APPROVED **[2023] IEHC 6**

THE HIGH COURT

2022 No. 341 J.R.

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

IN THE MATTER OF THE INTERNATIONAL PROTECTION ACT 2015

BETWEEN

K. (ZIMBABWE)

APPLICANT

AND

INTERNATIONAL PROTECTION APPEALS TRIBUNAL
MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 11 January 2023

INTRODUCTION

1. These judicial review proceedings relate to a decision to refuse to recognise the applicant as a refugee and/or as a person entitled to subsidiary protection. The

decision was made, on appeal, by the International Protection Appeals Tribunal ("***Appeals Tribunal***"). The Appeals Tribunal held, in effect, that the applicant's claim lacked credibility. Importantly, the Appeals Tribunal chose to defer consideration of the country of origin information until *after* it had already reached its findings of fact.

2. The principal issues raised in these judicial review proceedings are as follows. First, whether the Appeals Tribunal erred in its approach to the country of origin information. Secondly, whether the Appeals Tribunal made a fundamental error of fact in its assessment of the applicant's credibility.

APPLICANT'S CLAIM FOR PROTECTION

3. The applicant is a national of the Republic of Zimbabwe. The applicant travelled to Ireland in May 2019. On arrival at Dublin Airport, she made an application for refugee status and subsidiary protection.

4. The procedure under the International Protection Act 2015 involves a number of different stages. The first stage consists of what is described as a "*preliminary interview*" pursuant to Section 13 of the Act. The stated purpose of a preliminary interview is to establish, among other things, whether the interviewed person wishes to make an application for international protection, and, if so, the general grounds on which the application is based.

5. The record of the applicant's preliminary interview has been exhibited as part of these judicial review proceedings. Relevantly, the applicant is recorded as having stated that her life is in danger and that she is at risk from *both* of the political parties described below.

6. The second stage of the procedure entails the completion of a written questionnaire described as an "*Application for International Protection Questionnaire*". The applicant had completed the questionnaire on 28 June 2019. The questionnaire is date-stamped as having been received on 1 July 2019. The applicant set out, over the course of some six handwritten pages, the basis of her claim for international protection.

7. In brief, the applicant asserts that, by reason of her political activities, her life would be in danger were she to return to Zimbabwe. The applicant asserts that she had been a member of the political party known as the Movement for Democratic Change ("***MDC***") and had become part of the youth leadership team in her area. The applicant describes herself as having been well known in her local area as an MDC youth campaigner.

8. The applicant asserts that she was subsequently pressurised to join a rival political party known as Zimbabwe African National Union – Patriotic Front ("***ZANU PF***"). The applicant asserts that she was pressurised to recruit members of MDC to join ZANU PF, and to provide inside information on the activities of MDC. The applicant refers to having been requested to commit to "*spying*" on MDC.

9. The applicant asserts that she had been forced to attack members of opposition parties.

10. The applicant has described a number of incidents whereby she alleges she had been beaten up and tortured by members of ZANU PF.

11. The applicant has described an alleged incident, involving attempted arson, in April / May 2018 as follows. ZANU PF had planned to burn down a number of houses associated with members of MDC. The applicant has been consistent in

saying that one of the houses belonged to a senator, [name redacted], and the other to the chairman/chairperson of MDC in [a named town]. Reference has also been made to the mayor. It is unclear, however, from the papers whether the terms "*chairperson*" and "*mayor*" might actually describe the same political office.

12. The applicant asserts that she secretly informed members of the local MDC party of the planned arson attack. The applicant further asserts that, as a result of this, ZANU PF turned against her. The applicant describes having been taken to a house in a wooded area and as having been beaten, tortured and raped. The torture had involved a form of water torture often referred to as "*waterboarding*", whereby the victim is subjected to simulated drowning by the placing of a soaked cloth over their face. Importantly, the applicant has alleged that some of those who had taken her to the wooded area in the first instance had been wearing police uniforms.

