I use the expression "hard to believe" because I know that there is nothing in the Act that makes it compulsory for a person to apply for refugee status at the first port he reaches."

27. I am satisfied, in the circumstances of this case, that when assessing the applicant's credibility (which is fundamentally a matter for the Tribunal member) he was entitled to have regard to the reason given by the applicant for failing to claim asylum in the first safe country the applicant in since departing his country of origin.

28. The Tribunal member then quoted the same section from the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status as the RAC officer in relation to granting the benefit of the doubt to applicants.

29. The Tribunal member was satisfied, that in this case, it had been established that there were discrepancies in the applicant's account which affected the credibility of the claim, and the Tribunal member concluded that on balance the applicant's testimony fell short of what would be required in terms of credibility for him to be given the benefit of the doubt with regard to the material elements of his claim.

30. It is clear in this case that the credibility of the applicant goes to the core of the case. The applicant submitted that the Tribunal member erred in assessing the applicant's credibility.

31. It is important to bear in mind when evaluating this aspect of the submission that the court is engaged in a review rather than an exercise of appellate jurisdiction, therefore the court should be reluctant to intervene unless the applicant has identified a legal flaw in the process. The court must guard against substituting its own views on credibility for those of the decision maker. In Imafu v. Minister for Justice, Equality and Law Reform [2005] I.E.H.C. 416, Peart J. stated:-

"This Court must not fall into the trap of substituting its own view on credibility for that of the Tribunal member … a Court will be reluctant to interfere in a credibility finding by an inferior tribunal, other than for the reason that the process by which the assessment of credibility had been made is legally flawed."

32. Peart J. emphasised this point in T. v. Refugee Appeals Tribunal [2007] I.E.H.C. 287 where he pointed out that the decision maker has had the undoubted benefit of seeing and hearing at first hand the applicant giving evidence. He went on to say:-

"This Court cannot substitute another view simply by a reading of words on the page and by way of the summary contained in the documents, unless an error is a clear and manifest error, without which a different decision might well have been reached" [emphasis added].

33. In these cases, the applicant has to show well founded fear of being persecuted. This fear has both a subjective and an objective element, and therefore, a determination of a refugee status will require an evaluation of an applicant's statements.

34. In Kramarenko v. Refugee Appeals Tribunal [2004] 2 I.L.R.M. 450, Finlay Geoghegan J., dealing with the issue of credibility, stated as follows:-

"The credibility of an applicant is often crucial to the determination as to whether or not an applicant is entitled to a declaration of refugee status. Credibility potentially comes into play in two aspects of the assessment of the claim. It is well established that the determination as to whether a person is a refugee within the meaning of s. 2 of the Act of 1996 and the similar definition in the 1951 Geneva

Convention, relating to the status of refugee contains both a subjective and an objective element. The subjective element requires the applicant to establish that he or she has a fear of persecution for a Convention reason if returned to his/her own country. An assessment as to whether the applicant has such a fear will normally involve an assessment of credibility."

35. Counsel for the applicant submitted that the inconsistent evidence about the duration of the applicant's stay with the spiritualist was not such as to lead to a dismissal of the claim and that the applicant was entitled to the presumption that the remaining evidence of his history was accurate. Whereas counsel for the respondents submitted that the credibility findings made by the Tribunal member were more extensive than that, instancing factors which the Tribunal member identified as going to the credibility of the applicant's testimony. These credibility difficulties were identified by counsel as follows:-

> (i) The applicant had no difficulty from the age of seventeen until he was caught in 2007;
>
> (ii) Although there was a stigma attached to the applicant he was able to move freely to his parent's house;
>
> (iii) The applicant's evidence in relation to being taken to a spiritualist by his parents was contradictory as he had stated at the oral hearing that he ran away after a couple of days and he stated in his Questionnaire/section 11 interview that he stayed with the spiritualist from November 2007 to January 2008 when he was told he was free to go;
>
> (iv) It was difficult to accept that he would not know the details of his travel/passport;
>
> (v) His reason for not applying for asylum in the Netherlands (that he did not know the language) was not considered a valid reason for failing to claim asylum in the first safe country.

These were indeed matters to which the Tribunal member drew attention in the course of his analysis.

36. The respondents' counsel submitted that the reasons at (i) – (iii) above applied to the core story and drew attention to the finding of the Tribunal member that the applicant failed to resolve this "contradiction" despite being given an opportunity to do so. Counsel for the respondent also submitted that the matters at (iv) and (v) above were matters which the Tribunal member was entitled to have regard to under s. 11B, of the Refugee Act 1996.

