THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 728 J.R.]

BETWEEN

L.F. (SOUTH AFRICA)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 1st day of July, 2019

1. The main elements of the applicant's claim for international protection were accepted by the tribunal member in the present case. The applicant is a South African national born in Cape Town in 1976 and has four daughters born in 1993, 1997, 2002 and 2005. The first two children have different fathers from each other and from the younger daughters. The applicant lived in Cape Town up to 2016. Following her finding out in 2015 that her partner, Mr. O., a national of Nigeria, was involved in organising prostitution, the applicant was herself falsely imprisoned and raped and was threatened that her daughters would be kidnapped and forced into prostitution.

2. On 3rd February, 2016, she left South Africa and came to Ireland. According to her asylum questionnaire she stated that the location of the two older children was "N/A", which was not a very informative answer. Her counsel says that his instructions are that the two older children were living independently by 2016. One was a teenager and one was in her early twenties. The two younger daughters, as well as the daughter of one of the older children, were left behind in Cape Town with the applicant's mother and grandmother. On 12th February, 2016, the applicant applied for asylum. She was notified that this was refused on 19th July, 2016, and on 5th August, 2016 she appealed that decision to the Refugee Appeals Tribunal. After the commencement of the International Protection Act 2015 she was deemed to have applied for subsidiary protection and submitted a questionnaire in that regard.

3. On 23rd November, 2017 she was notified that the International Protection Office had refused the application for subsidiary protection. She then appealed to the International Protection Appeals Tribunal on 12th December, 2017. An oral hearing took place on 5th April, 2018. Mr. Shannon Haynes B.L. appeared for the applicant. The tribunal rejected her appeals on 14th August, 2018 and she was so notified on or about 17th August, 2018.

4. The present proceedings were filed on 5th September, 2018 and I granted leave on 10th September, 2018. A statement of opposition was filed on 21st February, 2019. The primary relief sought in the proceedings is *certiorari* of the IPAT decision of 17th August, 2018, although the relief sought is limited to particular paragraphs of the decision, namely paras. 5.13 to 5.19, 7.1, 8.7 to 8.9 and 10.1, the idea presumably being that the applicant wishes to preserve the favourable parts of the tribunal decision. I have received helpful submissions from Mr. Mark de Blacam S.C. (with Mr. Garry O'Halloran B.L.) for the applicant and from Ms. Emma Doyle B.L. for the respondents.

Alleged non-compliance with s. 32 of the 2015 Act

5. Ground 1 contends that "*The decision of the IPAT is vitiated by reason of the finding, at paras. 5.13-5.19 and paras. 8.7-8.9, that the Applicant can avail of internal relocation without compliance by the IPAT with Regulations 13(5) and (6) of the European Union (Subsidiary Protection) Regulations 2013 and Section 32 of the International Protection Act 2015.".*

6. This point is incorrectly pleaded because regs. 13(5) and (6) had already been revoked by s. 6 (2)(n) of the 2015 Act prior to the applicant being deemed to have made an application for subsidiary protection, which only occurred on the commencement of the 2015 Act. Therefore the consideration of internal relocation is governed by the 2015 Act exclusively and not by the 2013 regulations as far as the present case is concerned. The relevant provision of the 2015 Act is s. 32(1)(b). Section 32(1) provides for the possibility of refusing the claim for international protection on the grounds of internal relocation and states that an international protection officer or the tribunal can consider an applicant not to be in need of international protection: *"if in a part of the country of origin the applicant (a) has (i) no well-founded fear of being persecuted or is not at real risk of suffering serious harm, or (ii) access to protection against persecution or serious harm, and (b) can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there."*

7. There is some divergence between this wording and the corresponding wording of art. 8.1 of the qualification directive 2004/83/EC, which refers to a requirement that "*the applicant can reasonably be expected to stay in that part of the country*". The reference to "*stay*" in the 2004 directive was also contained in the 2013 regulations. By contrast the reference to "*settle*" which is used in the 2015 Act appears to originate in the recast qualification directive 2011/95/EU, which is not applicable to Ireland. Why the term "settle", a term which on the face of it is more emphatic than "stay", was used in the 2015 Act is unclear. No explanation whatsoever was furnished on behalf of the respondents other than the circular one that the definitions of statutory terms are a matter for the Oireachtas. That does not inspire any great confidence that the wording of this provision of the 2015 Act was fully thought through, and indeed the respondents' inability or perhaps more likely unwillingness to explain the wording suggests the possibility that the word "*settle*" was inserted in error.

