

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 693

RECORD NO. 2020/765JR

BETWEEN

NK

APPLICANT

-AND-

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

RESPONDENTS

JUDGMENT of Ms. Justice Tara Burns delivered on 28 October 2021

General

1. The Applicant is a national of Zimbabwe who entered the State on 6 July 2018 and thereupon applied for international protection.
2. The Applicant was interviewed pursuant to s. 35 of the International Protection Act 2015 (hereinafter referred to as "the 2015 Act") on 30 July 2019 and 18 September 2019.
3. An International Protection Officer (hereinafter referred to as "an IPO") recommended that the Applicant be granted neither a refugee nor subsidiary protection declaration on 22 October 2019.
4. The Applicant appealed this negative recommendation to the First Respondent. On 27 February 2020, an oral hearing took place before the First Respondent who determined to affirm the first instance negative recommendation on 24 September 2020.
5. 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 9 November 2020 on the grounds that the First Respondent erred in fact, acted irrationally or unreasonably, engaged in speculation or failed to discharge its shared duty when making certain credibility findings, and failed to determine an important aspect of the Applicant's claim.

The Protection Claim

6. The Applicant asserts that he is a bisexual man who has been involved in a number of same sex relationships, including a long term relationship relevant to his claim. He claimed that in March 2018, as a result of been seen kissing his long-term partner in public, he was assaulted by a group of men. After this attack, he asserted that he experienced threats from persons in his local community. He left Zimbabwe in May 2018 travelling through South Africa before arriving in Ireland. The Applicant claimed to fear that he would be killed if he returned to Zimbabwe because of his sexuality, or perceived sexuality by members of his community.

The First Respondent's Decision

7. Having analysed various aspects of the Applicant's claim, the First Respondent determined that it did not accept, on the balance of probabilities, that the Applicant identified as bisexual or differently orientated.

8. The Applicant does not challenge all of the credibility findings made against him by the First Respondent, however he challenges three such findings which he asserts cumulatively renders the First Respondent's decision unsafe.
9. The Applicant produced a GALZ (Gay and Lesbian Zimbabwe) membership card, in his name, to an IPO in August 2019. This was after the Applicant informed the IPO, at his first s. 35 interview in July 2019, that he never had been a member of a LGBT organization and said that he could not name any such organisation. The Applicant was called back for a second s. 35 interview in September 2019 to explain this discrepancy. The explanation he gave at that interview was similar to the explanation he gave to the First Respondent at the oral hearing. The First Respondent recorded the Applicant's evidence, and its determinations in relation to this issue, in the following manner, which is important to set out in full although the issue complained of has a much narrower focus:-

"The Appellant during examination in chief, informed his counsel that he had been a member of GALZ since 2014. He explained that he had not disclosed this during his first section 35 interview, as he had left his membership card behind him on top of his wardrobe in Gweru, and wanted to find someone who could find it for him, and send it to him in Ireland. He claimed that he feared that if he was asked if he was a member of such an organisation, but was unable to produce his membership card, then this would be a problem. Thus, he wanted to wait until he could procure the card before speaking about his membership.

The Appellant alleged that a friend of his mother's was visiting Zimbabwe from her home in the UK, and the Appellant's mother asked that friend to get the card for him, which she did and posted it to him from the UK upon her return. He stated that there had been previous attempts to post the card directly to him from Zimbabwe, but both DHL and Fed-Ex had refused to send it, as it had not been wrapped, and both companies feared taking the risk of posting a document associated with GALZ.

The Appellant was questioned by the Tribunal as to his answers in his first section 35 interview on this point. The Tribunal noted his explanation as to why he felt he could not disclose his GALZ membership, without supporting this assertion with a membership card. However, the Tribunal asked the Appellant why he had also claimed an inability to name any gay organization in Zimbabwe. The Appellant answered that since he was still trying to obtain his card at that juncture, he felt he would reveal everything after. The Tribunal in turn, indicated that it had difficulty understanding the logic of this explanation, to which the Appellant responded that he did not wish to talk about this issue. When asked why this was, the Appellant responded that the truth is that he is a member of GALZ.