37. In the course of his decision in I.R. v. Refugee Appeals Tribunal [2009] I.E.H.C. 353, Cooke J. identified a number of principles from case law as a guide to the manner in which evidence going to credibility ought to be treated and the review of conclusions on credibility to be carried out. I would like to mention two of those principles here, namely:-

> "(i) When subjected to judicial review, a decision on credibility must be read as a whole and the Court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in disregard of the cumulative impression made upon the decision-maker especially where the conclusion takes particular account of the demeanour and reaction of an applicant when testifying in person.
>
> (ii) …there is no general obligation in all cases to refer in a decision on credibility to every item of evidence and to every argument advanced, provided the reasons stated enable the applicant as addressee, and the Court in exercise of its judicial review function, to understand the substantive basis for the conclusion on credibility and the process of analysis or

evaluation by which it has been reached."

37. In the course of argument, counsel for the applicant cited a decision of Clarke J. in Muia v. RAT & Ors. (Unreported, High Court, Clarke J., 11th November 2005) where it was stated:-

"There are arguable grounds for suggesting that the applicant is entitled, in the circumstances of this case, to have any aspect of his account which was not the subject of a clear finding of lack of credibility treated as credible for the purposes of review" (emphasis added).

38. That case can be distinguished on its facts. In the course of the judgment Clarke J. stated:-

"It is of course the case that it is inappropriate to demand that a decision of a tribunal such as the RAT should be in any particular form. It is therefore necessary, in any review, to look at the decision as a whole. Even on that basis it is difficult to determine the extent to which any concerns which the decision maker may have had as to the applicant's credibility actually influence the final decision."

39. In the instant case, it seems to me that it can be reasonably said that, read as a whole, the Tribunal member has identified in his analysis, the matters which gave rise to his concerns about credibility and which influenced his final decision and they are not confined solely to the discrepancy in the applicant's testimony about his time with the spiritualist.

40. The Tribunal member went on to address the country of origin information unfavourable to the applicant and other country of origin information. The Tribunal member accepted that homosexual conduct was criminalised under Nigerian state law and his cited a UK Home Office Operational Guidance Note on Nigeria, dated 26th November, 2007 on homosexual men which states, inter alia as follows:-

"General attitudes regarding homosexuality in the population are reportedly very rigid, and there is a considerable pressure to get married. Though Nigerian society has not yet come to terms with homosexuality and gay men cannot publicly express their sexuality because they would suffer societal isolation and discrimination, gay men living in the larger cities of Nigeria may not have reason to fear persecution, as long as they do not present themselves as gay men in public. Gay men that are wealthier or more influential than the ordinary person may be able to bribe the police should they be accused or suspected of homosexual acts."

The Tribunal member then cited articles of the Nigerian Penal Code which criminalise homosexual acts or practices and noted the significant penalties of imprisonment incorporated in the Code.

41. The Tribunal member noted that in the country of origin information there is some evidence to indicate that the laws on homosexuality are, in some instances, enforced and that the laws contribute to the climate of intolerance towards gay men and young men, and that gay men tend to hide the fact if they fear being ostracised or being thrown out of the family home if their homosexuality becomes known. The Tribunal member also referred to a proposal of the Nigerian government in January 2006 to introduce the law to ban homosexual relations and same sex marriage, but that this law was defeated in 2007.

42. The Tribunal member then went on to deal with the availability of internal relocation and cited the U.K. Home Office Country of Origin Information Report which stated that "internal relocation to escape any ill-treatment from non-state agents may almost always be an option. The Report notes:-

'Some individuals may encounter a normal level of lack of acceptance by others in the new environment as well as lack of accommodation, land etc. The situation would be considerably easier if the individual has family or other ties in the new location.'

