

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 35

Record No. 2019/923JR

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

BETWEEN

LP

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Ms Justice Tara Burns delivered on 21st day of January 2021.

General

1. The Applicant is a national of Zimbabwe who applied for International Protection in the State on 21 November 2016. His claim was based on an assertion that he would face persecution because of his sexual orientation if returned to Zimbabwe. The Applicant completed an Application for International Protection Questionnaire on 20 February 2017 and attended a s. 35 interview on 29 August 2018.
2. The Applicant was refused a declaration of refugee status and subsidiary protection by the International Protection Office on 7 March 2019. He appealed to the First Respondent. An oral hearing was held on 5 of June 2019 and reconvened on the 25 June 2019. The Applicant was refused a declaration of refugee status and subsidiary protection by the First Respondent on 13 November 2019: the First Respondent found the Applicant's claim that he was gay not credible having regard to the inconsistencies which were at the core of his claim.
3. Leave to apply by way of Judicial Review seeking an Order of Certiorari of the First Respondent's decision was granted by the High Court on 16 December 2019.

The Protection Claim

4. The Applicant claimed that he was in a relationship in Zimbabwe with his male partner. Zanu PF youths threatened to kill the Applicant and his boyfriend. In September 2016, Zanu PF youths entered his partner's house in a menacing manner: the Applicant fled but his partner was attacked and seriously injured. The Applicant asserted that his mother informed him that his partner had been hospitalised and had subsequently died of the injuries sustained in the attack. Arising from this, the Applicant left Zimbabwe in November 2016.
5. In its decision, the First Respondent explored the following inconsistencies with respect to the Applicant's claim that he was a gay man in a same sex relationship:-

"4.4 The Appellant did not know the date of [his partner's] death or when [his partner's] funeral took place and his explanation at the hearing was that he never asked his mother for that information. The Appellant stated in his s. 35 interview... that [his partner] went to the hospital and "after some weeks he passed on". However, at

the appeal hearing the appellant stated that [his partner] died 5 days after arriving in hospital. The Appellant's explanation for this inconsistency was that he is not sure when [his partner] died. The Tribunal does not find that this response explains why the Appellant would give two different timeframes i.e. "weeks" and "5 days" for [his partner's] death after arriving in the hospital.

- 4.5 *At the appeal hearing, the Appellant stated that he spoke to his mother once in between the attack and leaving Zimbabwe. In his direct evidence, the Appellant stated that his mother told him, over the phone in October 2016, that [his partner] was in the hospital. When the Appellant was asked for details of what his mother told him over the phone call he stated that she just told him that [his partner] was in the hospital and awake. The Appellant stated that he did not know what injuries [his partner] sustained during the attack. The Appellant stated that his mother told him that [his partner's] cause of death was the injuries he sustained during the attack and that she told him this on the same phone call of October 2016. The Appellant did not have an explanation for why he had stated earlier that she only told him that [his partner] was in hospital during this phone call. The Appellant further stated that [his partner] died in September 2016 and that his mother informed him of this in September 2016. When asked to explain why he earlier stated that his mother told him that [his partner] was in the hospital in October of 2016 and is now saying that [he] died in September of 2016, the Appellant stated that he cannot remember and he is not sure. The Appellant was given a further opportunity to explain these inconsistencies and the Appellant said that he made a mistake when he stated that his mother told him that [his partner] was awake in the hospital of October 2016.*

At the reconvened hearing the Appellant confirmed that after the attack in [his partner's] house and before leaving Zimbabwe he only spoke to his mother once. The Appellant's explanation for the inconsistent accounts of when he spoke to his mother and of what she informed him over that phone call was that his mother was not on good speaking terms with [his partner's] parents so she could not get proper information. The Tribunal does not find that the Appellant's responses are reasonable explanations for the inconsistencies.