The Appellant's explanation as to why he denied knowledge of any gay organization in Zimbabwe is not accepted by the Tribunal. Leaving aside his failure to mention his alleged membership of GALZ, the implication of which will be examined subsequently the Appellant has offered no credible explanation as to why the

physical absence of his membership card would cause him to deny knowledge of any gay advocacy organisations in Zimbabwe. The bedrock of the Appellant's claim for international protection is his alleged sexuality, and the Appellant was made aware at all stages of his claim of the importance of submitting relevant information to corroborate such claim. One need not be a member of a particular organization to be aware of its existence, and the Tribunal cannot accept as credible the proposition that the Appellant's inability to produce a membership card would cause him to give an answer during his first section 35 interview, which, through his answers in his subsequent interview and in the instant appeal, he suggests is untrue... However, the principle negative credibility finding arising from this answer is made on the basis of the Appellant's unexplained inconsistency between his answer in his first section 35 interview, and the subsequent position he adopted.

The Tribunal will now proceed to examine the Appellant's explanation as to his failure to mention his alleged GALZ membership during his first section 35 interview, when asked directly. The Tribunal asked the Appellant during his evidence, why he felt he could only assert his membership of GALZ if his membership card were present. The Appellant responded that he felt that if he had claimed GALZ membership, he would have been asked to produce his card and he could not, he would have gotten into trouble. The Tribunal asked him if he had not considered explaining that his card was in Zimbabwe, and offering to subsequently produce it. The Appellant responded that such an answer would be forthcoming without any proof...

The Appellant's explanation as to his inability to assert GALZ membership absent his physical membership card is not accepted as credible by the Tribunal. It is not accepted as credible that the Appellant was under the misapprehension that making claims unsupported by documentary evidence would result in adverse implications, given that he made similar assertions about this alleged attack, for example. Moreover, the Appellant has failed to credibly explain why, if he were a GALZ member, he would not have informed the IPO of same, and simply explained the position as to the absence of his membership card. It is not accepted as credible that the Appellant would have felt that the better option was to mislead the IPO by denying membership of a gay organization, and - as put to the Appellant during his second section 35 interview - there was no guarantee at this juncture that the Appellant would be called back for a second section 35 interview meaning that the Appellant's putatively false assertion about his non-membership might to his mind, have constituted his final word as to this extremely important element of his claim during the first instance portion of his application.

Further credibility issues arise in respect of the Appellant's explanation as to why his membership card could not have been sent to him earlier, before a family friend had cause to travel to Zimbabwe and obtain it for him. This assertion is important, as it is linked to his explanation as to why no mention of his membership was forthcoming at or prior to his first section 35 interview, or until August 2019 when it

was submitted. He confirmed under cross-examination that neither DHL nor Fed-Ex in Zimbabwe would accept the card for sending. He confirmed, when asked, that his friend, who had attempted to send it via both entities, had walked into their offices and presented the card just as it was, uncovered. When asked to expand on his claim that it had been presented to the couriers without even an envelope covering, the Appellant claimed that it was for the couriers to wrap the package. At this juncture, the Tribunal intervened, and asked the Appellant why a small item such as a membership card could not be brought to the couriers in an envelope. The Appellant claimed that his friend had thought he could buy an envelope at the premises, before sending the card. The Tribunal then asked whether the Appellant's friend had attempted to first send the card via DHL or Fed-Ex, to which the Appellant responded DHL. The Tribunal asked, in such circumstances, why on the second occasion his friend had not learned his lesson from his first attempt, and nonetheless attempted to present the card uncovered for a second time. The Appellant did not directly answer the Tribunal's question, but stated that he himself was very stressed around the time of the attempts to send the card.

