[2020] IEHC 63

THE HIGH COURT

[2019 No. 373 JR]

BETWEEN

I

APPLICANT

– AND –

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Max Barrett delivered on 18th February 2020.

1. Ms I is a 27-year old Nigerian lady who has been refused international protection by the International Protection Appeals Tribunal ("IPAT") in a now-impugned decision of 2 April 2019. Ms I claimed international protection on two bases, *viz*. that: (i) she had worked as a prostitute in Nigeria since she was a minor and fears the reaction of her family if she is now to return or be returned to Nigeria; and (ii) she was trafficked to Ireland and fears the response of the traffickers if she is returned. The decision under challenge accepts that Ms I worked as a prostitute in Nigeria and that she was disowned by her family because of her work as a prostitute; it does not accept that her family had attacked or targeted her. The IPAT did not accept that Ms I was trafficked to Ireland or, therefore, that she faced any risk from traffickers were she to be returned to Nigeria. The focus of Ms I's challenge is that the IPAT's assessment of future risk, upon Ms I's return, failed to consider properly the issue of Ms I's family as potential actors of persecution. Ms I contends, in effect, that the IPAT conflated two grounds and simply considered the position of former traffickers as the actors of persecution, yielding a situation in which there was an unlawful failure to consider future risk from extended family members as the actors of persecution.

2. Turning briefly to the grounding affidavit, the following averments seem worthy of especial note in the circumstances presenting:

> "3. *I left Nigeria in 2015 and applied for international protection in Ireland on 16th November 2015. The basis of my claim for international protection is that* [1*] I face a real risk of persecution or serious harm from my family because I worked as a prostitute in Nigeria and* [2] *that I had been trafficked out of Nigeria and been forced to work as a prostitute in Ireland*. [Notably, in the just-quoted averments, Ms I identifies the two grounds on which protection was sought]."

3. In passing, the court notes that in Ms I's written submissions to the IPAT, she submitted, *inter alia*, that the core element of her claim was that she was at risk from her family in Nigeria because she had worked as a prostitute; a secondary element of her claim was that she was at risk from traffickers in Nigeria. In other words, Ms I clearly claimed that she was afraid of her family's response to the fact that she has worked as a prostitute. This is notable because the respondents, in their written submissions, have alleged that Ms I did not allege a fear of persecution on the basis of being disowned by her family. While this submission may technically be correct, the court respectfully considers it clearly

to be the case that Ms I specifically alleged a fear of her family on the basis that she had worked as a prostitute in Nigeria.

4. As part of her written submissions to the IPAT, Ms I provided Country of Origin Information ("COI") on the risk faced from domestic actors of persecution. This COI was provided not simply by way of reference to same but substantively quoted from. Throughout these submissions a clear separation is made between the alleged risk presenting from family and that presenting from traffickers.

5. Turning to the impugned decision, that decision states, *inter alia*, as follows:

"[2.2] *In support of her claim, the Appellant relied on the following documents…*

□ *Legal Submissions on behalf of the Appellant, referencing or quoting further sources of COI, dated 23 July 2018*

[Court Note: This is the extent of the IPAT's reference to the COI provided on the subject of family members as actors of persecution.]

…

[4.8] *….Having regard to all the evidence, the Tribunal concludes that, on the balance of probabilities…the Appellant did work as a prostitute all around the state of [□]…However, for the reasons stated above, it* [the IPAT] *concludes that she was not attacked, or targeted, by her family for her work as a prostitute, even though the family did disapprove of her work.*

[Court Note: So, the IPAT did accept that Ms I had worked as a prostitute (and, it would seem, implicitly accepted that this had been so from a point in time when Ms I was a minor), and that she had been disapproved of by her family.]

…

[4.14] *Based on its considerations and for the reasons set out above, the Tribunal finds that the following core facts of the Appellant's claim have been accepted: Ms I worked as a prostitute in the state of* [□]*…when living in Nigeria. She was disowned by her family but has since reconciled with her mother in Nigeria and her sister in Ireland.*

…

Persecution

[5.3] The harm that the Appellant claims to fear is mistreatment by her extended family members, on the basis that she had been working, or was likely to return to work, as a prostitute. Additionally, the Appellant claimed to fear harm from the man whom she claimed trafficked her to Ireland. Physical attacks would clearly amount to persecution, as defined by section 7, International Protection Act 2015.