- 4.6 *At the appeal hearing the Appellant stated in his direct evidence that [his partner's] parents had called him and said that it was the Appellant's fault that [his partner] died because of what the two of them were doing together. The Presenting Officer asked the Appellant if he tried to contact [his partner] while he was in the hospital. The Appellant said that he did not and his explanation for this was that he was afraid to call [his partner] and afraid to speak to [his partner's] parents because his parents had blamed him for what happened. However, the Appellant has earlier said that [his partner's] parents called him after [his] death, blaming him for [his partner's] death, which is clearly after [his partner] was being treated in hospital. The Appellant's explanation for the inconsistency was that [his partner's] parents were in the house when the attack happened and blamed him for the attack. That*

Appellant had not previously stated, at any stage of the Protection process, that [his partner's] parents were present during the attack. Later in the appeal hearing, the Appellant was asked about what contact he had with [his partner's] parents on the day of the attack and since he fled. The Appellant said he did not speak to [his partner's] parents on the day of the attack. The Appellant was then asked to explain why he earlier said that on the day of the attack [his partner's] parents said that he was to blame. The Appellant did not have a reasonable explanation for this and simply stated that they said that to him. The Appellant asked which account is correct, did he have contact with [his partner's] parents on the day of the attack or not, and what was the level of contact. The Appellant's response was that [his partner's] parents did speak to him on the day of the attack and it was when the men came in shouting that [his partner's] parents said to him that it was his fault. When asked about whether [his partner's] parents were injured on the day of the attack the Appellant said he does not know as he had no contact with them since the day of the attack. However, the Appellant had earlier given evidence that [his partner's] parents had called him and said that it was the Appellant's fault that [his partner] died and furthermore, in the Appellant's written submissions it is stated that "The Appellant is upset by [his partner's] family who are of the view that the Appellant is enjoying his life while their son is dead" (Legal submissions, August 2018). The Appellant was asked to explain this considering he has said that he has not heard from [his partner's] parents since the attack. The Appellant's response was that [his partner's] parents spoke to his mother. The Appellant further said that he did not know when the conversation between his mother and [his partner's] parents took place. The Appellant was asked if he found out from his mother whether [his partner's] parents were injured on the day of the attack in September 2016 and the Appellant's response was that he did not ask. The Tribunal does not find that the Appellant's account in relation to [his partner's] parents being in the house during the attack and blaming him for the attack and death of [his partner] to be credible because the Appellant's responses have not reasonably explained the inconsistencies as outlined in this paragraph.

- 4.7 *The Appellant stated at the appeal hearing that he realised he was gay at the age of 10 because he was doing different things than the other boys such as playing with dolls. However, in the s 35 interview the Appellant stated that he realised he was gay at the age of 15 and that it started when he was 15 (Q29, s35). At the s 35 interview the Appellant was asked how he is able to pinpoint so specifically that he was 15 when he realised he was gay and his response was "The things I used to do. I wasn't doing boy stuff much". At the appeal hearing, the Appellant was asked further specific questions on this point by his solicitor and the Appellant stated that at age 15 he realised he was not the same as other boys because he preferred to play with dolls and mostly played with girls. However, this did not remove the inconsistency about the age that the Appellant realised he was gay. The Appellant's explanation for the inconsistency was that he realised he was gay when he was 15 but he started when he was 10.*