8. Ms. Doyle argues that the applicant did not raise this distinction as a point until it came up at the hearing but that does not really matter because if legislation is up for interpretation the court has to interpret it. It cannot be prevented from doing so by the failure of a party to advance the correct interpretation, so the issue of statutory interpretation goes somewhat beyond the normal adversarial process. The court cannot dodge the obligation to give a correct interpretation to a statute, and indeed that follows also from the fact that individual judges make a declaration to uphold the Constitution and the laws. However, I will park for a moment any distinction between "*stay*" and "*settle*" which may not in any event make a huge practical difference depending on the facts of any given case.

9. According to Judge Harald Dörig writing in Hailbronner and Thym, *EU Immigration and Asylum Law* (2nd ed., C.H. Beck/Hart/Nomos,

2016) at p. 1160, there are four major elements to the question of whether it is reasonable for an applicant to relocate within his or her country of origin. Dörig was writing in the context of art. 8 of the 2011 recast qualification directive but precisely the same point arises under the 2004 directive, apart from the difference in wording, to which I have referred. In summary the four elements are as follows. First, there may be no well-founded fear of being persecuted or no real risk of suffering serious harm in the area concerned. Second, the person concerned must have access to protection. Third, he or she must be able to travel safely and legally to that part of the country and gain admittance there. Fourth, the applicant must reasonably be expected to settle in the area.

10. Four related criteria are referred to by Hathaway and Foster in somewhat different language in *The Law of Refugee Status* (2nd ed., Cambridge, 2014) at p. 342 where the authors referred to accessibility of the place by the applicant, the risk feared being reliably negated, there being no new risks and that *"an examination of the quality of what is on offer in the proposed place of internal protection to ensure that it can fairly be said that the applicant can benefit from 'the protection of that country'"*. The authors say that the fourth one is controversial and involves a spectrum of opinion as to whether affirmative protection has to be demonstrated or whether relocation is to be judged by "*a standard of reasonableness*", one which Hathaway and Foster reject. They do in fairness acknowledge at p. 350 that the reasonableness approach is "*the predominant … approach*", which originated in the UNHCR handbook. At p. 353 they suggested "*wide ranging factors*" come into play under this heading and at n. 415 they referred to the fact that "*familial ties*" are mentioned as part of the consideration in the US regulations 8 CFR 208.13(b)3. As I say, Hathaway rejects the notion of the reasonableness test altogether but it is clear that this view does not represent the law.

11. As regards that fourth limb, Judge Dörig at p. 1163 n. 266 cites a document produced by the European Council on Refugees and Exiles (ECRE), *Actors of protection and the application of the internal flight alternative,* 2014. At p. 62 of that document, the ECRE state that *"In France, according to an OFPRA internal note, the absence of relatives in the region is not in itself an obstacle to applying the IPA, but the presence of family members is a determinative aspect. UK authorities do not consider the absence of family connections a bar to the IPA, but consider it relevant in cases of women in societies where survival outside a family structure is difficult. In Hungary, family connections are considered in case of vulnerable asylum seekers but often not in the case of healthy young males"*. At p. 65, which is the reference cited by Judge Dörig, the ECRE report says "*In France both the Council of State and the Constitutional Court refer to the possibility for the applicant to lead a* 'normal family life'. *This would support an interpretation of* 'stay' *or* 'settle' *as meaning permanent residence*". The report cites the decision of the Constitutional Court (*Conseil Constitutionnel*), 4th December, 2003, (Decision n° 2003-485 DC) Official Journal (Journal Officiel) of 11.12.2003 p. 21085 Council of State 21.12.2012 (01FRSFGM), as well as "*decisions from the CNDA considering that the applicant should* 'settle durably and peacefully' *in a region*".

