THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 901 J.R.]

BETWEEN

S.N. (SOUTH AFRICA)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 20th day of March, 2018

1. The applicant is a South African national born in 1996. She gave her address in her own country as being in North-West South Africa in Potchefstroom, which appears to be an urban area. She is now nearly 22; but six years ago when she was aged 16, following the death of her father in 2012, she says that her mother forced her to have sex with a male for which the mother received payment. Then when she was 17 and in college her mother told her that she was required to marry a 60 year old businessman called "Ernest", who already had a number of wives. She attempted to obtain support from her extended family to avoid this forced marriage but was unable to do so and left South Africa for Ireland, arriving here on 9th July, 2014.

2. She applied for asylum on the basis of persecution based on membership of a particular social group. On 28th July, 2014 her application was rejected and on 18th August, 2014 she appealed that decision to the tribunal. On 30th September, 2016 the tribunal rejected the applicant's appeal. Papers challenging that decision were filed on 29th November, 2016 and no time issue has been pressed.

3. I have received helpful submissions from Mr. Gary O'Halloran B.L. for the applicant and Ms. Miriam Reilly S.C. (with Ms. Eva Humphreys B.L.) for the respondents. I am grateful for the helpful submissions of both parties and in particular for the very practical approach taken by the State in this case. On the time issue, as I say, that is not exactly being pressed and I am satisfied from the affidavit of the applicant's solicitor that time should be extended.

4. Turning then to the grounds of challenge, ground 1 I will return to later.

5. Ground 2 contends that there was an incorrect balance of proof applied. That point has already been rejected in *O.N. v. Refugee Appeals Tribunal* [2017] IEHC 13 (Unreported, High Court, 17th January, 2017) by O'Regan J. and I would follow that decision.

6. Ground 3 claims that there was a failure to assess the well-foundedness of the claim in the light of country reports that suggested the fears were in fact well-founded. The country reports actually submitted to the Refugee Applications Commissioner (see letter of 17th July, 2014) refer to forced marriage of young girls as being "*still practised in some remote villages in Eastern and Western Cape provinces"* (see U.S. State Department Report, 2014 "Trafficking in Persons Report - South Africa" 20th June, 2014) or "*remote villages*" (see 2013 Country Report and 2014 Country Report cited at para. 5.4 of the decision). The tribunal held that "*relevant country of origin information cannot be said to be particularly consistent with the substance of the appellant's claim*" at para. 5.7. Nonetheless, the benefit of the doubt was extended to the applicant. Country of origin information cannot be said not to have been considered. The issue was not so much that the events described did not happen but that it had not been established that Ernest was in a position to enforce the bargain once the applicant returned to South Africa. Therefore, in my view this ground has not been made out.

7. Ground 4 claims that preferential regard was had to country of origin information or that there was no rational assessment of the evidence. For similar reasons this ground cannot succeed.

8. Ground 5 contends that having accepted the credibility of the applicant, the tribunal failed to arrive at a decision cognisant of the evidence in the s. 11 interview that once you pay a bride price "*you belong to the man, he can do whatever he wants*". That seems to me to be a restatement of ground 3 and fails for the same reasons.

9. Ground 6 claims that there was a breach of s. 16(6)(a) of the Refugee Act 1996 and reg. 5(1)(a) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) in failing to consider the well-foundedness of the claim in the light of the country of origin reports and "*failing to consider the comprehensive grounds of appeal and submissions made on behalf of the applicant*". But para. 3.20 of the decision states that all material was considered. Therefore, this point cannot be made out in the absence of proof to the contrary (see *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401, *per* Hardiman J.)

10. Returning then to ground 1, this ground contends that the decision is irrational insofar as the tribunal accepts the material facts at para. 5.8 including the fear of harm at the hands of a criminal who paid a bride price for the applicant. However, it was held that there was an insufficiency of evidence that this criminal "Ernest" would cause the applicant problems. It is, however, not necessarily irrational to accept the applicant's story as to what happened in the past but not the likelihood of her subjective fears as to future matters. Those are two different things. The tribunal considered the risk of persecution from Ernest quite separately from that in relation to the mother, Ernest being dealt with at para. 6.3 and the mother at paras. 6.4 to 6.9. Consideration of whether there is good reason not to think that past persecution might give rise to risk of future persecution in accordance with reg. 5(2) of the 2006 regulations was only engaged in in respect of the separate decision in relation to the mother. There is no consideration of reg. 5(2) of the 2006 regulations in the discussion regarding Ernest. As regards the mother, the tribunal considered the principle that where a protection applicant has already been subject to persecution, that shall be regarded as serious indication of the well-founded fear of persecution unless there are good reasons to consider that such persecution will not be repeated (see reg. 5(2) of the 2006 regulations and the judgment of the CJEU in joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others*, ECLI:EU:C:2010:105 at paras. 89 and 92 to 100). Good reasons are required if the persecution is likely to be of the same nature as the past persecution (see Hailbronner and Thym, *EU Immigration Asylum Law*, 2nd edn. (C.H. Beck/Hart/Nomos, 2016), Part D III, by Judge Dörig at p. 1140). The tribunal considered that good reasons existed for holding that the subjective fear of future risk was not

established. Firstly, the applicant was two years older than she was at the time of the persecution. Previously she was a minor or around the age of majority. Secondly, she was now an independent person having obtained a university place despite the mother's interference and "*successfully plotting her own course in life*". Thirdly, the country of origin information does not fully support the claim of future risk "*given her current age and circumstances*". Can it be said that these reasons were not open to the tribunal on the facts? I do not think so. Whether or not one might necessarily arrive at the same decision oneself I do not think that these reasons were outside the range of reasons open to the tribunal under this heading.

11. However, as regards Ernest, para. 6.3 of the decision does not consider reg. 5 at all and Ms. Reilly submits that that did not have to be considered because of an insufficiency of evidence of future risk. However, it seems to me that that submission does not reach the point at issue. If it is accepted that there was past persecution, the decision-maker needs to consider positively whether there is good reason to consider that there would be no future risk. There is a finding at para. 6.5 that the mother's behaviour amounts to persecution. No similar finding is made in relation to Ernest but it would seem at first sight to follow because part of the mother's behaviour was an agreement to effectively sell the applicant to Ernest. It is suggested there was no past behaviour involving Ernest but that is not so. He made an agreement and paid a price in that regard. He is certainly well implicated in the persecutory behaviour if the applicant's account is accepted, which it seems to be. It seems to me therefore that in this particular fact- specific context the decision-maker should have gone on to consider whether to apply reg. 5(2) in respect of the risk of future harm from Ernest. I am not saying that it is not conceivably open to the tribunal to hold that reg. 5(2) is not applicable if some stated reason for such a conclusion could be arrived at but the tribunal does not seem to have considered the question of whether to apply reg. 5 in this context at all. It seems on the face of it more likely that the tribunal should have considered and applied reg. 5 and assessed whether the past persecution would give rise to a fear of future persecution from Ernest. It is agreed between the parties that the procedure to be followed in the event of the decision being quashed will be that set out in a letter from the Chief State Solicitor's Office dated 15th March, 2018.

Order

12. For the foregoing reasons there will be an order of *certiorari* removing for the purpose of being quashed the decision of the tribunal refusing the applicant's application for asylum and remitting the matter back to the tribunal in accordance with the procedure set out in the letter from the Chief State Solicitor's Office dated 15th March, 2018.