- 4.8 *The Appellant confirmed at the appeal hearing that he was friends with [his partner] for 5 years and they began dating and had a 7 year relationship and that the relationship ended when [his partner] died in 2016. The Appellant's evidence as to when he was in a relationship with [his partner] was particularly inconsistent. The Appellant stated at the appeal hearing that he began dating [his partner] in 2009 and this was a 7 year relationship that ended in 2016. It is evident from the Appellant's date of birth that the Appellant was age 34/35 in 2009. However, at the s35 interview the Appellant stated that after 5 years of friendship they started a relationship and he was age 26 or 27 when the relationship with [his partner] started, therefore around 2000/2001. (Q34 – 35. S35 interview). The Appellant was asked at the hearing to explain this inconsistency and his response was that he is "not sure". The Appellant was asked again what age he was when he began dating [his partner] and he said 26 or 27. As such, the Appellant was asked to explain why he said in his evidence that the relationship began in 2009 and the Appellant's explanation was that he said to people in 2009 that they were in a relationship.*
- 4.9 *At the reconvened hearing the Appellant was given a further opportunity to address this significant issue. The Appellant confirmed that after meeting [his partner] they were friends for 5 years; they then began dating and had a 7 year relationship ending when [his partner] died in 2016. The Appellant was asked if his evidence is that this relationship began when he was 26 or 27 and the Appellant's response was that he now thinks he was age 30 when they started dating. The Tribunal noted that if the Appellant began dating [his partner] when he was age 30 then the relationship started in 2004 and, as he said the relationship lasted 7 years, this would mean it ended in 2011, which is 5 years before [his partner] died. This inconsistency was put to the Appellant and his response was that the friendship started in 2004 and lasted 5 years. The Appellant was asked to explain why there is such a big difference in the ages he has given for when the relationship with [his partner] started i.e. age 26/27, age 30, age 34/35. The Appellant's response that he is not sure. Considering that the Appellant has stated that this was his only relationship and his claim is entirely based around this relationship, the Tribunal does not find it credible that the Appellant could not give an approximate age for when this relationship began. The Tribunal does not find it reasonable that the age given by the Appellant continued to change when it did not fit with the claim he was putting forward. The Tribunal does not find that the Appellant's responses are reasonable explanations for this serious inconsistency.*
- 4.10 *At the appeal hearing the Appellant stated that after he left [his partner's] house on this day of the attack, he went to stay with [O] who is a relative on his father's side. However, in the s35 interview the Appellant stated that [O] was a friend and he never said that he was a relative (page 9, s35 interview). The Appellant's explanation for this inconsistency was that [O] was not a close relative. In the Appellant's direct evidence, he stated that he stayed with [O] because he knew it was safe there; he cannot stay there now because [O] died when he was beaten up coming from the pub, he does not know why [O] was attacked. When asked about*

[O's] sexual orientation, the Appellant stated that [O] was not gay. However, the written submissions dated June 2019 sent on behalf of the Appellant state that, " in June 2018 the Appellant found out that his friend, [O] who had offered him shelter after the attack on his home and who was also gay had been killed" and also that, " The Appellant's friend, [O], who was also gay and offered him refuge when he was hiding in Zimbabwe before he could flee, was killed in June 2018". When asked about the difference in the written submissions, the Appellant confirmed that he did say [O] was gay and his explanation for this inconsistency was that he did not know if [O] was gay or not. The Appellant was asked to explain why he would say that [O] was gay if he did not know and his response was that [O] took him into his house so he could have been gay. The Tribunal does not find that this is a reasonable explanation for putting forward false information.

4.11 The Appellant stated that people came to his mother's house for a second time in June of 2017 or 2018. The Appellant stated that he does not know the year because he goes long periods without speaking to his mother. The Appellant stated that the men who came in his house last June said to his mother "your son is gay". The Appellant was asked why he never said at the s35 interview that the men said to his mother that her son is gay when they called in June. The Appellant's response was that he is not sure and sometimes he is stressed. The Appellant was asked why these men would wait 9 months or 18 months to call to his mother's house and the Appellant then said that the men said they wanted to check if he was still around. The Tribunal finds that the Appellant has a duty to mention important factors, such as what was said to his mother when these men called to her house, at the first opportunity..."

Grounds of Challenge

6. The grounds relied on by the Applicant in seeking an order of Certiorari of the First Respondent's decision are that the First Respondent:-

- (i) failed to properly consider the Spirasi report submitted on behalf of the Applicant;
- (ii) failed to assess the future risk to the applicant in Zimbabwe, if returned, having actively participated in activities such as attending and being photographed at a Pride parade;
- (iii) failed to separate the material facts of the applicant's sexuality and his account of the attack in Zimbabwe;
- (iv) failed to give the Applicant the benefit of the doubt;
- (v) failed to give reasons as to why it was not applying the benefit of the doubt;
- (vi) failed to properly assess country of origin information to determine whether the Applicant may have been vulnerable to persecution for other reasons.

Spirasi Report

7. A medical report was submitted to the First Respondent from the Applicant's GP which stated that the Applicant was suffering from PTSD. A medical report was also submitted from Spirasi which stated that the Applicant met the criteria for a diagnosis of complex PTSD, as well as symptoms related to anxiety and a diagnosis of major depression. A detailed care plan in respect of the Applicant was set out and his progress within the groups he had been referred to was referred to. It was noted that the Applicant was in a psychologically vulnerable state. The Spirasi report concluded by stating:

