

## THE HIGH COURT

## JUDICIAL REVIEW

[2018 No. 823 J.R.]

BETWEEN

P.A.F. (NIGERIA)

APPLICANT

AND

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

RESPONDENTS

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 15th day of March, 2019**

1. The applicant was born in Nigeria in 1987 and worked there as an evangelical Christian preacher. He and his partner had two children together there and lived with his parents, sister and children. His claim, which was essentially accepted by the International Protection Appeals Tribunal, was that on 16th September, 2015 his family home was the subject of an attack by Boko Haram, his father was shot, the applicant was forced to lie in his blood, and was threatened with a knife. His father was then stabbed and died from his injuries. The applicant was then taken prisoner for approximately two months and was subject to torture and inhuman and degrading treatment.

2. He arrived in the State on 4th December, 2015 and applied for asylum on 7th December, 2015. On 3rd November, 2016 the Refugee Applications Commissioner rejected his claim for asylum and did not accept the credibility of his account. He appealed to the Refugee Appeals Tribunal on 16th December, 2016. On 31st December, 2016 the International Protection Act 2015 came into operation and the applicant submitted an application for subsidiary protection on 21st February, 2017. In the course of that application the applicant submitted a number of medical reports attesting to his suffering from post-traumatic stress disorder and related symptoms. On 8th December, 2017 the International Protection Office rejected the application for subsidiary protection and on 16th January, 2018 the applicant appealed to the International Protection Appeals Tribunal. On 19th September, 2018 the tribunal rejected the appeals. The tribunal member accepted the credibility of the applicant's account but held that the applicant could internally relocate within Nigeria. The tribunal also held that there were no compelling reasons arising out of past persecution which would render the applicant eligible for protection as a refugee; and the present proceedings turn on that latter aspect of the decision.

3. Barrett J. granted leave in the present proceedings on 15th October, 2018, the primary relief sought being an order of *certiorari* quashing the tribunal decision in part, namely as to paras. 8.2, 9.1, 12.3 and the first sentence of para. 12.4 only. A statement of opposition was filed on 25th January, 2018 and I have now received helpful submissions from Mr. Mark de Blacam S.C. (with Ms. Marie Flynn B.L.) for the applicants and from Mr. Tim O'Connor B.L. for the respondents.

**Whether the applicant can seek to quash part of a decision only**

4. While the applicant has raised this as a question, it does not appear to be particularly disputed on behalf of the respondents. If the part of the decision that is impugned is legitimately severable from the remainder there is no reason why an applicant cannot seek to quash a decision in part only, or indeed why a court cannot fashion that as an appropriate remedy in a particular case (see *H.A.A. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 34 [2018] 1 JIC 2303 (Unreported, High Court, 23rd January, 2018), *A.A. (Pakistan) v. International Protection Appeals Tribunal* [2018] IEHC 497 [2018] 7 JIC 3138 (Unreported, High Court, 31st July, 2018)).

**Test to be applied when assessing the presence of compelling reasons**

5. Mr. de Blacam's main argument was focused on ground 3 of the statement of grounds, which contends that "*The first respondent erred in law in applying the wrong test when considering whether or not there were "compelling reasons" arising out of past persecution alone which would warrant a determination that the applicant is eligible for protection as a refugee. The first respondent erroneously applied a "very high threshold of atrocity" test rather than an "atrocity" test.*"

6. The origin of the "compelling reasons arising out of past persecution" standard lies in the somewhat different context of art. 1 of the Geneva Convention. Article 1A defines the term "*refugee*" as applying to two categories of persons essentially (1) pre-1951 refugees and (2) current and future refugees. That distinction has some relevance to the later clause of the Convention dealing with cessation of refugee status. Under art. 1C, the Convention "*shall cease to apply to any person falling under the terms of section A*" if one of a number of situations arise. The relevant situation in the present case is that under para. 5, which is "*He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality*". A similar proviso in relation to compelling reasons arising out of previous persecution also applies to the related exception at para. 6 of art. 1C of the Convention.