43. The Tribunal member referred to an Immigration and Refugee Board of Canada response which quoted a representative of Alliance Rights Nigeria as saying that … "in Lagos, for example, gays and lesbians can live freely as long as they do not impinge upon the rights of others" and a British/Danish

Fact-Finding report which states that “homosexuals living in the larger cities of Nigeria may not have reason to fear persecution as long as they do not present themselves as homosexuals in public”. The Tribunal member also referred to a U.K. Home Office Country of Origin Information Report which states that: “The President of Alliance Rights, a gay rights group, stated that the laws on homosexuality are rarely applied in practice but contribute to the climate of intolerance towards homosexuals”, and that it was the opinion of a representative from BAOBAB, a women’s rights’ organisation in Nigeria, that “gays and lesbians in Nigeria were mainly suffering because of discrimination and stigmatisation, not because of legal persecution”. There was also reference to a Refugee Board of Canada response which states that “a representative of Alliance Rights Nigeria, a non governmental organisation promoting the interests of lesbian, gay, bisexual and transgendered persons in Nigeria, said that the Nigerian “penal code is more strict on paper than it is practically”, and there was reference to a British/Danish fact finding report which states that “homosexuality is illegal according to Nigerian common law in the south, a few cases have been tried in the courts and there is usually very little attention in the Press”. The Tribunal member also noted that this report states that the editor-in-chief of the Daily Trust newspaper “considered that any homosexual in Nigeria has a well founded fear of being ill treated not by the authorities but from the person’s local community and society at large”.

44. The Tribunal member’s finding in relation to the availability of relocation to another part of Nigeria is set out in two paragraphs of the decision which state as follows:-

“The applicant stated that he could not move to another part of Nigeria as ‘I don’t have anybody to stay with’ (see section 11 Interview, p. 14). COI indicates that it is possible for homosexuals to live in large urban areas in Nigeria such as Lagos and Abuja. The applicant attended the University of Benin and obtained a diploma in social work (questionnaire, Q. 12). It would not be unduly harsh for the applicant to relocate to another part of Nigeria such as Lagos in order to avoid the threat posed by his community in Benin City.

“The applicant has not demonstrated that he was targeted by the authorities because of his sexual orientation. Given the legal position of homosexuals in Nigeria, it is reasonable to accept that a homosexual man would not approach the Nigerian police for assistance. It appears from the information referred to above that in areas in the south of the country, and in particular larger cities such as Lagos that the government does not actively pursue homosexuals. Taking this, along with the availability of internal relocation into account, it is deemed that the applicant could live in one of the large cities in Nigeria such as Lagos.”

The finding of the Tribunal member

45. The applicant, as indicated earlier, is relying heavily, on what he contends was a “pivotal” finding of the Tribunal member that “the applicant could relocate elsewhere in Nigeria if he kept his gender identity hidden”.

46. There is no mention of such a finding in the applicant’s statement of grounds; nor is there reference to such a finding in the applicant’s affidavit, and I have not been able to locate a finding in such terms by the Tribunal member in the body of the decision itself.

47. It is in the light of this claimed for, “pivotal” finding that the applicant places reliance on the M.A. case. However, in my view, such reliance is misplaced. The order granting leave by Cooke J. in M.A. was on the following ground:

“In deciding that protection would be available to the applicant in Nigeria against mistreatment on account of his sexual orientation provided he was discreet, did not impinge on the rights of others and, if necessary, relocated internally to escape ill treatment from non-state actors, the Minister erred in law by failing to consider whether such requirements to conceal his sexual orientation resulting from the criminalisation of homosexual relations and resulting in discriminatory treatment, constituted, according to current standards of human rights, a form of persecution for the purposes of international protection”.

48. The sequence of events in that case (which is important) is set out in the analysis of Ryan J. in the decision in the substantive case and can be summarised as follows. The examiner carrying out the subsidiary protection examination referred to country of origin information relating to Nigeria and concluded that "the above extract from the report indicates that if Nigerian homosexuals are discreet, they are unlikely to run foul of the law". Judicial review proceedings were then instituted by the applicant seeking to quash the deportation order and at the leave hearing, sought to rely on a UNHCR guidance note that had not been previously furnished to the Minister. These proceedings were withdrawn and the Minister undertook not to deport the applicant until the revocation application had been considered. The applicant then applied to the Minister under s. 3 (11) of the Immigration Act 1999 to revoke the deportation order, relying on the Guidance Note. The applicant did not limit himself to this ground, but it was obvious, according to Ryan J. in his decision, that it was the major plank of his application. As Ryan J. stated, there would have been no doubt about this in the Minister's mind because of what happened at the abortive application, and therefore the Minister was aware that the UNHCR Guidance Note was a major point in the case.

49. In the said Guidance Note on refugee claims relating to sexual orientation and gender identity (2008), sexual orientation is recognised as a "fundamental part of human identity". It advises at para. 12 that: "Being compelled to forsake or conceal one's sexual orientation and gender identity, where this is instigated or condoned by the State, may amount to persecution". It further states:-

> "25. A person cannot be expected or required by the State to change or conceal his or her identity to avoid persecution.
>
> 26. …There is no duty to be 'discreet' or to take certain steps to avoid persecution, such as living a life of isolation, or refraining from having intimate relationships."

