THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 898 J.R.]

BETWEEN

J.M. (MALAWI)

APPLICANT

AND

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

RESPONDENTS

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

1. The applicant claimed international protection on 17th October, 2016 on the grounds of fear of persecution by reason of his sexual orientation. That was refused by the International Protection Office on the basis that his account lacked credibility. He appealed to the International Protection Appeals Tribunal and on 30th August, 2017 submitted country of origin information and stated that he would have two witnesses at the oral hearing. That took place on 5th September, 2017, when Ms. Aoife McMahon B.L. appeared for the applicant. Helpfully the applicant's solicitor has briefed in these proceedings the same counsel as appeared at the tribunal. In cases where that practice is not adopted, it means that the court is not assisted by counsel who were actually present and in a position to inform the court if necessary as to what happened at the hearing.

2. On 19th October, 2017 the applicant's solicitor submitted a medical report and a previous decision of another member of the tribunal, dated 4th October, 2017, regarding a case where a claim of persecution or serious harm in Malawi was successful on grounds of sexual orientation.

3. On 26th October, 2017, the tribunal rejected the appeal in a decision by Mr. Byron Wade B.L. The applicant was found to be credible but the issue was that a well-founded fear had not been established.

Procedural history
4. The primary relief sought in the proceedings is *certiorari* of the decision of the tribunal of 26th October, 2017. I granted leave on 20th November, 2017 and a statement of opposition was delivered by the respondents in February, 2018. The applicant delivered written legal submissions on 19th March, 2018 and the respondent followed suit on 16th April, 2018.

5. I have received helpful submissions from Mr. Michael Conlon S.C. (with Ms. McMahon) for the applicant and from Ms. Diane Duggan B.L. for the respondents.

Failure to take into account relevant considerations
6. As far as Mr. Conlon's argument encompassed failure to take into account the previous decision of another member of the tribunal, I will deal with that separately below. He also raised a point about failure to take into account a real risk of persecution and serious harm by reason of societal attitudes. That appears to overlap with the point made about non-state actors, which I will also deal with separately.

7. His independent point under the heading of failure to take into account relevant considerations was that pertinent parts of UNHCR guidelines were not narratively referred to. Reliance was placed on behalf of the applicant before the tribunal on the UNHCR *Guidelines in International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23rd October 2012. UNHCR guidelines are, of course, not part of the law and I have already rejected the concept that they need to be narratively discussed: see *S.A. (Ghana and South Africa) v. International Protection Appeals Tribunal* [2018] IEHC 97 [2018] 2 JIC 0104 (Unreported, High Court, 1st February, 2018) and the cases referred to in that decision. The decision of the tribunal member here says that evidence submitted was considered and refers to the UNHCR guidelines expressly at para. 2.14.

8. As far as the applicant's submission here is concerned, the Supreme Court decision in *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 [2018] 1 I.L.R.M. 109 has been read as a green light to qualify *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401 *per* Hardiman J., and to demand narrative discussion of points that are of interest to the applicant. That is not a correct reading. *Y.Y.* was an exceptional case given the absolute nature of art. 3 of the ECHR, as applied by the European Convention on Human Rights Act 2003, and the fact that the tribunal in that case had found a risk of future harm but that the exclusion clause applied. The decision in that exceptional case does not mean that any or all points made by an applicant in any other case have to be narratively discussed.

Equality before the law
9. Complaint is made that the applicant in this case was treated less favourably than the applicant in the other tribunal decision relied on. That submission is a complete non-starter. *Stare decisis* does not apply to the tribunal and there is no right to absolutely equal treatment compared to another person in the context of decisions by a panel of independent decision-makers. In any event, the facts of any two given cases are different and the individual decision-maker must have a margin of appreciation, which is not exceeded here. The point does not arise in any event because significantly less harm was found to this particular applicant than arose in the other case. Absolute equality in a tribunal context would be a one-way ratchet process whereby a single outlying favourable decision would cause a contagion of levelling-up throughout the system.

Inadequate reasoning
10. Mr. Conlon complains that there was a lack of reasons for the failure of the tribunal member to take into account the previous decision relied on. However, a reason was provided. The issue is not that the decision is unreasoned but whether the decision was fair, and I will deal with that separately below.

Failure to afford natural justice and/or breach of the International Protection Act 2015
11. As noted above, after the oral hearing the applicant's solicitors submitted a decision of another tribunal member and a medical

report. No complaint is made regarding the failure to consider the medical report. Jurisdiction to accept material from an applicant is set out in s. 46 (1) of the International Protection Act 2015. That provides for reception of material from an applicant under a number of different headings. Paragraph (a) encompasses the notice of appeal, which obviously includes any material submitted with that notice. Paragraph (e) encompasses evidence and representations submitted at the hearing and para. (f) provides for reception of "*such other matters as the Tribunal considers relevant to the appeal*". It is agreed that that allows for reception of material outside of the two specific timeframes mentioned, namely the notice of appeal itself and the confines of the hearing. It is in particular agreed by Ms. Duggan that the tribunal member did have jurisdiction to accept the submission made after the oral hearing.