13. The applicant asserts that she had been requested, towards the end of 2018, to become involved in election activities for ZANU PF. The applicant asserts that she had asked, as a favour, to operate in a place far from her home area. The applicant asserts that she had been taken to [a named town].

14. The applicant asserts that her grandmother warned her not to return to her home as "*angry MDC people*" had been looking for her after the election and accusing her of being a traitor and as having contributed to the victory of ZANU PF.

15. Finally, the applicant asserts that, while she was with members of ZANU PF in March 2019, her membership card from MDC was discovered. The applicant says that she knew she was in danger and that thereafter, with the help of her grandmother, she arranged to leave Zimbabwe.

16. The third stage in the procedure consisted of a "*personal interview*" with the applicant pursuant to Section 35 of the International Protection Act 2015. This interview was conducted in December 2020, i.e. some eighteen months after the applicant had completed her questionnaire.

17. The report of this interview has been exhibited in these judicial review proceedings and consists of a transcript of a series of questions and answers. It is apparent from the report that the interviewing officer regarded aspects of the applicant's narrative as lacking credibility. In particular, the applicant was subject to close questioning on the circumstances of the planned arson attack on houses belonging to members of MDC. The interviewing officer appears to have been of the view that it was not credible that the applicant, knowing of the risks which she would face from ZANU PF, would inform MDC of the planned arson attack.

THE APPEALS TRIBUNAL'S DECISION

18. The Appeals Tribunal chose to defer consideration of any country of origin information until *after* it had purported to reach its findings of fact. The Appeals Tribunal purported to assess the credibility of the applicant's narrative of events without reference to relevant information in respect of the political process in the Republic of Zimbabwe. No reference was made, for example, to reports that elements within ZANU PF and the security forces intimidated and committed abuses against other political parties and their supporters.

19. The Appeals Tribunal purported to identify a number of inconsistencies in the applicant's narrative. The Appeals Tribunal then sought to rely on these

supposed inconsistencies to make findings of fact adverse to the applicant as follows.

20. First, the Appeals Tribunal purported to find that the applicant was not a member of MDC. This finding was predicated on an earlier conclusion (i) that the applicant had been inconsistent regarding the date when she said she joined MDC and about the role of her grandmother in MDC; and (ii) that the applicant had been inconsistent regarding which political party she was passing information to. As explained at paragraphs 49 *et seq*., the Appeals Tribunal committed a fundamental error of fact in this regard.

21. Secondly, the Appeals Tribunal purported to find that the applicant was not a member of ZANU PF. This finding was predicated on earlier conclusions (i) that the applicant had been inconsistent regarding who approached her to join ZANU PF; (ii) that the applicant had been inconsistent regarding which party an individual known as "*Brian*" had been a member of, and as to when she received payment from ZANU PF; and (iii) that the applicant had been inconsistent regarding the details of the planned arson attack.

22. Thirdly, the Appeals Tribunal purported to find that the applicant had not been targeted by MDC or ZANU PF, on the basis that the applicant had been inconsistent regarding the assaults upon her.

23. The Appeals Tribunal concluded that the only personal circumstances of the applicant which were relevant to an analysis of her claim for refugee status and/or subsidiary protection were that the applicant was a single mother from Zimbabwe. It was only after having whittled down the personal circumstances of the applicant to these characteristics that the Appeals Tribunal then considered

country of origin information from the US Department of State's report on Zimbabwe.

24. The approach of the Appeals Tribunal is unsatisfactory in a number of respects. The Appeals Tribunal simply adopted the submissions of the presenting officer without any meaningful engagement. The Appeals Tribunal purported to identify supposed "*inconsistencies*" between the applicant's narrative of events as recorded in the questionnaire; the personal interview; and the oral hearing before the tribunal itself. The Appeals Tribunal then relied on these supposed "*inconsistencies*" to discount the entire of the applicant's narrative, concluding that the only core facts which had been established were that the applicant is a single mother from Zimbabwe.