The Appellant is found not to have credibly reconciled clear inconsistencies in his narrative as to the sending of the card. The Tribunal finds that if the process of sending a membership card of an LGBT advocacy organisation by international courier is such an act of notoriety in Zimbabwe, the Appellant's friend is not likely to have taken such card to not one, but two couriers without taking any precautions to keep confidential its nature, even such precautions on a cursory level, such as putting it in a sealed envelope. Moreover, even if the tribunal is wrong in its previous finding, and the Appellant's friend ought not to have expected any difficulties in sending such a card, it is not accepted as credible that after an initial failed attempt to send the membership card, he repeated such attempt without any effort to package or wrap the card himself. In making this finding, the Tribunal does not purport to make findings or declarations as to the normal operations of couriers in Zimbabwe, but rather finds that the Appellant has failed to reconcile apparent inconsistencies which have become apparent to the Tribunal from his narrative, and has answered evasively when one such issue was put to him."

Not Concealing the GALZ Membership Card

10. The Applicant specifically complains that the First Respondent's finding that the Applicant's friend was not likely to have attempted to send the GALZ card via courier, without taking steps to conceal its nature, is unsustainable in light of the fact that in Zimbabwe one is legally required to reveal the contents of a package in a wayfair bill attached to the package. This is despite the fact that the Applicant stated in his s. 35 interview, conducted in September 2019, that he informed the person, allegedly attempting to send the card, "to wrap the card in something else, but they didn't."
11. The criticisms of the First Respondent's determinations in this regard are misplaced. The First Respondent did not reject the evidence before it that wayfair bills are required to be

completed in Zimbabwe which disclose the nature of the contents of packages. The task which the First Respondent engaged in was to analyse the alleged steps taken to attempt to send the card so as to determine whether it could accept that these attempts had occurred, rather than assessing whether the alleged attempts could ultimately be successful.

12. The First Respondent determined that in light of the nature of the item which the Applicant's friend allegedly was attempting to send via courier, common sense would dictate that an effort to conceal the nature of the item would have been made by the Applicant's friend, if sending a card of this nature was an act of such notoriety. The First Respondent further found that even had the Applicant's friend not realised the difficulty of sending such a card, he was put on notice of this having allegedly made one failed attempt to do so. Accordingly, common sense would dictate that on the second alleged attempt he would have taken measures to ensure that the card would be accepted on this occasion. Arising from this analysis and the inconsistencies in the Applicant's account, the First Respondent did not accept that the alleged attempts occurred.
13. This is not speculation on the First Respondent's part. Rather, the First Respondent is determining the veracity of the Applicant's claim that an effort had been made to send this membership card. Simply because something has been stated in evidence before the First Respondent does not mean that the First Respondent must accept that evidence. Rather, the First Respondent must consider and analyse the evidence before it to determine whether to accept the evidence and what weight it should attach to it. In carrying out that exercise, it must of necessity apply common sense and a knowledge of life to the evidence before it. Determinations on questions of fact are quintessentially a matter for the First Respondent. This Court has made this observation regarding an assertion of speculation in a number of cases: *RK v. IPAT* [2020] IEHC 522; *SKS v. IPAT* [2020] IEHC 560; *EH v. IPAT* [2021] IEHC 367.
14. The difficulty with the Applicant's argument in this regard is that it is premised on the basis that these asserted attempts to send the GALZ card actually occurred. However, that is not the starting point for the First Respondent who rather is determining whether to accept the evidence that there were two failed attempts to send the GALZ card. The First Respondent is not engaging in speculation but instead is applying its common sense to decide whether this evidence is credible.
15. The determination made by the First Respondent was open to it to make. It is not an irrational or unreasonable finding. The shared duty on the First Respondent to investigate does not arise as the evidence that there were two attempts to send the GALZ card simply was not accepted, regardless of the legal requirements asserted to exist in Zimbabwe regarding wayfair bills.