12. Section 28(4)(a) of the 2015 Act requires the tribunal to consider all the relevant facts regarding country information "*at the time of taking a decision on the application*". Hailbronner and Thym, *EU Asylum and Immigration Law*, 2nd ed. (C.H. Beck/Hart/Nomos, 2016) at Chapter DIII by Judge Dörig, note that "*the relevant time for the assessment has thus been determined at the time of taking a decision*" (p. 1136).

13. The rationale for the decision by the tribunal member not to accept the late submission was that "*the said other decision is not conceivably relevant or of probative value. It relates to a different case, albeit from the same country*". He went on to make the point that no *stare decisis* applies within the tribunal. He then said, "*most of its value could only be as a piece of C.O.I., but any relevant C.O.I. could have been got well prior to the hearing*." There is certainly a problem here with the word "*conceivably*". A previous decision is something on which an applicant is entitled, in principle, to rely: see *P.P.A. v. Refugee Appeals Tribunal* [2006] IESC 53 [2007] 4 I.R. 94. A question of consulting such other decisions cuts both ways. For example, where a tribunal member has heard a case and is considering deciding it a particular way, he or she may consider it worthwhile to check other similar decisions before making his or her mind up finally. That is not a question of natural justice as such, but rather of the tribunal informing itself generally of the broad approach being adopted by other colleagues, before settling on a specific approach in the given case. This does not require recalling the parties to inform them that he or she has looked at a particular case or cases unless perhaps the tribunal member is planning to cite such cases in the decision.

14. The other tribunal decision relied on in the present case was M.M., Decision No. 1781955-IPAP-17. As regards the assessment of claim, paras. 4.2 to 4.4 are not relevant, and s. 5 regarding credibility is specific to that applicant. Section 6 regarding the well-founded fear is however relevant. Having said that, everything relied on in s. 6 of that decision was there before the oral hearing in the present case. What was not there was the fact that another tribunal member had applied such materials favourably. Certainly, the cases are different in the sense that the level of harm suffered by the applicant in the present case was, in the tribunal's view, not that significant. The unusual feature of the present case is that the other decision was not available at the time of the oral hearing. In those unusual circumstances the tribunal member erred in not receiving it, albeit that he did independently consider some of the material quoted, specifically the Home Office report, and albeit that any other country of origin information pre-existed the oral hearing. What the applicant could not be faulted for is not being able to urge the tribunal member to follow a similar approach to that of his colleague. Fairness requires that the applicant should at least be entitled to make that point and have it considered, of course without prejudice to the fact that any such other decision is not binding on a given tribunal member.

15. Ms. Duggan phrases the matter as a question of discretion but it is really one of fairness. A decision-maker does not have discretion to do anything that is unfair; and to hold that the tribunal member was entitled to decline to consider something which was not available to the applicant at any prior point would be a Catch-22 and would be unfair in the fact-specific circumstances of the present case.

Failure to address the question of non-state actors

16. The tribunal member says at para. 5.12 that he will come back to non-state actors, but Ms. Duggan accepts that he does not do so. That is an error on the face of the decision and thus a second independent ground on which the applicant should succeed.

Order

17. Before concluding, I should note that the tribunal member ends his decision with some *obiter* remarks about the applicant in the immigration context and says "*it is not my role but it does seem to me that he may be a good candidate for leave to remain or some other similar right*". There are a number of fundamental problems with comments such as these.

(i). As Mr. Wade himself acknowledges, such considerations are not the function of the tribunal.

(ii). Assessment of leave to remain would require consideration of additional materials and issues of which the tribunal simply has no knowledge, information, competence or expertise.

(iii). For tribunal members to make comments of this kind, or to be suggesting how any immigration dimension should be dealt with either positively or negatively, can only dilute the tribunal's statutory role and undermine public confidence in that role. That is so whether the tribunal says so expressly, as here, or on a nudge-nudge-wink-wink basis that notes archly that humanitarian concerns are for another forum.

(iv). Tossing out such views on a casual, *obiter* basis, trivialises the process of leave to remain, which is not a matter of no moment, as it typically involves a right to remain for life, a path to citizenship, the possibility of family reunification, and a right to remain not just for an applicant but for his or her descendants and those of any ultimately admitted family members, unto the thousandth generation. Any social, demographic or economic considerations arising from such a decision are ones for the executive to consider.

(v). Also, on another level, such comments sound like an each-way bet and dilute the actual decision which the tribunal *does* have jurisdiction to make.

(vi). Free-riding attempts by the tribunal to win friends and to soften the blow in this manner come at the expense of the Minister and indeed at the expense of court lists and other litigants, because they make a further judicial review inevitable if such leave to remain is not granted.

(vii). A final but deeply unnerving feature of Mr. Wade's comments here is that he places reliance on his belief that the applicant has not told lies as a reason why leave to remain should be granted. But telling the truth to the State is a bedrock obligation that applies to citizens, lawfully present non-citizens and illegal immigrants equally. Only in a nightmare jurisprudential landscape where legal rights had totally eclipsed legal duties would truthfulness amount to a super-special concession by an applicant that warranted being rewarded either with a right to remain or at all.

18. The errors identified here have a knock-on effect on too significant a portion of the decision to make it meaningful to consider a

partial quashing, so there will be an order of *certiorari* removing for the purpose of being quashed the decision of the tribunal and remitting the matter to another tribunal member for reconsideration.