25. This exercise of comparing-and-contrasting the narrative as recorded in the questionnaire, the personal interview, and the oral hearing, respectively, was done without any meaningful engagement with the explanations offered by the applicant for the supposed inconsistencies. In some instances, the applicant had asserted, correctly, that there was no inconsistency. In particular, as discussed at paragraphs 49 *et seq*., the applicant had not reversed her position on the identity of the political party to which she was secretly providing information.

26. In other instances, the supposed inconsistencies merely involve the provision of *additional* details which do not affect the core claim. For example, the applicant is recorded as having confirmed, at the oral hearing, that the purpose of the proposed arson attack had been to scare the occupants of the houses into resigning their political offices. The Appeals Tribunal purported to rely on the absence of an express statement to similar effect in the questionnaire as

supporting a finding that the applicant had been "*inconsistent*" regarding the plan to burn the houses.

27. With respect, this finding is perverse. For the purpose of assessing the claim for international protection, the significance of the proposed arson attack is that it is said to have resulted in the applicant being exposed to retaliation by ZANU PF. More specifically, the applicant asserts that ZANU PF became aware that she had informed the local MDC party of the proposed arson attack, and that this resulted in her being beaten, tortured and raped. The precise purpose of the arson attack is not directly relevant to these assertions. Certainly, it cannot be said that it is "*inconsistent*" with the applicant's version of events to add detail as to the precise purpose underlying the proposed arson attack. It is obvious from the questionnaire and the record of the personal interview that the broad purpose of the arson attack was to intimidate members of the opposition party, MDC.

28. Some of the other instances of supposed inconsistencies relied upon by the Appeals Tribunal relate to the detail of the sexual assaults said to have been committed against the applicant. The applicant had explained at the oral hearing that she did not like talking about these things. More generally, the applicant has explained that she did not know she had to "*say each and every detail in questionnaire – only concentrate on reason why I run away*". The applicant also explained that, at the time of her preliminary interview, she did not know what was going to happen; did not understand the asylum process; did not know whether to trust the authorities here; and did not know that she "*must say so many things*" about herself. The Appeals Tribunal decision does not meaningfully engage with these explanations.

29. More generally, the approach of the Appeals Tribunal fails to appreciate the very different circumstances under which the narrative had been elicited in each instance. As explained in the UNHCR report, *Beyond Proof: Credibility Assessment in EU Asylum Systems* (May 2013), the circumstances can influence the narrative:

> "Memory is influenced by the nature of a question or cue used to elicit information, such as closed or open-ended questions, as well as the way the question is asked. Memories are susceptible to suggestion, more so when the interviewee feels under stress, has low self-esteem, or perceives the interviewer to be critical or negative. Research has also shown that there is variation in reporting when information is elicited in face-to-face interviews compared with self-completing forms. The behaviour and perceived intentions of the interviewer influence the recall of memories. Thus, it is very possible for repeated interviews, or statement writing, to yield discrepancies that result from the form and process of the interrogation, which have no bearing on the credibility of the person or their account.
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> There is, therefore, ample research on the functioning of memory to show that '*stories can change for many reasons and such changes do not necessarily indicate that the narrator is lying*.' Indeed, the research shows that it is highly unusual for recall to be accurately reproduced and that, instead, variations are more common."
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> *Footnotes omitted

30. The various information-eliciting processes to which the applicant was subjected, as part of the statutory procedure, were all very different. For example, the "*personal interview*" conducted pursuant to Section 35 of the International Protection Act 2015 was very much guided by the interviewing officer. The interviewing officer determined the course of the interview and the areas of discussion. Indeed, the report of the personal interview reads as a hostile cross-examination of the applicant.

31. It was inappropriate for the Appeals Tribunal to seek to draw inferences from the content of the interview, without having any regard to the process by which that narrative was elicited as compared to, say, the self-completed questionnaire.

JUDICIAL REVIEW PROCEEDINGS

32. These judicial review proceedings were instituted on 9 May 2022 by way of an *ex parte* application for leave. Leave was granted the same day and the substantive application for judicial review ultimately came on for hearing before me on 29 November 2022.