[Court Note: As can be seen, the IPAT unambiguously accepts that two claims of persecution have been put forward and that the claimed fear from the family would amount to persecution if it was accepted to have occurred.]

Nexus….

[5.5] The Tribunal concludes that there is a clear nexus between the persecution that the Appellant would endure and the Convention grounds, in that such persecution would be based on the fact that she had been working, or was likely to return to work, as a prostitute, viz. her membership of a particular social group.

[Court Note: The above text clearly accepts that simply and solely because Ms I had been working as a prostitute, (i) she had claimed a fear of persecution, and (ii) had a Convention nexus as a member of a particular social group. This ground required examination by the IPAT, and this examination, unfortunately, was not carried out.]

Any mistreatment by the man whom she claimed duped her into travelling to Ireland and forced her to have sex with men would also be based on her membership of that particular social group.

[Court Note: Here one can see that the IPAT is expressly distinguishing between the two grounds.]

Objective basis

[5.6] Considering the Tribunal's conclusions, viz. that while the Appellant had been disowned by her family at one time for working as a prostitute, she did not endure attacks from her family, and was now reconciled with her mother and her sister (albeit that her sister now lived in Ireland) and considering the COI relevant to the analysis [emphasis added] the Tribunal finds that there is not a reasonable chance that if she were to be returned to Nigeria she would face a well-founded fear of persecution on the basis of her membership of a particular social group. For example [emphasis added], in the UK Home Office's Country Policy and Information Note, Nigeria: Trafficking of Women, Version 2.0, November 2016, para. 2.3.12 it states that, in general, even women are unlikely to be at risk of reprisal on return to Nigeria and the Tribunal has already concluded that the Appellant had not been trafficked.

[Court Note: This paragraph neatly encapsulates what the IPAT considered relevant to the issues of objective risk and forward-looking fear and simply does not deal with the risk from family members, *i.e*. of domestic actors, notwithstanding that extensive COI was put before the IPAT concerning familial persecution/fear.]"

6. The respondents maintain that there was not a sufficient credibility finding made by the IPAT to trigger an obligation to assess family members as actors of persecution. Thus, counsel for the respondents, in her written submissions, submits, *inter alia*, as follows:

"8. Ms I, in her legal submissions, now alleges that there was a conflation of the two grounds being the fear of her family and the fear of her traffickers. It is clear from

the decision that the Tribunal was taking the country of origin information at its height in stating that 'even women who have been trafficked for sexual exploitation are unlikely to be at risk of reprisal on return to Nigeria'. It is respectfully submitted that this was not a conflation of the two arguments by the Tribunal but a finding that Ms I would not face a risk of persecution for having worked as a prostitute even in circumstances where she had been disowned by her family. These were the material facts accepted by the Tribunal and the only ones that had to be considered in the assessment of whether Ms I had a well-founded fear of persecution. There was therefore no obligation, as alleged….to assess any risk from Ms I's extended family as actors of persecution."

7. Put shortly, Ms I's case is that the foregoing is incorrect. An immediate difficulty that presents in the foregoing is that it would effectively require an applicant to have suffered past persecution or past serious harm before an obligation is triggered to assess the future risk. That proposition is not supported by authority; and it would also, with respect, fly in the face of the statutory test identified at s.28(6) of the International Protection Act 2015, which provides as follows:

> *"The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such serious harm, is a serious indication of [Ms I'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."*

8. The just-quoted statutory test imposes an obligation where there has been past persecution or serious harm: it does not dispose of the obligation to assess the claim put forward by an applicant/Ms I. In this regard, the court has considered *P.D. v. The Minister for Justice, Equality and Law Reform & Ors.* [2015] IEHC 111, a case which supports the proposition that where, as here, an applicant advances a case of risk of persecution by reference solely to her work as a prostitute, a legal obligation arises to conduct a specific investigation into that claimed fear. In that case, Mac Eochaidh J. observed, *inter alia*, as follows:

