THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 869 J.R.]

BETWEEN

M.I. (PAKISTAN)

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 25th day of June, 2019

1. The applicant is a national of Pakistan, born in 1974. He arrived in Ireland on 11th September, 2015 and applied for asylum. His claim indicated that he travelled *via* Pakistan, Iran, Turkey, Greece, other unspecified countries and the UK before coming to Ireland.

2. On 25th November, 2016 he was notified that the asylum claim had been refused. He appealed that to the Refugee Appeals Tribunal on 15th December, 2016. The grounds of appeal in that notice of appeal are summary handwritten grounds which provide no information whatsoever and simply contend that the Commissioner erred in fact and in law as the applicant had established a case to qualify for refugee status. That of course is utterly meaningless.

3. Country reports were also submitted and on 31st December, 2016, on the commencement of the International Protection Act 2015, the applicant was deemed to have made an application for international protection, and thereafter submitted a questionnaire seeking subsidiary protection.

4. On 22nd March, 2018 he was informed by the International Protection Office that the subsidiary protection claim was refused.

5. On 9th April, 2018, he submitted a notice of appeal to the International Protection Appeals Tribunal. The grounds of appeal are relatively opaque, certainly when compared with the submissions made in the present judicial review, and don't really address the various inconsistencies in the applicant's evidence in much detail. The grounds of appeal claim a "*mistake*" in the applicant's original evidence but don't put that down to medical reasons. By way of another example, they don't make any case about indiscriminate violence in the country of origin, which is part of the grounds as pleaded in the present judicial review. Again one has to make the basic point that it is not open to an applicant to make a point at the judicial review stage that he or she hasn't contested in the tribunal hearing.

6. An oral hearing took place on 19th July, 2018 when Ms. Lisa McKeogh B.L. appeared for the applicant.

7. On 13th September, 2018, the tribunal rejected the appeal and the applicant was so notified by letter dated 17th September, 2018, received on 20th September, 2018.

8. The present proceedings were filed on 22nd October, 2018, possibly slightly out of time, although sensibly the respondents have not raised any issue about that.

9. I granted leave on 5th November, 2018, the primary relief sought in the proceedings being *certiorari* of the decision of the tribunal.

10. The substantive notice of motion was returnable for 19th November, 2018 and a statement of opposition was filed on 14th March, 2019. I have now received helpful submission from Mr. Garry O'Halloran B.L. for the applicant and from Ms. Sarah K.M. Cooney B.L. for the respondents.

Ground 1 - alleged failure to assess documentary evidence

11. Ground 1 contends "*The IPAT erred in law in rejecting the credibility of the Applicant without making any reasonable assessment of the documentary evidence submitted and which prima facie established the identity of the Applicant and provided objective support to the narrative related by the Applicant."*

12. The applicant hasn't established that the tribunal failed to make a reasonable assessment of the documentary evidence. The tribunal member says at para. 2.2 of the decision that he had regard to all documents submitted and the applicant hasn't displaced that: see per Hardiman J. in *G.K. v. Minister for Justice Equality and Law Reform* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401. The fact that the applicant established that he was from Pakistan doesn't take him meaningfully very far along the road to proving his account of the alleged persecution or serious harm.

Ground 2 – failure to have regard to country information

13. Ground 2 contends that: "*The IPAT failed to assess the plausibility of the Applicant's claim in light of the country of origin information before it*".

14. That has not been demonstrated. Again the tribunal member said that all documents submitted were considered (para. 2.2) and that hasn't been displaced, in accordance with *G.K. v. Minister for Justice Equality and Law Reform* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401.

15. The applicant can't challenge the decision by reference to something he didn't submit. That would be a gas-lighting of the decision-maker of a high order. Indeed, it is not clear that the applicant relied on any country information at the hearing. He doesn't aver that he did so. There is no mention of country information in the tribunal member's synopsis of the applicant's evidence and no specific challenge has been launched in the proceedings as to the accuracy of that synopsis.