7. Thus, under the Geneva Convention, the question of compelling reasons arising from past persecution is not a ground for recognition of refugee status as such in the first place but only an exception to the application of the cessation clause. It does not extend the definition of refugee in the first instance but allows somebody who has already been recognised as a refugee to continue to be so recognised where the basis for that recognition would otherwise have ceased to exist. These provisions of the Geneva Convention were implemented as an exception to the cessation or revocation procedure in the Refugee Act 1996 at s. 21(2). However, that provision goes well beyond the Geneva Convention. The compelling reasons proviso to the cessation clause under the Geneva Convention only applies to art. 1A(1) refugees, that is pre-1951 refugees, rather than contemporary refugees. Hathaway and Foster in *The Law of Refugee Status*, 2nd ed. (Cambridge, 2015) at p. 490 state that this is "*no accident*", citing *R. v. Special Adjudicator ex parte Hoxha* [2005] UKHL 15 at para. 16. Notwithstanding that limitation in the Geneva Convention, the benefit of this exception to the cessation clause has been extended by Irish legislation to all refugees, whether historic or contemporary. However, the point remains that the Geneva Convention has "*no provision to grant status to persons on the basis of past persecution alone*" (Hathaway and Foster at p. 163).

8. A separate development then occurred by virtue of reg. 5(2) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006), which provides that the fact that a protection applicant has already been subject to previous

persecution or serious harm or threats in that regard shall be regarded as a serious indication of having a well-founded fear of persecution or harm (in the absence of good reasons to consider that such will not be repeated) *"but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection"* (reg. 5(2)). A protection applicant under the 2006 regulations includes an applicant for either asylum or subsidiary protection (see reg. 2(1)). Thus Irish law as of 2006 went considerably beyond the Geneva Convention in yet a further respect, namely that compelling reasons arising from past persecution or harm was regarded as substantively extending the scope of entitlement to refugee status or subsidiary protection status itself in the first instance. The 2006 regulations were made under the European Communities Act 1972, and thus could only have been lawfully and validly made if they were *"necessary"* to implement EU law. There must be some significant question mark over whether this was a lawful provision because the extension of eligibility for refugee status and subsidiary protection status, while compatible with EU law, was not necessitated or required by it (see *S.I. v. Minister for Justice and Equality* [2016] IEHC 112 [2016] 2 JIC 1517 (Unreported, High Court, 15th February, 2016) at para. 63 and *B.A. v. International Protection Appeals Tribunal* [2017] IEHC 36 (Unreported, High Court, 27th January, 2017) per Keane J. at para. 39).

9. I will proceed for the time being on the assumption that it is unnecessary to decide on the question of validity for the purposes of the present case. On that assumption, the effect of the 2006 regulations was to create an additional ground for protection on the basis of compelling reasons arising from past persecution which went well beyond the cessation context, as indeed was held by Clark J. in *N.N. (Cameroon) v. Minister for Justice and Equality* [2012] IEHC 499 [2014] 3 I.R. 396 at pp. 404 to 406. The 2006 regulations were amended by the European Union (Subsidiary Protection) Regulations 2013 (S.I. No. 426 of 2013) reg. 32(2)), which confined the scope of the compelling reasons arising from past persecution clause to applications for refugee status and removed references to subsidiary protection. The effect was thus to cut down on the scope of the compelling reasons ground for protection.

10. A further significant change occurred with the 2015 Act which repealed the 1996 Act and revoked the 2006 regulations. Section 9(3) of the 2015 Act retains the concept of compelling reasons as a factor in the context of cessation of refugee status and s. 11(3) correspondingly retains compelling reasons as a factor in the context of cessation of subsidiary protection status. But the effect of the 2015 Act is that insofar as compelling reasons were a factor in the definition of refugee status in the first place, that provision has been revoked.

11. The present applicant, as noted above, is someone who had an appeal pending to the tribunal's predecessor body on the date of commencement of the 2015 Act and of revocation of the provisions on which he now relies. The tribunal chairperson's statutory guidelines no. 1/2018, issued under the 2015 Act, indicate that in such case *"the transitional provisions of s. 70(2) of the International Protection Act, 2015 should be interpreted so as to allow consideration of compelling reasons by the Tribunal in the limited number of cases where an appeal against a recommendation from the Office of the Refugee Applications Commissioner (ORAC) that a person not be granted refugee status was pending before the Tribunal at the time of the commencement of the 2015 Act"*.