12. On the subject of the helpfulness or otherwise of Hathaway's textbook, Mr. de Blacam's article "*In Defence of the Textbook*" (2018) 41(1) D.U.L.J. 175, is relevant. It is certainly to be celebrated that Mr. de Blacam, whether as writer or advocate, makes his points vigorously, courageously and respectfully (a respect that is certainly mutual as far as I am concerned); but that of course does not mean that all of those points are automatically correct. The implied thesis of his article, as the title suggests, is simple. One aspect of one textbook (Hathaway) was viewed with reservation in one case (*I.E. v. Minister for Justice and Equality* [2016] IEHC 85 [2016] 2 JIC 1505 (Unreported, High Court, 15th February, 2016)). But given that we are told (by Mr. de Blacam) that judges conventionally view textbooks with what sounds like fawning admiration, the *I.E*. judgment must be construed as an attack; and an attack on one textbook must surely be an attack on all. But where is the d'Artagnan of the courtroom to defend, not just *a* textbook but "*the*" textbook from this judicial dastard? Step forward Mr. de Blacam.

13. Leaving aside the grandiosity of the article's central thesis, it is perhaps worth saying that as a criticism of the *I.E*. decision, the article is unimpressive. The basic point made in *I.E*. stands, namely that seeing as Hathaway is acknowledged even now by Mr. de Blacam to be something of a text with an agenda, it needs to be used with caution, particularly when its authors are in campaigning mode. Indeed not only I am unpersuaded by Mr. de Blacam's criticisms of the reservations towards Hathaway, I would double down on those reservations based on the present case. The authors of Hathaway certainly are in campaigning mode in relation to the point of law at issue in the present proceedings. More even-handed textbooks tend to be somewhat more useful. However, that does not mean that Hathaway is a useless work; far from it. I have derived assistance from it in a number of cases such as. *B.D. (Bhutan and Nepal) v. The Minister for Justice and Equality* [2018] IEHC 461, *B.K. (Albania) v, Refugee Appeals Tribunal* [2017] IEHC 746, *P.A.F. (Nigeria) v. The International Protection Appeals Tribunal* [2019] IEHC 204, and *G.B. v. Refugee Appeals Tribunal* [2016] IEHC 517, [2016] 1 IR 731. In the latter context I noted that while *I.E. v. Minister for Justice and Equality* [2016] IEHC 85 (Unreported, High Court, 15th February, 2016) para. 29 illustrated that Hathaway's analysis was at times that of an advocate rather than a disinterested academic, in the point at issue in the *G.B.* case, Hathaway's discussion was a fair reflection of the law relating to the Geneva Convention. That involves a balance of positives to be set against the reservations, a balance that is not conspicuously acknowledged in Mr. de Blacam's rather crusading article.

14. On the plus side, Mr. de Blacam makes a significant point that international texts and materials are crucial to considering asylum and protection law and that this area cannot be thought of in parochial or purely Irish terms. I could not agree more, and indeed that is a point I have repeatedly tried to make, stressing that this whole area of law must be viewed in terms of a well-travelled road of EU law and the Geneva Convention rather than being attemptedly structured on the basis of *ad hoc* judgments of the Irish superior courts: see *A.A.L. (Nigeria) v. International Protection Appeals Tribunal* [2018] IEHC 792 [2018] 12 JIC 2126 (Unreported, High Court, 21st December, 2018) at para. 19, *P.A.F. (Nigeria) v. International Protection Appeals Tribunal* [2019] IEHC 204 [2019] 3 JIC 1512 (Unreported, High Court, 15th March, 2019), at para. 17. In that context it is therefore with a little disbelief that one reads Mr. de Blacam's complaint that *I.E*. adopts a "*parochial*" approach to protection law. Here unfortunately Mr. de Blacam's not inconsiderable skills as a writer possibly disserve the reader because they obscure the almost surreal falsity of the complaint being made. Perhaps that is just the necessary price readers have to pay for the choice of a choking-on-one's-organic-muesli tone of modish umbrage adopted by Mr. de Blacam in this ululating exercise in social justice warfare. Far from advocating parochialism, the point needs to be repeatedly made that asylum and immigration law is not something to be made up by Irish judges on the hoof. The *grandes lignes* of the law in this area are laid down at European and international level. Therefore, European and international texts and materials, including academic works, are always welcome in elucidating that (see e.g. per Baker J. in *M.A.M. v. Minister for Justice & Equality* [2019] IECA 116 (Unreported, Court of Appeal, 29th March, 2019) para. 55 "*That [a court] tested [its] interpretation against [relevant] international instruments, case law, and commentary is not just permissible but appropriate")*, as long as one takes note of a health warning if the text is a campaigning one, as Hathaway not infrequently is. In the present case, while referencing materials in a footnote that throw a little light on the issue, Hathaway's view of what the law should be would take us a distance away from what the law actually is. Thus the point made in *I.E*. is not only not displaced, but is reinforced, by the present case.