50. Ryan J. stated:-

"The principles recognise that sexual orientation and gender identity are 'integral to every person's dignity and humanity'. These principles were endorsed by the U.K. Supreme Court in H.J. (Iran) & H.T. (Cameroon) v. Secretary of State for the Home Department[2010] U.K.S.C. 31."

51. The complaint at the substantive hearing was that the Minister gave no consideration to these questions and to the principles and advice set out in the Guidance Note. Ryan J. identified the question which had to be specifically addressed in the Minister's consideration of that application to revoke, namely, how achieving safety by living discreetly could be reconciled with Convention provisions and human rights. The Court found that the memorandum in that case did not reveal any consideration of this matter and that that was a fatal omission by reason of which the Minister's decision lacked validity. It was because of the Minister's failure to consider relevant matters, that the applicant succeeded in his application for a judicial review in that case, which resulted in the order quashing the decision on the revocation application.

52. It seems to me that a reading of the judgment of Ryan J. in M.A. reveals that the court did not make a finding that the Minister was in breach of the UNHCR Guidelines but, rather, that he had failed to consider them. That was the fatal omission by reason of which the Minister's decision lacked validity in that case.

The status of the UNCHR Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity of 2008

53. Commenting on these recently published UNHCR Guidelines, Cooke J., at the leave stage, stated:-

"It is true that this document is certainly not of any binding legal effect in this jurisdiction and is of less authoritative status in asylum matters than the UNHCR Handbook, but it does hold itself out as attempting to reflect current thinking in many jurisdictions party to the Convention on the applicable

standards to which regard must be had in dealing with these issues."

54. In this case, counsel for the applicant submitted that the Tribunal member should have had regard to the 2008 UNHCR Guidelines on refugee claims relating to sexual orientation and gender identity in his decision. However, counsel did not actively pursue this point further at the hearing when it was noted that the publication of the guidelines post-dated the decision of the Tribunal member, and indeed, the initiation of the original proceedings in this matter.

55. Whatever may be the legal effect of a UNHCR Guidance Note on Refugee Claims relating to sexual orientation and gender identity in our jurisdiction, (an issue which may fall to be decided in other cases) they were not effective at the time of the Tribunal's hearing of this matter, and therefore the issue of whether the Tribunal member infringed the guidelines or disregarded them does not arise.

56. Nevertheless, the applicant submitted that the court should have regard to the decision of the U.K. Supreme Court, in H.J. (Iran) and H.T. (Cameroon) v. Secretary of State for the Home Dept. [2010] U.K. S.C. 31. That case addressed the question of whether a requirement to conceal sexual orientation resulting from the criminality of homosexual relations constituted itself a form of persecution. That case overruled a test of "reasonable tolerability" which had been applied by the Court of Appeal, and held inter alia, that it is a breach of fundamental rights to compel a homosexual person to pretend that his/her sexuality does not exist or that the behaviour by which it manifests itself can be suppressed. The decision also noted that, the persecution must be State-sponsored or condoned in order to engage Convention rights and simple discrimination or family or social disapproval is not sufficient.

57. In this case Lord Rodger dealt with some of the questions that arise in the case of alleged persecution by reason of sexual orientation. They are to be found at paragraph 82 in the judgment of Lord Rodger. However, the primary issue before the court in that case was the rejection of an application on the ground that the applicant could avoid persecution by living discreetly. I have not been persuaded, that in the individual circumstances of this case, where no such finding was made by the Tribunal member and where an adverse finding of credibility is clearly at the heart of the decision, that the questions posed by Lord Rodger are questions which should have been posed by the Tribunal member in this case. They may of course have relevance in other cases.

Extension of Time

58. The applicant seeks an order extending the time by nine days in circumstances where the applicant was notified of the Tribunal decision on the 18th August, 2008, and the Notice in Motion issued on the 10th September, 2008.

59. The applicant's explanation for the delay is that he waited until 1st September 2008 for a response from the Refugee Legal Service as to whether they were going to assist in these proceedings. He stated in his affidavit that when he failed to receive a reply he sought the assistance of his present solicitor who sought his file. He stated that his file was forwarded to counsel for his opinion on 3rd September, 2008 and that opinion was received on 5th September, 2008 when instructions were given to institute the proceedings without delay.