33. At the opening of the case, counsel on behalf of the applicant applied for leave to amend the statement of grounds. The application was made pursuant to the provisions of Order 84, rule 23 of the Rules of the Superior Courts. Counsel relied on the judgment of the High Court (Humphreys J.) in *B.W. v. Refugee Appeals Tribunal* [2015] IEHC 725 (in particular, paragraphs 9 to 13 and paragraph 19).

34. Counsel on behalf of the respondents, on instructions, adopted a neutral attitude to the amendment application, neither consenting nor objecting.

35. Having regard to the principles stated in *Keegan v. Garda Síochána Ombudsman Commission* [2012] IESC 29, [2012] 2 I.R. 570, I was satisfied to allow the amendments. The additional grounds of challenge involve little more than an elaboration upon the previously pleaded case. The additional grounds, in effect, flesh out the existing plea that the impugned decision contained findings which were erroneous and/or had been arrived at unfairly.

36. The amendments do not give rise to any prejudice to the respondents. The case stands and falls on an analysis of the decision of the Appeals Tribunal, read in

context with the relevant documentation, including, in particular, the various application forms, questionnaires and reports of interview completed by the applicant. This documentation had already been exhibited as part of the proceedings. Counsel on behalf of the respondents was able to advance detailed counterarguments, notwithstanding the late introduction of the amendments.

COUNTRY OF ORIGIN INFORMATION

37. Section 28(4) of the International Protection Act 2015 provides, *inter alia*, that the assessment by the Appeals Tribunal of an appeal shall be carried out on an individual basis and shall include taking into account all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied.

38. The proper approach to be adopted in the assessment of country of origin information has been explained by the Court of Appeal in *R.A. v. Refugee Appeals Tribunal* [2017] IECA 297. This judgment was delivered in the context of the domestic legislative regime prior to the International Protection Act 2015, but the principles apply equally to that Act. This is because the domestic legislation, in each instance, reflects the relevant EU legislation.

39. The Court of Appeal held that the obligation on the part of the decision-maker is to consider only *relevant* country of origin information. There is no need for the decision-maker to consult country of origin information in a ritualised or mechanistic fashion in every single case, regardless of the personal circumstances of the applicant or the nature of the claim made by the applicant.

40. In most cases, however, country of origin information will be of use in ascertaining whether the social, political and other conditions in the country of origin are such that the events recounted, or the mistreatment claimed to have been suffered, may or may not have taken place.

41. The Court of Appeal approved of the following passage from Goodwin-Gill, *The Refugee and International Law* (Clarendon Paperbacks, Oxford) (which had been cited by the High Court (Kelly J.) in *Camara v. Minister for Justice Equality and Law Reform*, unreported, 26 July 2000):

> "Simply considered, there are just two issues. First, could the applicant's story have happened, or could his/her apprehension come to pass, on their own terms, given what we know from available country of origin information? Secondly, is the applicant personally believable? If the story is consistent with what is known about the country of origin, then the basis for the right inferences has been laid.
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> Inconsistencies must be assessed as material or immaterial. Material inconsistencies go to the heart of the claim, and concern, for example, the key experiences that are the cause of flight and fear. Being crucial to acceptance of the story, applicants ought in principle to be invited to explain contradictions and clarify confusions."

42. The Court of Appeal also approved of the following statement of principle:

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

43. I turn now to apply these principles to the circumstances of the present case.

44. Here, the Appeals Tribunal deferred any consideration of the country of origin information until *after* it had already purported to make findings of facts adverse to the applicant.

45. With respect, this is to approach the matter the wrong way round. It was crucial to a proper assessment of the applicant's claim to understand first the nature of the political system in Zimbabwe. In particular, it was important to understand that there were documented instances of violence being perpetrated by the ruling party, ZANU PF, against opposition parties. It was also relevant to note that members of the police force have been implicated in such political violence. It will be recalled that the applicant had stated that the group, who had abducted her following the foiled arson attack, had included individuals wearing police uniforms.