> *"51. The authorised officer has not acknowledged that the applicant's fear of persecution was not limited to the mistreatment he feared from his family. A review of the s.11 interview, which was conducted by the same authorised officer who wrote the s.13 report, indicates that the questions asked and the answers given dealt primarily with the circumstances in which he allegedly suffered from his family and sought to escape their negative attentions. However, the questionnaire, the statutory prescribed form by which one applies for asylum and in which an applicant is required by law to state why asylum is sought, indicates that the applicant seeks protection because criminal sanction allegedly applies to homosexuals in Malawi and Zimbabwe.*
>
> [Court Note: Whether or not the claim was made by Ms I that she faced persecution by her family is not in issue in the within *proceedings: Ms I did so claim.]*

…

57. *Having regard to the pleadings, the legal duty on the respondent to investigate an application, the legal duty to assess relevant laws in the country of origin and the definition of persecution as embracing discriminatory laws as they might apply to persons of a particular sexual orientation, the question which arises is whether the authorised officer in this case was obliged, as a matter of law, to investigate the legal regime for homosexuals in Zimbabwe and Malawi once the applicant indicated he feared prosecution for being gay.*

[Court Note: That is essentially the question that arises here. Was the IPAT obliged to investigate Ms I's claimed fear of her family members in circumstances where it accepted that she put that forward?]

…

[Mac Eochaidh J. then proceeds to consider *X, Y, Z v. Minister voor Immigratie en Asiel (Case C-199/12, C-200/12 and C-201/12)* [ECLI:EU:C:2013:720], before concluding as shown below, at paras. 60 *et seq*. of his judgment.]

60. *I have no doubt but that the applicant in this case presented a claim for asylum which relied on the existence in Zimbabwe and Malawi of legislation which criminalised homosexual acts. Once such a claim was presented it was the duty of the authorised officer to investigate that claim by examining the legal regime in those countries. The authorised officer was also required to consider what punishment is provided for relevant crimes and whether the law is actually applied. It is to be recalled in this case that the applicant positively asserted that a person he knew had been given a 14-year prison sentence because he was gay.*

61. *I have no hesitation in concluding that the failure of the authorised officer to carry out the precise investigation required by law and described in the X,Y,Z case constituted an error. Such an investigation, needless to say, could have been carried out independently of an investigation as to whether the applicant was homosexual. If, on investigation, it emerged that there were no relevant criminal statutes in Zimbabwe or Malawi or if it emerged, for example, that the criminal statutes existed but were never applied, it might well be unnecessary to decide on the sexual orientation of an applicant and the deciding officer could conclude that there was an absence of a well-founded fear of persecution because the feared criminal sanction is not applied in the country of origin.*

…

63. *I find that the failure of the deciding officer to carry out an investigation of the applicant's claim in accordance with s.11 of the Act and Article 4 of the Directive (requiring the authorised officer to investigate the alleged anti-gay laws in the country of origin) and the failure to bear in mind the provisions of Article 9 of the Directive and of the Irish Regulations, constitutes significant error as to jurisdiction. The investigation of the claim relating to anti-gay laws required by European and Irish law was not attempted in this case. There was a failure to identify that a claim*

relating to a fear of prosecution was made. There was no recognition whatsoever in the decision of the authorised officer of the obligations which arise when a person makes a claim such as that raised by the applicant in this case….

[Court Note: Here, likewise, there was, in substance, a failure to assess the COI put forward by Ms I in this case relevant to family members as actors of persecution, and that was unlawful.]"

9. Perhaps the salient point from the foregoing is that in this case the forward-looking fear of family as actors of persecution, solely on the basis of Ms I's having acted as a prostitute, was not addressed by the IPAT. Yet once the fact that Ms I had worked as a prostitute was accepted, the IPAT was required to carry out the precise form of investigation contemplated in *P.D.* into the case put forward regarding the family members as potential actors of persecution, the court recalling again in this regard that the material facts underlying that case, viz. that Ms I had acted as a prostitute as a minor, had been disapproved of by her family and had to go and live with somebody else, were all accepted by the IPAT.