60. In C.S. v. The Minister for Justice Equality and Law Reform, Ireland and the Attorney General [2005] 1 I.R. 343 at p. 363 McGuinness J. stated:-

"This court has previously stressed that in this type of case the applicant should personally set out on affidavit the circumstances which gave rise to any delay by the applicant himself or herself while the solicitor should set out any circumstances of delay which arose in the legal process itself."

61. It G.K. v. The Minister for Justice [2002] 2 I.R. 418 at 423, Hardiman J. dealing with an application for an extension of time under Section 5(2)(a) of the Illegal Immigrants Trafficking Act 2000:-

"…it is not an excessive burden to require the demonstration of an arguable case. In addition, of

course the question of the extent of the delay beyond the fourteen day period and the reasons if any for it must be addressed."

62. Therefore, I directed an affidavit be sworn by the solicitors for the applicant, and I also sought an affidavit from the Refugee Legal Service explaining its role in the matter. In the affidavit of Sean Mulvihill the applicant's solicitor he states that he met the applicant on 1st September, 2008 and that the applicant was aware that if he wished to challenge the decision he had to make an application to the Court, and that a time-limit applied to such an application. He said that it was his intention to make such an application but that he required legal assistance to do so. Mr. Mulvihill explained how he had advised the applicant as to his position, and that it would be necessary to obtain counsel's opinion which he received on Friday, 5th September, 2008, and Mr. Mulvihill explained the sequence of events in the process thereafter.

63. Garret Searson, a managing solicitor assigned to the Judicial Review Unit of the Refugee Legal Service, stated in his affidavit that the file allocated to Cork Refugee Legal Service was now closed, and had been sent to storage and that he had perused the records of entries registered on the Refugee Legal Service database relating to the applicant's file. He stated that the negative decision of the tribunal member was received by Cork Refugee Legal Service by DX on 18th August 2008 and this was forwarded by post to counsel who had represented the applicant at the appeal hearing, in order to obtain views for a possible challenge. Mr. Searson states in his affidavit that it is not clear from an examination of the records on the database whether a response was received from counsel. Mr. Searson went on to say that the applicant phoned the Cork Refugee Legal Service on 20th August and left a message that he wished to speak to his solicitor concerning the negative tribunal decision. Mr. Searson notes that a letter of authority, dated 1st September 2008 was received from the applicant's present solicitors that the applicant had instructed their firm and requested a copy of the file; that arrangements were made for the file to be copied on 3rd September, 2008; and that it would appear that the file was forwarded by post on 3rd September, 2008 to Sean Mulvihill and Company, Solicitors for the applicant.

64. Frankly, this is an unsatisfactory affidavit, because if it were not clear from an examination of the records on the database whether a response was received from counsel, then surely the file should have been retrieved from storage to ascertain the full position. No reason was advanced as to why this was not done.

65. On the other hand, it is reasonably clear from the contents of Mr. Mulvihill's affidavit, that the applicant was aware that if he wished to challenge the decision, he had to make an application to the Court and that a time-limit applied to such an application. Nevertheless, and giving the applicant the benefit of the doubt, he was probably relying on the Refugee Legal Service to act promptly in the matter on his behalf, and given their expertise in these matters, that they would follow up the matter of counsel's opinion with due expedition. The reality of the matter is, that the applicant obviously felt himself bound to seek fresh legal representation.

66. In S. v. The Minister for Justice, Equality and Law Reform (Unreported Supreme Court, 5th March, 2002), Denham J. deals with the question whether the reason for the delay may be largely attributable to the culpability of legal advisors, but in doing so, she noted that the fact that an applicant may not be to blame for delay, is not, of itself, a sufficient basis for disregarding a time limit for instituting proceedings. She stated at p. 176:

"The delay in issue is essentially delay by legal advisors. Legal advisors have a duty to act with expedition in these cases. In general delay by legal advisors will not prima facie be a good and sufficient reason to extend time. Circumstances must exist to excuse such a delay and to enable the matter to be considered further."

67. In Re Article 26 v. The Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 I.R. 360 at p. 389 the Supreme Court discussed the many factors that could combine to make it difficult for those seeking asylum or refugee status to pursue applications, and drew attention to the remarks of counsel for the Attorney General that one could by no means exclude a combination of circumstances in a particular case which could result in an applicant not finding it possible to bring an application for leave to seek

judicial review within the 14 day period.