"In addition to the above, it is worth noting that evidence suggests that the traumatic events have a different effect on memory to non-traumatic events. The examining physician during the initial assessment noted that [the applicant] suffers from depression. Dietrich (2000) states "one of the most frequent and neuro-psychologically well-investigated symptoms in depression is reduced memory capacity and Pelosi (2000) demonstrated that depressed patients had poor recall and concluded major depression significantly affects working memory."
8. The Applicant asserts that the First Respondent erred in its consideration of the Spirasi report and specifically failed to have regard to the information that depression can have a negative impact on the capability of an affected person to remember. It is asserted that the First Respondent failed to consider this issue when considering the various inconsistencies which arose in the Applicant's account.
9. The difficulty with this argument is that there was no evidence before the First Respondent that the Applicant suffered from a lack of recall or had difficulties with memory. Indeed, the evidence before the First Respondent was to the contrary in light of observations relating to his "*Mental State Examination*" made by a psychologist when conducting a psychological review, under the auspices of Spirasi which is included in the Spirasi report, to the effect that "*he did not report any problems with memory or cognition*". So while the Spirasi report most certainly refers to the Applicant as suffering from trauma and refers to objective scientific findings that people who suffer trauma can have difficulty with memory, the underlying subjective link between these two issues in the Applicant's case is non-existent as there is no complaint from the Applicant that he has difficulty remembering events, or clinical finding from a medical source that this is a symptom which the Applicant is suffering from.
10. Further, when discrepancies in his various accounts were put to the Applicant over the course of the two hearings held before the First Respondent, he never asserted that he had a difficulty with his memory. The furthest the Applicant went was when he was asked why he never said at the s. 35 interview that the men who called to his mother's house said to his mother that her son is gay: he said, in response, that he was not sure and sometimes he is stressed. Furthermore, an analysis of his various accounts relating to his protection claim, as carried out by the First Respondent, reveals that it was not that he was unable to give an account of events, but rather that he gave different accounts at different times.

11. As with any decision maker, it was a matter for the First Respondent to assess the medical evidence before it, which it did in the following manner at paragraph 4.12 of its decision, as follows:-

"The report from Spirasi...states that the Appellant met the criteria for a diagnosis of Complex PTSD, as well as symptoms related to anxiety and a diagnosis of Major Depression. The Spirasi report cited medical articles relating to the negative effects of depression on memory capacity. However, there is no finding in the report that the Appellant has a problem with memory and the report notes that the observations of the psychologist included that the Appellant did not report any problems with memory or cognition. The Appellant was found to be in a psychologically vulnerable state. The findings of this report, including the diagnosis of PTSD, anxiety and major depression have been taken into consideration during the appeal hearing and when assessing the Appellant's credibility."

12. These were findings which were open to the First Respondent to make having regard to the medical evidence before it and no error can be discerned from the manner in which it assessed and applied the medical evidence.

Failure to assess the future risk to the applicant in Zimbabwe having actively participated in activities such as attending and being photographed at Pride

13. The Applicant submitted photographs of attending a Pride parade, in support of his claim. The First Respondent considered these photographs from the perspective of whether they substantiated the Applicant's claim. The First Respondent determined that the photographs did not outweigh the serious credibility issues which arose with respect to the Applicant's claim of being gay, which it rejected.
14. The Applicant now submits that the First Respondent failed to consider the consequences which these photographs might have for the Applicant if returned to Zimbabwe. This argument must be assessed in light of the First Respondent's finding that it did not accept the Applicant's claim that he was gay.
15. A preliminary issue arises with respect to this submission which is that it did not form part of the Applicant's claim before the First Respondent. The Applicant's claim was based on his assertion that he was a gay man. This was rejected by the Tribunal. An argument was not made that his presence at the Pride parade would cause him difficulties regardless of his sexual orientation. This is a fundamental difficulty for the Applicant with respect to his challenge to the decision of the First Respondent on this ground. In judicial review proceedings, it is not permissible for an applicant to litigate issues which were not argued before the decision maker whose decision is under review. A decision is under review arising from what was at issue: it is not under review because of the consequences of the decision.
16. Counsel for the Applicant asserts that the submissions made on his behalf were wide enough to encompass this argument. The Court does not agree. While reference was indeed made by his solicitor to attitudes to the Applicant by other residents of his accommodation centre since his attendance at the Pride parade was publicised, those

submissions were based on him being a gay man which was rejected by the First Respondent.