12. Whether one views that outcome as a consequence of the need for necessary modifications, that is recognised in s. 70(2), as suggested in the chairperson's guidelines, or whether one considers that an appeal before the tribunal is equivalent to a form of *"legal proceedings"* covered by s. 27(2) of the Interpretation Act 2005 or involves a right protected by s. 27(1) of that Act, given that the applicant's appeal was pending on a particular legal basis when the law was changed, there would at a minimum needed to have been express provision to apply a change which related to substantive rights as opposed to merely procedural rights to that appeal, assuming, without deciding, that it would have been constitutionally permissible to do so.

13. The logic of s. 27(2) of the Interpretation Act 2005 very much militates in favour of a view that that the statutory intention was that the appeal would be decided on the basis of the substantive law in existence as of the time the appeal was lodged. That is a very different situation from a case where an applicant had a mere right to bring proceedings or otherwise avail of a repealed provision, being a right that was not exercised prior to a change in the law that extinguishes it. Such a change in the law is a legitimate option that may be exercised by the Oireachtas and s. 27(2) does not apply to that. Nor would s. 27(1) apply save where there was something in the nature of a vested right which would make it unjust to allow a pre-existing possibility of proceedings to be extinguished. The upshot here is that the present case is to be determined by reference to what might be called the old definition for qualification for refugee status rather than that arising under the 2015 Act.

#### **Whether the correct test was applied here**

14. In dealing with this point the tribunal held as follows: *"The Tribunal considers what the appellant experienced to be utterly abhorrent. Nonetheless the Tribunal does not consider the return of the appellant to Nigeria within and of itself to be so traumatic as to expose the appellant to inhuman and degrading treatment. It is clear from the case law that 'compelling reasons' is a doctrine reserved for situations of past persecution reaching a very high threshold of atrocity, some of the (non-exhaustive) examples being given including witnessing mass murder, genocide and ethnic cleansing. The relevant threshold of atrociousness for establishing compelling reasons is not reached on the facts of this case"*.

15. While in its own terms it is not immediately clear what caselaw the tribunal is referring to or where the tribunal is getting the test from, the source appears on further examination to be *M.S.T. v. Minister for Justice and Equality* [2009] IEHC 529 (Unreported, High Court, 4th December, 2009) per Cooke J. at para. 32. It might be worth turning to that paragraph to give the full context. Cooke J. referred to the difficulties of interpretation of the final clause of reg. 5(2) of the 2006 regulations and went on to say: *"Notwithstanding the difficulties presented by the additional wording, there cannot be any doubt, in the Court's view, that the additional wording can only be construed as intending to permit some limited extension to the conditions of eligibility prescribed in article 4.4 designed to allow some latitude in according subsidiary protection based exclusively upon the fact of previous serious harm when it is accompanied by compelling reasons. It is relevant to bear in mind that 'serious harm' is defined as including 'inhuman or degrading treatment'. (See para. 23 above.) It is possible therefore to envisage a situation in which an applicant had escaped from an incident of mass murder, genocide or ethnic cleansing in a particular locality. Even if the conditions in the country of origin had so changed that no real risk now existed of those events happening once again, the trauma already suffered might still be such as to give rise to compelling reasons for not requiring the applicant to return to the locality of the earlier suffering because the return itself could be so traumatic as to expose the applicant to inhuman or degrading treatment."*

16. The first point that will immediately strike the reader in relation to this paragraph, having regard to the contextual and legislative history I have set out, is that the focus of Cooke J. in considering the question of compelling reasons is within the context of the definition of subsidiary protection, including inhuman and degrading treatment. As will be apparent from the chronology I have set out above, that ceased to be a relevant legal consideration in 2013 when the provisions of reg. 5(2) were amended to exclude its application to subsidiary protection. The tribunal member in the present case applied the comments of Cooke J., including the references to inhuman and degrading treatment, to the present case as if nothing had changed whereas in fact the entire legal context had changed by setting the provision firmly in the context of refugee status alone. That seems to have stemmed from the reliance on *M.S.T.* in the statutory guidelines.