68. It is however clear from the decision in that case that the discretion of the High Court to extend the 14 day period is to enable persons who have shown reasonable diligence, to have sufficient access to the courts for the purpose of seeking judicial review.

The Strength of the Applicant's Case

69. In G.K. v. The Minister for Justice [2002] 1 ILRM 401, at 405, Hardiman J. in the Supreme Court stated in relation to extensions of time under Section 5(2)(a) of the Illegal Immigrants (Trafficking) Act, 2000 stated:-

"I believe that the use of the phrase good and sufficient reason for extending the period still more clearly permits the court to consider whether the substantive claim is arguable. If a claim is manifestly unarguable there can normally be no good or sufficient reason for permitting it to be brought, however slight the delay requiring the exercise of the court's discretion, and however understandable it may be in the particular circumstances."

Conclusion

70. The Tribunal member was clearly dissatisfied with the applicant's credibility and he recited the factors, to which I have already referred, which gave rise to his concerns in this regard. They are more extensive than contended for in the submissions on behalf of the applicant. The fact that, when offered an opportunity to do so, in relation to the issue of the discrepancy between the applicant's different accounts of the duration of his stay with the spiritualist, and the fact that he did not take the opportunity that he had been given to resolve that conflict, I am satisfied a relevant matter for the tribunal member to take into consideration when assessing credibility, and it was neither peripheral or minimal.

71. Furthermore, it is clear from the tribunal member's analysis that his consideration of credibility was not confined to the issue with the spiritualist and that he took other matters into consideration as well. I do not believe that the Court can easily disregard, or look behind, the cumulative impression of these factors, on the tribunal member's overall consideration of the applicant's credibility, especially, as the tribunal member stated in the decision, that he had an opportunity to observe the demeanour of the applicant, and being mindful of the opportunity the tribunal member had given the applicant to resolve the conflict, the tribunal member, nevertheless, found the applicant's evidence to be neither plausible nor credible.

72. The applicant submitted that the tribunal member's consideration of the country of origin information was selective. In E. (E.) v RAT and others [2010] IEHC 135, Cooke J. considered the approach of the Court to the reliance placed on country of origin information by a Tribunal member. He stated:

It is for the Tribunal member to weigh and assess relevant information drawn from country of origin documentation and to decide what value or weight should be accorded to various parts of it, having regard to its relevance, the authoritative quality of its source, its apparent reliability and so forth. As with issues of credibility, the Court cannot substitute its own assessment of that information. It is concerned only with the legality and rational character of the process by which the conclusions or findings have been reached in the analysis which the Tribunal member has employed. As illustrated by the cases which have been cited to the Court in argument, (the Simo case, the H.O. case, the M.I.A. case,) the Court should intervene to disturb a decision based upon an assessment of country of origin only where it is shown that some fundamental mistake has occurred in the use or interpretation of the available information or where the conclusion reached is manifestly at variance with the content and obvious effect of the documentation.

The full picture that emerges from the country of origin information which the tribunal member had before him, is that read as a whole, the tribunal member had information before him to conclude that the applicant had not demonstrated that he was targeted by the authorities because of his sexual

orientation and that there was information that in areas in the south of the country, in particular larger cities such as Lagos, that the government does not actively pursue homosexuals. The Tribunal member noted that in considering whether it would be unduly harsh for the applicant to relocate to another part of Nigeria such as Lagos the applicant's response was that he didn't have anybody to stay with.

73. The Court is satisfied in this case that no substantial ground has been raised that the Tribunal member's analysis of the country of origin information reflects a partial or selective presentation or manipulation of the information, or that his interpretation or use of the information is manifestly at variance with the content of the documentation before him.

74. I am satisfied that the tribunal member properly considered the country of origin documentation and was entitled to conclude that it would not be unduly harsh for the applicant to relocate internally to one of the larger cities such as Lagos where the country of origin information suggests that the government does not actively pursue homosexuals and that there was a legal basis for his finding that the applicant had not established a well founded fear of persecution for any of the reasons set out in Section 2 of the Refugee Act 1996 as amended. Accordingly I am satisfied that the applicant has not shown good and sufficient reasons allowing the court to exercise its discretion to extend time in this case. While, I undoubtedly had some sympathy with the predicament that the applicant found himself in in relation to his application for an extension of time nevertheless, he has not demonstrated an arguable case. In all the circumstances I must dismiss the applicant's claim.