Ground 4 – alleged rolling together of a series of events
16. Ground 4 contends that: "*The IPAT erred in law and in fact in rolling a series of events into singular events, most notably when dealing with the evidence of violent encounters in 2008, 2009, 2011 and 2015 and when dealing with the evidence of ongoing illness experienced by the father of the Applicant prior to his ultimate demise, and in then making adverse credibility findings based on the erroneous recollection of the evidence*."

17. A decision-maker is not generally obliged to provide a narrative discussion. That is to be distinguished from the obligation to give reasons. A decision-maker is therefore not precluded from rolling together related issues as long as the reasons for the conclusions are apparent. Indeed, the High Court does this on occasion where it considers that kind of approach to be convenient, and it would be hypocritical to criticise an administrative decision-maker for doing so.

18. The applicant very modestly characterises the difficulties with his evidence in this ground as "*erroneous recollection*", but the tribunal member saw and heard the applicant and is far better placed than the court to decide on the applicant's credibility. The fact that he did so adversely to the applicant doesn't create any unlawfulness.

19. Mr. O'Halloran's written legal submissions state that: "*Grounds 1, 2, 4 and 7 all relate to the requirement to assess credibility by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed. The erroneous recollection of the evidence infected the assessment of credibility – see I.R. v MJELR & Refugee Appeals Tribunal [2009] IEHC 353, [2015] 4 I.R. 144 and R.A. v Refugee Appeals Tribunal [2017] IECA 297*." This unfortunately is a tendentious characterisation. The difficulties with the applicant's evidence were not considered to be simply an erroneous recollection. Those difficulties legitimately informed the assessment of credibility. That is not an "*infection*", it is the lawful process of evidence assessment in action. The submissions don't particularly explain why *I.R.* and *R.A.* assist the applicant, but given the false premise of the applicant's submission under this heading it is clear that they don't.

Ground 7 – alleged failure to make clear findings
20. Ground 7 contends that: "*The IPAT decision is further impugned by reason of the failure to make any clear findings on the credibility of significant elements of the Applicant's claim".*

21. The premise of this ground is incorrect. The tribunal member rejected all of the applicant's claims (see paras. 4.6 and 4.8) apart from his being from Pakistan (para. 4.10). Therefore there *are* clear findings.

Ground 3 - alleged complete reliance on inconsistencies and failure to have regard to applicant's explanations
22. Ground 3 alleges that: "*The credibility findings made at paras. 4.2, 4.3, 4.4 and 4.5 are impugned by reason of the failure of the IPAT to have any regard to the lapses of time from the initial dispute in 2008 and the various interviews conducted in July, 2016, November, 2017 and July, 2018, coupled with summary rejection of explanations furnished by the Applicant for perceived inconsistencies."*

23. *G.K. v. Minister for Justice Equality and Law Reform* applies here again. Failure to discuss something is not to be equated with failure to consider it or to have regard to it. I don't know how many times this has been stated in the jurisprudence but it is well into double figures now. However, that doesn't appear to have had any impact in reducing the extent to which that spurious point continues to be made.

24. The complaint of summary rejection is misconceived. The rejection of the applicant's account is not that summary. His account and the tribunal member's analysis of it is discussed over eleven pages (pp. 2-12 inclusive) in some detail. Anyway, a decision-maker is not precluded from summary rejection. The requirement of *Meadows v. Minister for Justice and Equality* [2010] IESC 3 [2010] 2 I.R. 701 is to give reasons, not to give a narrative discussion. The notion that the tribunal member didn't have regard to the time difference between the dispute in 2008 and the various interviews later doesn't stand up because that is a fact that is patent on the face of the papers and nothing has been provided to show that the tribunal member didn't have regard to it.

25. Ms. Cooney therefore is not far wrong when she submits in her written submission at para. 23 that: "*This ground is unstateable on the facts and disingenuous in the extreme*".