46. Country of origin information might also have corroborated other aspects of the applicant's narrative. For example, the applicant asserts that most of the people in [name of region redacted] were members of, and would want to vote for, MDC, and that there had been rioting following the success of ZANU PF in the election. If this had been confirmed by country of origin information, then it might be thought to support the applicant's narrative of the tension between the parties in the local area and the attempts by ZANU PF to recruit members of MDC.

47. These matters should have been referred to before any assessment of the specific case being made by the applicant. As appears from the passages cited with approval by the Court of Appeal, the decision-maker should ask whether, having regard to the country of origin information, could the applicant's story have happened. By deferring consideration of the country of origin information until after the tribunal had already whittled down the findings of fact to deciding that the applicant was a national of Zimbabwe of a particular age, sex and marital status, the Appeals Tribunal erred in law.

48. It should be emphasised, of course, that saying that regard should have been had to the country of origin information does not amount to saying that the specific allegations made by any particular applicant for international protection will be found to be credible. The point is, rather, that in order to properly assess those allegations and to reach a reasoned view in relation to credibility, it is important to understand the political context.

FUNDAMENTAL ERROR OF FACT

49. An assessment of the credibility of an applicant must be based on a correct understanding of the facts. Here, the Appeals Tribunal erroneously adopted the presenting officer's statement that the applicant had reversed her position on a crucial issue, namely the identity of the political party to which she was secretly providing information. More specifically, the presenting officer had argued that the applicant's claim, as originally articulated, had been that she had been obtaining information in respect of the activities of MDC and providing that information to ZANU PF. The presenting officer then argued that the applicant, at the hearing before the Appeals Tribunal, had reversed her position and was now saying that she had gathered information from ZANU PF and had given it to MDC. The presenting officer asserted, incorrectly, that the applicant had not mentioned this at the earlier stages of the international protection process.

50. In truth, the applicant's position had always been that she had been passing information in both directions, i.e. the applicant had been providing information to each political party in respect of the other. This is apparent from the questionnaire completed by the applicant. One of the key events described therein is the foiled arson attack, whereby the applicant had provided

information to MDC about the plans of ZANU PF. This is also apparent from the report prepared in respect of the applicant's interview pursuant to Section 35 of the International Protection Act 2015. The applicant refers to herself as a "*double agent*". The applicant also stated that MDC thought her a whistle-blower and ZANU PF charged her with treason.

51. It was incorrect, therefore, for the presenting officer to assert that the applicant had "*reversed*" her position at the hearing before the Appeals Tribunal, and to assert that the applicant had not previously stated that she had provided information to MDC. Regrettably, the Appeals Tribunal replicated the presenting officer's error in this regard and relied upon same in reaching its conclusion that the applicant had been "*inconsistent regarding which political party she was passing information to*". The erroneous finding was the cornerstone of the Appeals Tribunal's conclusion that the applicant had not been a member of either political party.

52. It is well established that a finding of lack of credibility must be based on correct facts (*I.R. v. Minister for Justice* [2009] IEHC 353, [2015] 4 I.R. 144). Here, the Appeals Tribunal predicated its decision on a fundamental error of fact, namely that the applicant had been inconsistent as to the identity of the political party to which she had been providing information. This error of fact goes to the heart of the finding that the applicant was not entitled to international protection. The Appeals Tribunal's decision is invalid for this reason.

CONCLUSION AND PROPOSED FORM OF ORDER

53. An order of *certiorari* will be made setting aside the decision of the Appeals Tribunal. An order will also be made, pursuant to Order 84, rule 27 of the Rules

of the Superior Courts, remitting the applicant's appeal to a differently constituted division of the Appeals Tribunal, with a direction to reconsider the appeal and to reach a decision in accordance with the findings of the High Court.

54. As to costs, my provisional view, having regard to Section 169 of the Legal Services Regulation Act 2015, is that the applicant, as the successful party, is entitled to recover her costs as against the respondents.

55. If either party wishes to contend for a different form of order, they should file written submissions by 1 February 2023.

Appearances

Mark de Blacam SC and Garrett O'Halloran for the applicant instructed by Trayers & Co
Gráinne Mullan for the respondents instructed by the Chief State Solicitor