17. Accordingly, this ground of challenge is not open to the Applicant.

Failure to separate the material facts of the applicant's sexuality and his account of the attack in Zimbabwe

18. The Applicant submits that the First Respondent should have assessed the Applicant's claim to be a gay man separate to his account of the asserted attack in Zimbabwe.
19. The First Respondent did determine the Applicant's claim to be a gay man and determined this assertion against the Applicant. In making this determination, the First Respondent clearly considered the Applicant's evidence relating to the asserted attack in Zimbabwe but it also considered his evidence relating to more general issues of his realisation of being gay and his life as a gay person. It is not factually correct to assert that the First Respondent only considered his assertion of being gay from the perspective of the asserted attack. The First Respondent determined that the Applicant's claim to be a gay man was not credible in light of all the evidence which was more far ranging than simply the asserted attack.
20. The reasons why the First Respondent rejected the Applicant's claim of being gay are clearly set out. I do not accept that there was a requirement on the First Respondent to set out a set of reasons as to why it did not accept the Applicant's claim to be gay separate to the asserted attack. The First Respondent was required to consider the Applicant's claim as a whole, which it clearly did.

Benefit of the Doubt

21. The Applicant submits that the First Respondent failed to assess whether the Applicant was entitled to the benefit of the doubt in the assessment of his claims.
22. The First Respondent stated the following at paragraph 4.15 of its decision regarding the assessment of the Applicant's claim and the applicable standard of proof:-

"Having carefully considered the material facts of the Appellant's claims..., the Tribunal finds that the Appellant's claim... is not credible, on the balance of probabilities, for the reasons set out above. There are no facts or circumstances in which the benefit of the doubt can apply taking into account relevant case law and the UNHCR handbook."

23. Giving the Applicant the benefit of the doubt simply did not arise for consideration in this case given the fact that the Applicant's general credibility was rejected. As stated by Humphreys J in *JUO (Nigeria) v. International Protection Appeals Tribunal* [2018] IEHC 710L at paragraph 16 of his decision-

"[U]nder this heading, the applicant launched a point about the benefit of the doubt, but it is well-established both in the UNHCR handbook para. 2014 and in the International Protection Act 2015 s. 28(7) that the principle of the benefit of the

doubt simply does not apply unless the applicant's general credibility is already established."

24. The Court fails to see what error is asserted on the part of the First Respondent in light of its finding that the Applicant was not credible in his claim. The Applicant's general credibility was not established as is clear from the terms of the decision, therefore the stepping stone for applying a consideration of the benefit of the doubt was never reached.

Failure to properly assess country of origin information to determine whether the Applicant may have been vulnerable to persecution for other reasons

25. The Applicant refers to a report in the Guardian Newspaper relating to a call on the United Kingdom government to stop deportations to Zimbabwe in light of human rights abuses in the country. The Applicant asserts that the First Respondent failed to consider this country of origin information in light of other issues which might cause difficulties for the Applicant, if he was returned to Zimbabwe, such as his support for the MDC or that he would be a returnee.
26. Firstly, this was not the basis of the claim which was being made by the Applicant before the First Respondent. The Applicant was not asserting that he was at risk of future persecution for either of these reasons. Secondly, the Applicant indicated in evidence before the First Respondent that he did not think that being a member of MDC caused him any difficulties.
27. As already indicated in this judgment, this Court can only review a decision of the First Respondent having regard to the claim and arguments made before the First Respondent. The reason for that is because of the review process which this Court is engaged in. This Court cannot entertain arguments not made before the First Respondent because such an exercise has nothing to do with reviewing the decision to determine its lawfulness.
28. Having considered and assessed the Applicant's claim, the First Respondent's found that the Applicant "*was not a victim of past persecution, whether in the form of assault or otherwise*" and that "*[t]here was no threat to the Applicant from anyone which can be characterised as real, personal or present i.e., he does not have a well-founded fear*" having regard to the claim made by him. This is a clear determination by the First Respondent of previous harm and future harm asserted by the Applicant in the course of his claim which the First Respondent rejected.
29. The Applicant has failed to establish any of the grounds of challenge to the First Respondent's decision which were submitted by him.
30. I therefore refuse the Applicant the relief sought and make an order for the Respondents costs as against the Applicant.