Ground 5 - alleged non-compliance with the procedures directive and subsidiary protection regulation
26. Ground 5 alleges that: "*The IPAT failed to make an assessment of the Applicant's exposure to inhuman and degrading treatment in accordance with Article 15(c) of Directive 2004/83/EC and Regulation 13(1) (a), (b) and (c) of the 2013 Subsidiary Protection Regulations."*

27. That is not a valid complaint in the light of the wording of the decision. Article 15(c) of the 2004 directive is specifically referred to at para. 7.1. As noted above, the applicant didn't make an issue of this anyway in his notice of appeal to the tribunal. This limb of the test was rejected by the tribunal member at paras. 7.7 and 7.8 so it can hardly be said that the tribunal failed to make an assessment of it.

28. The reference in the ground to reg. 13 of the European Union (Subsidiary Protection) Regulations 2013 (S.I. No. 426 of 2013) is virtually meaningless as it isn't specified what the tribunal failed to have regard to. It is clear from the terms of the decision that the tribunal member had regard to all relevant matters and all documents submitted in particular (see para. 2.2) and the applicant hasn't displaced that.

29. The applicant's written legal submission in relation to this point states as follows: "*Grounds 3 and 5 relate to the complete reliance on inconsistencies in the Applicant's evidence and without reasonable and rational regard to the underlying reasons for the inconsistencies and viewed in the light of Regs. 13(1) (a), (b) and (c) of the 2013 Subsidiary Protection Regulations, thereby rendering the reasons given by the Tribunal for rejecting the personal credibility of the Applicant's claim void – see RO v Minister for Justice and Equality & Refugee Appeals Tribunal [2012] IEHC 573. With respect to the Applicant's admission that he experiences difficulty in recalling dates, and the supportive counsellor's report, this support's the view that there exists an onus on the Tribunal to satisfy itself as to the Applicant's ability to recall historical events with precision, by the procurement of independent medical evaluation. Such an argument was rejected by the court in A.A.L. v IPAT [2018] 792, and an application for a certificate to appeal was also refused in A.A.L. v IPAT (No. 2) [2019] 123. A subsequent application to the Supreme Court for leave to appeal awaits determination."*

30. One might be forgiven for inferring that the premise here is to set the present case up for a leave to appeal application to piggyback on *A.A.L.,* but there are a number of problems with this. First of all, the tribunal didn't ignore the alleged medical reasons for inconsistencies and failures in recollection and the supportive counsellor's report. It considered all of this material (see para. 2.2). It

just didn't accept those explanations, and it rejected the applicant's account having seen and heard him. That is a legitimate outcome.

31. The submissions place tedious reliance on *R.O. v. Minister for Justice and Equality* [2012] IEHC 573 without referring to the subsequent qualification in I*.E. v. Minister for Justice and Equality* [2012] IEHC 573 and again one might almost be forgiven for thinking that there could be a view in some quarters on the applicants' side of the house that high-water mark caselaw is to be clung to, and to be repetitively rolled out *ad nauseam*, without regard to any later developments. That is not necessarily the most helpful approach.

32. As regards the point based on *A.A.L.,* the applicant was represented at the oral hearing by the same firm of solicitors who are running the present judicial review. They didn't ask the tribunal to organise independent medical consultation and nor did they instruct their counsel to do so. Again, perhaps conveniently for the purposes of this argument, the applicant has now switched counsel and is now impliedly commenting through his new counsel on what happened at the hearing. At least one can be grateful for the small mercy that Mr. O'Halloran didn't suggest that Ms. McKeogh made any kind of error in not seeking independent medical advice at the hearing. That omission if nothing else distinguishes the present case from *A.A.L.*

33. Furthermore, the applicant hasn't produced a medical report establishing any medical difficulties, only a supportive counsellor's report. The counsellor Mr. Joe Heffernan of Mallow, Co. Cork comes across as perhaps naturally keen to assist the applicant, but his report certainly doesn't meet the requirements of objectivity required for a professional forensic report. He sets out the applicant's narrative as if it were fact as opposed to a statement of what the applicant reports. He says of the applicant speaking to him quickly that "*I feel that this has had a negative effect on the outcome of his original interview"* which is a considerably more definite statement than he is properly in a position to make. It is questionable whether it is open to him as a non-medically qualified person to suggest post-traumatic stress. He also says that he hopes the applicant will be given leave to remain, which is well beyond his remit.