17. More fundamentally, international protection law is a matter of EU and international law and is a road well-travelled in all major jurisdictions both on the continent and across the globe. It is not something to be formulated or reprogrammed on the basis of *ad hoc* judgments of the Irish Superior Courts. The concepts of mass murder, genocide or ethnic cleansing that are mentioned by Cooke J. are just examples that happened to occur to him to illustrate the point being made. No particular basis in EU law or in international texts or materials is set out in *M.S.T.* to specify that those are particularly definitional instances of the concept being discussed and indeed, as noted above, those examples were in the context of considering compelling reasons in the subsidiary protection context, which itself includes inhuman and degrading treatment as opposed to the broader notion of refugee status. Therefore, undue reliance should not be placed on the examples given by Cooke J. in *M.S.T.* and one should turn instead to the underlying texts and materials. In applying the compelling reasons test in the context of the substantive definition of refugee status, the law and practice in relation to that concept in the cessation clauses is a useful guideline, while not of course binding law (see the approach of Keane J. in *B.A.* at para. 35).

18. The UNHCR Handbook at para. 136 refers to a situation where a person "*may have been subjected to very serious persecution in the past*" and says that a person who or whose family has "*suffered under atrocious forms of persecution should not be expected to repatriate*", thus apparently equating "*atrocious*" persecution with "*very serious*" persecution.

19. The UNHCR Guidelines on the cessation clauses at para. 20 state that:

*"This exception is intended to cover cases where refugees, or their family members, have suffered atrocious forms of persecution and therefore cannot be expected to return to the country of origin or former habitual residence. This might, for example, include ex-camp or prison detainees, survivors or witnesses of violence against family members, including sexual violence, as well as severely traumatised persons. It is presumed that such persons have suffered grave persecution, including at the hands of elements of the local population, and cannot reasonably be expected to return."*

20. The concept of compelling reasons is also reflected in art. 11(3) of the Qualification Directive (Recast) 2011/95/EU which, while not applicable to Ireland, is again of persuasive assistance. It is discussed in Hailbronner and Thym, *EU Immigration and Asylum Law*, 2nd ed. (C.H. Beck/Hart/Nomos, 2016) at p. 1198 by Judge Ingo Kraft who states that it is "*not a general invitation to exercise humanitarian or compassionate jurisdiction*" and refers to the requirement for "*very serious persecution*" or "*atrocious forms of persecution*", citing the UNHCR Handbook at para. 136. Kraft stresses that it is an objective test which "*has regard for a particular mental situation of an individual*". Hathaway and Foster at p. 493 suggest that the clause requires "*particular account of the psychological hardship that might be faced by the victims of persecution*" while noting that the clause was not a "*general invitation to exercise humanitarian or compassionate jurisdiction*". At p. 494, Hathaway and Foster cite the decision of the US Court of Appeals for the Ninth Circuit in *Lal v. Immigration and Naturalisation Service* (2001) 255 F. 3d 998 (Jul. 3, 2001). The court there, referring to a statutory provision similar to that in Ireland which extended the concept of compelling reasons arising from past persecution so as to be a basis for a substantive protection in the first instance, said that "*One who has been persecuted and seeks asylum falls within the regulatory exception if they possess compelling reasons for being unwilling to return to his or her country arising out of the severity of the past persecution.*" ... *Although we ordinarily owe the [Board of Immigration Appeals] some deference to decide what type of past persecution is severe enough, we need not defer if the line they draw is arbitrary or otherwise unreasonable.* *Santamaria-Ames v. INS*, 104 F.3d 1127, 1132 n. 7 (9th Cir. 1996) ('[D]eference is not afforded if the administrative construction is clearly contrary to the plain and sensible meaning of the regulation.'). *Crown Pacific [v. Occupational Safety & Health Review Commission]*, 197 F.3d [1036 (9th Cir. 1999)] at 1040 ('[I]n examining a regulation, we take into account common sense, the regulatory purpose and the practical consequences of the suggested interpretations.'). That was decided in the American context which (by virtue of the doctrine in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which has no counterpart in Ireland) involves a considerable deference to the statutory decision-maker's own interpretation of legislation. Nonetheless the approach of the Ninth Circuit has some illuminating parallels with the present case.