10. The obligation to assess depends on whether sufficient facts have been accepted. Here, the respondents' assertion that insufficient facts have been accepted, respectfully, is not accepted by Ms I or indeed the court. The respondents, in this regard, rely on the decision of the High Court in *M.L.T.T. (Cameroon) v. The Minister for Justice, Equality and Law Reform & Anor.* [2012] IEHC 568, in particular the observation at para. 13 of the judgment therein that "*where the very core of an applicant's claim is not believed, the decision-maker is not obliged to carry out an artificial exercise and assess what might occur if a hypothetical person with the applicant's disbelieved history and characteristics were returned to the applicant's country of origin*." Here, however, Ms I's history and characteristics were accepted. So what she seeks, by way of these proceedings, is not the carrying out of a hypothetical exercise: it was expressly accepted that Ms I worked as a prostitute and implicitly accepted that that encompassed a period of time when she was a minor, and it was accepted that she had been disapproved of by her family because Ms I had worked as a prostitute. Here, in truth, the IPAT in what it has done has carried out a hypothetical exercise because it considered the position of trafficked women, notwithstanding that it rejected the trafficking contention.

11. A point well made by counsel for Ms I and worth repeating here is that the distinction between mistreatment by family members and mistreatment by others is not a fanciful distinction; it is as significant a distinction as if in some hypothetical case the IPAT had considered risk from a paramilitary organization and failed to assess risk from a State actor. However, this aspect of matters, in truth, does not require detailed exploration because the respondents, if the court might use a colloquialism, have 'nailed their colours to the mast' and denied that the contended-for obligation to assess arose. The court, in this regard, respectfully adopts the following observations in the written submissions of counsel for Ms I:

"23. The Tribunal's failure to consider the risk posed by Ms I's family as the actors of persecution is even more striking given that the COI referred to by the Tribunal, the UK Home Office's Country Policy titled Information Note: Nigeria: Trafficking of Women, recognises that separate considerations apply where the potential actor of persecution is a family member rather than a trafficker (para.2.3.9):

> However, there may in some cases be a real risk of serious harm from her family, whether or not they were initially complicit in her trafficking for sexual exploitation. 'It is generally reasonable to conclude that her family would expect an economic and financial return from her consequent upon her travel to Europe. Return to a previous trafficking situation under the duress of family pressure, family violence, ostracism and stigmatisation by the woman's community and possible resultant destitution, homelessness and lack of any financial security is likely in most cases to amount to serious harm. (emphasis added).

24. Admittedly, the above quotation relates to women who are being returned to Nigeria having been trafficked, and for the avoidance of doubt Ms I does not make that case in these proceedings. However, the salient point is that the Tribunal fell into a category error in its assessment of future risk by solely considering the risk posed by traffickers rather than considering the risk posed by Ms I's family."

12. So, the trafficker/family member distinction is made in the very COI relied upon by the IPAT.

13. As regards the issue of reasonableness, the issue appears no longer to arise, given that the respondents have 'nailed their colours to the mast' in the manner described above (claiming no obligation to make the contended-for assessment presents). So, the court will deal with this aspect of matters relatively briefly.

14. Ms I put forward specific COI relating to the risk of violence against women from family members as actors of persecution, e.g., United Kingdom: Home Office, *Country Information and Guidance - Nigeria: Women fearing gender-based harm or violence* (August 2016, Version 2.0), available at: https://www.refworld.org/docid/57b70ff44.html (accessed 10 February 2020) which includes the observation, at para. 3.1.2, that *"[s]ome women may be able to demonstrate a real risk of gender-based persecution or serious harm but…this will depend on their particular circumstances.*" Here, the established particular circumstances are that Ms I had been disowned by her extended family because of her work as a prostitute, including while she was a minor. That is a specific circumstance which has to be assessed by the IPAT, yet the IPAT failed to take this aspect of matters into account or refer to, dealing instead only with COI relevant to traffickers.