Finding that the Applicant was Evasive

16. The Applicant challenges the First Respondent's determination that the Applicant was evasive in answering a question with respect to his friend allegedly attempting to send the GALZ card. This is an extremely difficult ground for the Applicant to establish as

determinations regarding the manner in which an individual gives his evidence are entirely for the First Respondent to determine. In reality, such a ground could only be successful if the Applicant was in a position to establish that the First Respondent's determination in this regard was based on an inaccurate interpretation of what had occurred before the First Respondent.

17. The First Respondent recorded that the Applicant did not answer a relevant question put by it to the Applicant regarding the alleged attempts to send the GALZ card. It recorded that the Applicant did not answer the question but stated that he was very stressed around the time of the attempts to send the card. The Applicant in his grounding affidavit avers that he was not evasive, however he does not challenge the First Respondent's record that he did not answer the question but rather stated that he was very stressed at that point in time. In his affidavit, he makes assertions that he was unable to answer the question put as it was outside his means of knowledge, however, this is not what he stated to the First Respondent when asked the question.
18. The First Respondent concluded that the Applicant answered evasively. This was a determination which was open to the First Respondent to make. It had the opportunity to observe the Applicant give evidence. The Applicant did not explain why he was not able to answer the question, as he now purports to do in his grounding affidavit. Instead, he gave an answer indicating that he was stressed at the relevant time. The conclusion drawn by the First Respondent that he was being evasive in light of the answer actually given rather than the answer provided in his affidavit cannot be said to be irrational or unreasonable.

Address of GALZ Headquarters

19. The First Respondent made the following determinations regarding the Applicant's lack of knowledge of the GALZ headquarters

“Notwithstanding the Tribunal has found there to be present inconsistencies in the Appellant's alleged GALZ membership, arising from the late stage at which this assertion was made, and the failure to adequately explain same, the Tribunal will proceed to address an issue that arose when the Appellant was asked about his interaction with that organisation, which he claimed to be a member of since 2014. The Appellant was asked by the Tribunal to describe his involvement in GALZ. He answered that the organisation would arrange meetings or outings: meeting in different places, and sometimes members would contribute money and go on a trip together. The Appellant was asked who the head of GALZ was, and he responded that he did not know. He was asked in turn who was the organiser of events, when the Appellant was a member. He answered that there was a man called Martin, but he did not know Martin's family name. The Appellant was subsequently asked by the Tribunal where GALZ's offices are located, and answered 'Harare'. He confirmed, when asked, that he had been to those offices. He was then asked what the address of the Harare office was. He answered that he attended at GALZ functions, and not at a particular address. He said that for GALZ events, they would meet somewhere in town, and never at the office. He said that he only attended at

the office when applying for his membership card. Again, in such circumstances, he was asked whether he could give a general idea as to the office's address. After considering, the Appellant said that he could not say, and that he did not want to say the wrong thing.

The Tribunal finds it more likely than not had the Appellant been a member of GALZ since 2014, and attended a number of their outings and functions, he would be in a position to give the full name of at least one person in an organizational capacity, and also name, even in general terms – the location of its Harare office. However, the Tribunal can also accept that the Appellant might not be a person particularly attuned to retaining such information, and notes that a person might be involved in the events of an organization without necessarily retaining all salient details. Accordingly, rather than serving to further undermine the Appellant's claim as to his membership of GALZ, his answers as set out in the preceding paragraph are simply found to have failed to corroborate his assertions in this regard, notwithstanding he has been given an opportunity to corroborate them."

20. The Applicant complains that this finding of the First Respondent is irrational and unreasonable in light of the fact that the Applicant had stated that he had only been at the GALZ headquarter premises on one occasion when he got his membership card, and the headquarter premises of GALZ is a fairly mundane generic building situated in a residential location which would not leave an impression on a person attending it.
21. This determination of the First Respondent was completely open to it to make. The Applicant asserted that he had been at the headquarters on one occasion. Having been unable to provide the address of the GALZ headquarters, he was asked to give a general idea as to the office's address, which he was unable to do. In light of the fact that the Applicant had been a member of the organization since 2014 and had allegedly attended the headquarters on one occasion to get his membership card, it cannot be said that the First Respondent's determination that he should have been able to give a general location of the GALZ headquarters was irrational or unreasonable.