21. Continuing with the psychological theme, Hathaway and Foster also cite the decision of the Canadian Federal Court in *Suleiman v. Canada (Minister of Citizenship and Immigration)* (F.C.) 2004 FC 1125; [2005] 2 F.C.R. 26. at para. 19 to the effect that consideration under the compelling reasons clause needs to be given to "*the extent of travail of the inner soul to which the [refugee] would be subjugated*".

22. In *B.A. v. International Protection Appeals Tribunal*, the tribunal asked whether the persecution was "*atrocious*". That was held to be a legitimate approach by Keane J. in that case, and I respectfully agree.

23. The decision in the present case involves the following problematic features:

(i). The decision is dominated by reference to inhuman and degrading treatment which is a subsidiary protection and *refoulement* concept, not one that should be read as cutting down the broader definition of qualification for refugee status.

(ii). The decision places undue reliance on the extreme cases that happened to have been mentioned by Cooke J. in *M.S.T.*, which again were inspired by the context he was considering of torture and inhuman and degrading treatment, and therefore involves a misunderstanding of the test in the refugee status context that applies here.

(iii). The tribunal failed to consider the broader issues of international or EU law which illuminate the question of what amounts to compelling reasons. The examples put forward by Cooke J. were not intended to be definitional or comprehensive and were not ones based on a broad consideration of such international texts and materials.

(iv). Given that the tribunal referred to a "*very high threshold of atrocity*" I should not be left in the position of having to endure a semantic debate as to what the tribunal exactly meant by that and whether that was distinct from the concept of "*atrocious*" *simpliciter*. Certainly, I cannot exclude the possibility that the tribunal had something in mind different from *atrocious simpliciter* under this heading. If all the tribunal meant was that *atrocious* is required and that that is a very high threshold (higher than persecution alone), then that is not a problem, but the wording in its context is not sufficiently clear.

24. Having regard to the combined effect of all of those features of the present decision, I conclude that the tribunal asked the incorrect question under this heading. The correct question is whether past persecution was atrocious to the extent that compelling reasons to afford the applicant refugee status exist because the applicant could not reasonably be expected to return notwithstanding regime change or an internal relocation option. I should emphasise that that is not to equate atrocious persecution and compelling reasons on the one hand with the concept of it being unreasonable to expect an applicant to return on the other. There may be situations where an applicant might contend it is unreasonable to return, but that in itself is insufficient. The applicant

must also show past atrocious persecution and compelling reasons arising from that. Nonetheless, this question was not properly posed by the tribunal in the present case.

#### **Other grounds**

25. Grounds 1, 2 and 4 of the statement of grounds allege unreasonableness, irrationality, failure to provide adequate reasons and the question of what exactly the tribunal meant by the compelling reasons test. Those points do not add very much to the points made under ground 3, which encompasses the gist of the applicant's case, so it is not necessary to consider them further.

#### **Order**

26. The only thing that would stand in the way of the applicant obtaining relief in the present case is the very significant question mark over the validity of reg. 5(2) of the 2006 regulations, as amended. Both parties were enthusiastic in their efforts to dissuade me from considering that issue, and I will humour them on this occasion, primarily for the reason that the issues now under discussion are purely historic following the revocation of the 2006 regulations. Therefore, it is unlikely that there will be very many people in the applicant's situation, so my applying reg. 5(2), despite the question mark as to its validity, could be viewed as not amounting to a significant inroad into the rule of law.

27. The order therefore will be one quashing the tribunal decision in part, namely as to paras. 8.2, 9.1, 12.3 and the first sentence of para. 12.4, and remitting the matter to the same tribunal member to complete his decision in accordance with this judgment.