34. The duties of experts were recently helpfully set out by the UK Upper Tribunal in *M.O.J. and Ors. (Return to Mogadishu), Somalia C.G.* [2014] U.K.U.T. 00442 I.A.C., where the tribunal said: "*We summarise these duties thus: (i) to provide information and express opinions independently, uninfluenced by the litigation; (ii) to consider all material facts, including those which might detract from the expert witness' opinion ; (iii) to be objective and unbiased; (iv) to avoid trespass into the prohibited territory of advocacy; (v) to be fully informed; (vi) to act within the confines of the witness's area of expertise; and (vii) to modify, or abandon one's view, where appropriate*."

35. Unfortunately, Mr. Heffernan's no doubt well-intentioned report fails most of these criteria. In fairness to him, it certainly hasn't been shown that it was made clear to him that his report was to be used for forensic purposes so perhaps he was unaware of that. His report was referred to the I.P.O. by the applicant's former solicitors, Sean Mulvihill and Company, but it hasn't been demonstrated or made clear what if anything was explained to Mr. Heffernan so my comments shouldn't be taken as criticism of him. But it would be helpful in the future if experts that are writing reports for the purposes of international protection applications and judicial reviews have full regard to the duties of experts as set out helpfully by the U.K. Upper Tribunal in *M.O.J.*, which I regard as also stating the law in Ireland. To ensure that this actually happens, an expert report should also set out what the expert's brief was as well as stating what the expert conceives his or her duties to be.

36. The tribunal's finding under this heading that it was for it, not the expert, to assess the elements of the applicant's claim is simply impregnably correct.

Ground 6 - alleged failure to consider possible exposure of the applicant to persecution or serious harm
37. Ground 6 contends that: "*The decision also stands to be quashed because of the IPAT's failure to consider the possible exposure of the Applicant to a risk of persecution or serious harm on refoulement to Pakistan*."

38. There is no substance to that complaint because the very terms of the decision consider and reject the risk of persecution or serious harm.

Alleged error on the face of the record
39. In a somewhat throwaway submission made on his feet, Mr. O'Halloran complained that there were errors of fact at paras. 2.1 and 2.2 of the tribunal decision. At para. 2.1 the tribunal member states that the applicant said that he left Pakistan to go to the UK, whereas Mr. O'Halloran says that in fact it was Malaysia. No point under this heading is pleaded so the applicant can't succeed but in any event this error, if it is an error, doesn't appear to be material and in fairness to Mr. O'Halloran he didn't claim that it was. Procedurally the applicant hasn't averred that this was an error. Had he done so this would have given the respondents the chance to consider the point in advance of the hearing.

40. In relation to para. 2.3 of the decision, the tribunal member says that the applicant's account was that a neighbour gave the applicant's father money for the property the subject of a land dispute in Pakistan and was then cutting trees on the land, whereas Mr. O'Halloran says that the applicant's account was that the neighbour claimed to have given the money but in fact didn't give the money, thereby giving rise to a dispute.

41. The same points arise here. This point isn't pleaded so the applicant can't succeed, nor has he shown that it's particularly material. But more fundamentally, the correct procedure to assert that there is a factual mistake in a decision is to say so in the grounding affidavit. That gives the respondents the opportunity to contradict that if they wish to do so or to concede the point and take appropriate action if they wish to do that alternatively. That procedurally is fairly fundamental. One can't claim a factual error in a decision on one's feet without having laid the proper evidential foundation.

Order
42. For those reasons the application is dismissed.