Failure to Consider an Aspect of Claim

22. The Applicant submits that the First Respondent failed to consider an aspect of his claim which was that he feared persecution/serious harm as a result of being perceived as being bisexual rather than actually being bisexual, the First Respondent having determined that it did not accept that the Applicant identified as bisexual or differently orientated.
23. The difficulty with this aspect of the Applicant's claim is that the facts of his claim were based on an assertion that he had been seen kissing his partner in public and was thereupon attacked. After that attack, he asserted he was threatened regularly. The following excerpts from the Applicant's s. 35 interview conducted in July 2019 are of relevance:-

"Q Can you tell me in your own words why you are seeking international protection here in Ireland?

A I had problem in Zimbabwe in March 2018. I was caught intimately kissing another boy named [K]. We were beaten up by the community members. I went to my house after the beating and each time I would meet some community members they would threaten and intimidate me...

Q What is it you fear specifically about returning to Zimbabwe?

A I fear the possibility of being tortured and killed because I am bi-sexual. I am afraid of people who do not get along with the gay community the government cannot protect us."

Q Did you ever have any problems with being with other men.

A No because we kept it under the wraps and hid it

Q Did anyone in your village know you were bi-sexual

A Yes before we were caught they were always suspicious, they beat us in March 2018.

Q This beating happened in March 2018, you left for SA in May, for those two months tell me exactly what happened to you in Zimbabwe.

A I was in hiding at my grandmother's house, my grandmother died in 2007. Each time I left the house I would be threatened with punishment beating. These were community members

Q Were you ever beaten

A Just on the one occasion in March 2018".

24. The height of the Applicant's claim, in his s. 35 interview, that he was perceived as being bisexual or differently orientated by members of his community is that the community were suspicious. There are no details of how he knows that the community were suspicious or any events arising from this asserted suspiciousness. Counsel for the Applicant does not point to any evidence before the First Respondent which expands on this issue.
25. The First Respondent did not accept that the First Respondent identified as bisexual or differently orientated and did not accept that he had been subject to an attack in March 2018. Having rejected these aspects of the Applicant's claim, there were no other asserted facts which grounded a claim to fear persecution or serious harm because he was perceived as being bisexual or differently orientated. There was an assertion that the community were suspicious, but no details were given to establish that suggestion. The Applicant's claim was based on a limited number of assertions which were rejected by the First Respondent. The facts as accepted by the First Respondent did not ground a claim for establishing that the Applicant had a well-founded fear of persecution or faced a real

risk of being subjected to serious harm because he was perceived as being bisexual or differently orientated. There simply was no evidence adduced before the First Respondent to establish that he was perceived as being bisexual or differently orientated, separate to the evidence which was rejected by the First Respondent. Accordingly, a consideration of this claim did not arise.

26. The Applicant submits that the First Respondent erred in law in determining that it had to assess the Applicant's actual sexuality, as it is not always necessary to do so. This argument fails to recognize the extent, nature and detail of the first limb of the Applicant's claim which was that he was bisexual or differently orientated and because of this feared returning to Zimbabwe. In light of that claim it was necessary for the First Respondent to determine whether he was bisexual or differently orientated. Having rejected that claim, had there been other evidence before the First Respondent to establish that he was perceived by the general community as being bisexual or differently orientated, it would have been necessary for the First Respondent to consider that evidence, but there was no such evidence before it apart from an unfounded assertion that the community were suspicious.
27. Accordingly, the Applicant has failed to establish any of the grounds upon which he based his challenge to the First Respondent's decision. I therefore will refuse the relief sought and make an order for the Respondent's costs as against the Applicant.