15. The essential complaint here is that there was inadequate consideration of the applicant's personal circumstances and particularly in terms of whether it was reasonable to relocate, including the failure to consider the question of whether the children could be relocated to Johannesburg and how contact would be maintained. It is clear from Judge Dörig's discussion of this issue that the family situation is relevant. The UNHCR guideline no. 4 on internal flight is somewhat more vague, although it does say that family circumstances should be considered. Paragraph 25 says "*The personal circumstances of an individual should always be given due weight in assessing whether it would be unduly harsh and therefore unreasonable for the person to relocate in the proposed area. Of*

relevance in making this assessment are factors such as age, sex, health, disability, family situation and relationships… Depending on individual circumstances, those factors capable of ensuring the material and psychological well-being of the person, such as the presence of family members or other close social links in the proposed area, may be more important than others.". The same point was made by Clark J. in *K.D. (Nigeria) v. Refugee Appeals Tribunal* [2013] IEHC 481 [2013] 1 I.R. 448, noting that one relevant factor could be whether the applicant is "*old, infirm, ill, has many small children or is without family support and other real issues*".

16. Ms. Doyle generally accepted that family circumstances could be relevant and were part of personal circumstances and submitted that the question here was whether they were adequately considered. However, adequate consideration in the present context would have to involve considering how the applicant would maintain contact with family members if relocated. In the case of a dependent child that would involve considering who would look after the child, and if that was somebody other than the parent, whether and how contact would be maintained and whether the overall arrangement was reasonable. It seems implicit in the tribunal decision that the tribunal member thought that the current custody arrangements would continue with the children in Cape Town and the mother in Johannesburg maintaining contact at a long distance. The tribunal member did not go on to ask whether that would be reasonable in the long term. That amounts to a failure to correctly apply the reasonableness test. In particular, the tribunal member's statement that the mother could avoid telling the children where she was does not appear to comply with the requirement that the arrangement be reasonable. One cannot seriously expect a mother to relocate without telling her children where she is. More broadly, whether it is reasonable to consider that the parent should continue to be separated from a child or children if returned to the country of origin is open to debate, to say the least. The applicant had been caring for the children before the flight, and consideration should have been given to whether they could all go to Johannesburg and if so whether that was reasonable. Hence the tribunal failed to make a clear assessment of what the precise family arrangement was going to be in the country of origin and whether that arrangement was one to which the applicant could reasonably be expected to submit.

Alleged irrationality in deciding that the applicant can avail of internal relocation

17. Ground 2 contends that "*The decision of the IPAT that the Applicant can avail of internal relocation is further flawed by reason of the irrational finding, at the end of para. 5.15, that "The fact that the appellant's children are still in Cape Town and have not only not been harmed by Mr. [O] but have in fac[t] received financial support from him indicates that he does not pose any danger to them and may not have any intention of pursuing the Appellant if she relocates to Johannesburg in any event"."*

18. The problem in the very fact-specific situation in this case is that the decision-maker found as a fact that Mr. O was involved in organising prostitution. Having regard to that finding of fact it is not possible to rationally draw a benign inference from his interest in the applicant's young daughters. That interest may be benign or it may not be but on these facts one cannot conclude that that his interest is benign simply because he is providing financial support. The respondents argue that if there is an infirmity with this particular finding in relation to Mr. O. it is severable from the internal relocation assessment, relying on *M.Y. v. Minister for Justice and Equality* [2017] IEHC 129 (Unreported, High Court, 23rd February 2017) *per* O'Regan J., *H.A.A. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 34 [2018] 1 JIC 2303 (Unreported, High Court, 23rd January, 2018), and *Krupecki v. Minister for Justice and Equality* [2018] IEHC 538 [2018] 10 JIC 0112 (Unreported, High Court, 1st October, 2018). However, this aspect is clearly not severable. As noted above, the finding on internal relocation involved a decision both that there was no risk in Johannesburg and that it would be reasonable to relocate there. The first leg of that is clearly related to the tribunal's view of the ongoing level of risk from Mr. O.

Order

19. Accordingly, the order will be one of *certiorari* partly quashing the decision to the extent of paras. 5.13 to 5.19, 7.1, 8.7 to 8.9 and 10.1, and remitting the matter to the same tribunal member to complete the decision in accordance with the judgment of the court.