15. Perhaps the clearest example of just how grave the last-mentioned error was is apparent when one turns to the COI to which the IPAT did have regard (and which is relevant to traffickers); it specifically notes that different considerations must be applied. Thus the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), *Nigeria: COI Compilation on Human Trafficking* (December 2017) available at:

https://www.refworld.org/docid/5a79c7114.html (accessed 10 February 2020) (COI that was submitted by Ms I) compares the position of sex workers fearing a risk of harm from their families being akin to the position of sufferers of domestic abuse, and points to the need, when claimed harm relates to family members acting because, e.g., one has worked as a prostitute, it is necessary to go back to look at the COI generally relevant to domestic violence. This is a point that underlines the unfortunate error into which the IPAT fell in this regard. Also of interest in this regard is the decision of the United Kingdom Upper Tribunal in *HD (Trafficked Women) Nigeria Country Guidance* [2016] UKUT 454 (IAC) which states:

> *"157. There may be a real risk of serious harm from her family, whether or not they* [inter alia*] were initially complicit in her trafficking for sexual exploitation. It is generally reasonable to conclude that her family would expect an economic and financial return from her consequent upon her travel to Europe".*

16. Reference to this case is made in the COI relevant to trafficked women, the key point for present purposes being that when a claim is based on risk of family harm, different considerations apply. Those considerations were, regrettably, not brought properly into play by the IPAT in this case. The IPAT does make tangential reference, it is true, to the COI relevant to domestic type abuse but just in terms of noting it had been submitted, nothing more, a fact which but illustrates further that a specific investigation of the type required by law was not carried out in this case.

17. Ms I contends, and the court accepts, that, in breach of the law as identified in *D.V.T.S. v. Minister for Justice, Equality and Law Reform & Anor*. [2008] 3 IR 476, the IPAT, although it did offer a reason why it preferred certain pieces of COI over the other, did not offer a valid reason. This is so because what the IPAT in essence states when considering the COI is that because Ms I had "*worked as a prostitute and managed to sustain herself*" – through a period that included a portion of her childhood (so as a victim of child sexual abuse) – Ms I would be in a better position than some returnees to resettle, were she to return to Nigeria. It is for Ms I to determine how she now chooses to live her life; however, the notion that Ireland would countenance the return of any woman (here a woman who is the accepted victim of child sexual abuse) to any country, by reference, *inter alia*, to the fact that once there she could return to prostitution to sustain herself is so egregiously offensive to the inherent and natural human dignity of women (and of men, were a sometime male prostitute to find himself similarly placed) that the IPAT's reasoning in this regard cannot be permitted to, and, the court finds, does not have, any legal weight; hence the reason given for preferring certain COI is invalid.

18. In passing, the court notes that there was a point raised by the respondents regarding the time within this application for judicial review has been made. However, counsel for the respondents indicated that this point was not being assiduously advanced, the court considers that it was therefore effectively dropped and would in any event have granted the extension sought.

19. Four questions have been posited by Ms I to arise for resolution by the court. These are briefly answered below by reference to the analysis in the preceding pages.

[1] Did the IPAT assess whether Ms I had a well-founded fear of being persecuted by her extended family? [2] More specifically, did the IPAT conflate this with its assessment of a well-founded fear of being persecuted on the basis of having been a victim of trafficking?

For the reasons stated above, the court's answer to [1] is 'no' and to [2] is 'yes'.

[3] Did the IPAT come to an irrational and/or unreasonable decision by relying on COI, and particular segments of same, dealing only with the risk faced by victims of trafficking who had been returned to Nigeria without due regard to the COI submitted on the risk faced by women from familial/societal actors?

For the reasons stated above, the court considers that the decision was unreasonable.

[4] Did the IPAT provide adequate reasons for preferring certain COI, in particular the United Kingdom: Home Office, *Country Information and Guidance - Nigeria: Women fearing gender-based harm or violence,* over other COI, in particular ACCORD, *Nigeria: COI Compilation on Human Trafficking?*

For the reasons stated above, the court's answer to [4] is 'no'.

26. For the various reasons stated above, the court will grant the order of *certiorari* sought and return this matter to the IPAT for fresh consideration.