THE HIGH COURT

[2024] IEHC 551

[2019 No. 124 JR]

BETWEEN

X

APPLICANT

– AND –

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

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 14th June 2024.

SUMMARY

In this judgment I explain why, following on a preliminary ruling of the CJEU in this matter, I will set aside a decision of the IPAT and refer matters to it for fresh consideration.

A. Introduction

1. This judgment follows on the preliminary ruling of the CJEU in Case C-756/21 *X v. IPAT and Ors* (ECLI:EU:C:2023:523). I am grateful to the members of the CJEU for that ruling. I refer also to my own interim judgments (Nos. 1 and 2) of March and November 2021 in this matter. Rather than re-state the background facts and law, I respectfully adopt in this regard the text of the judgment of the CJEU, paras. 14-28 (inclusive) and its identification of the applicable EU law at paras. 3-13 (inclusive).

B. My First and Sixth Questions - Relating to the Duty of Cooperation

2. In its judgment, the CJEU observes as follows at para. 44:

> 'By its first and sixth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 4(1) of Directive 2004/83 must be interpreted as meaning that the duty of cooperation laid down in that provision requires the determining authority to obtain (i) up-to-date information concerning all the relevant facts as regards the general situation prevailing in the country of origin of an applicant for asylum and international protection and (ii) a medico-legal report on his or her mental health, where there is evidence of mental health problems resulting potentially from a traumatic event which occurred in that country of origin.'

3. The CJEU's analysis of these questions follows, at paras. 45-60 (inclusive). The CJEU then concludes, at para. 61:

> 'In the light of the foregoing considerations, the answer to the first and sixth questions is that Article 4(1) of Directive 2004/83 must be interpreted as meaning that the duty of cooperation laid down in that provision requires the determining authority to obtain (i) up-to-date information concerning all the relevant facts as regards the general situation prevailing in the country of origin of an applicant for asylum and international protection and (ii) a medico-legal report on his or her mental health, where there is evidence of mental health problems resulting potentially from a traumatic event which occurred in that country of origin and the

> use of such a report is necessary or relevant in order to assess the applicant's genuine need for international protection, provided that the modalities of the use of such a report comply, *inter alia*, with the fundamental rights guaranteed by the Charter.'

4. The above questions arose from Mr X's original application and concerned his contention that there was a breach of the obligation to cooperate with Mr X by the IPAT, arising from its failure to consult relevant and up-to-date country of origin information at the time of the making of its decision. As I stated at para. 39 of my judgment of March 2021, I had 'repeatedly pointed [to that point in my judgment]...to how the IPAT in this case relied on COI that was out of date at the time when it made the impugned decision'. Since the IPAT did not obtain up to date information concerning all the relevant facts as regards the general situation presenting in the country of origin of Mr X, when it was under a clear duty to so, the duty of care owed was breached.

C. My Second and Third Questions – Relating to the Procedural Consequences of a Breach of the Duty of Cooperation

5. In its judgment, the CJEU observes as follows at para. 62:

> 'By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 4(1) of Directive 2004/83 must be interpreted as meaning that the finding, in the context of the second level of judicial scrutiny provided for by national law, of a breach of the duty of cooperation laid down in that provision must, by itself, lead to the annulment of the decision dismissing an appeal brought against a decision rejecting an application for international protection, or whether the applicant for international protection may be required to demonstrate that the decision dismissing the appeal might have been different in the absence of such a breach.'

6. The CJEU's analysis of these questions follows, at paras. 63-71 (inclusive). The CJEU then concludes, at para. 72:

> 'In the light of the foregoing considerations, the answer to the second and third questions is that Article 4(1) of Directive 2004/83 must be interpreted as meaning that the finding – in the context of a second level of judicial scrutiny provided for by national law – of a breach of the duty of cooperation laid down in that provision need not necessarily entail, by itself, the annulment of the decision dismissing an appeal brought against a decision rejecting an application for international protection, since the applicant for international protection may be required to demonstrate that the decision dismissing the appeal might have been different in the absence of that breach.'

7. I respectfully agree with counsel for Mr X that what appears to arise from the just-quoted answer is that it is for Mr X to demonstrate that had the duty of cooperation been respected (and it was not) the decision *might* have been different. That is a notably low hurdle for an applicant to vault successfully.

8. I note, before proceeding further, the conclusion of the CJEU in Case C-465/07 *Elgafaji* (ECLI:EU:C:2009:94), post-para. 45:

> 'Article 15(c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, in conjunction with Article 2(e) thereof, must be interpreted as meaning that...[i] the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances...[ii] the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.'

9. Judicial review generally involves a prohibition on producing evidence before the reviewing court that was not before the original decisionmaker. However, in a case such as this the application of that rule (if applicable) would appear to violate EU law as it would effectively remove the possibility of arguing properly and fully what *might* have been the decision forthcoming from IPAT in the event that it had not breached the duty of cooperation (which of course it did breach).

10. It follows, therefore, that Mr X should be and is entitled to demonstrate to the court what the IPAT might have looked at if the IPAT had satisfied the duty of cooperation. In this regard, I note that I have been referred to certain relevant materials in the public domain that have been published concerning Pakistan by the US State Department, the European Asylum Support Office, Freedom House, and Human Rights Watch, all sources of the highest integrity. Having regard to this information, I cannot but respectfully conclude that had this information been before the IPAT, the decision arrived at *might* have been different.

D. My Fourth and Fifth Questions – Concerning the Reasonable Period of Time

11. In its judgment, the CJEU observes as follows at para. 73:

> 'By its fourth and fifth questions, which it is appropriate to examine together, the referring court asks, in essence, whether EU law, in particular Article 23(2) and Article 39(4) of Directive 2005/85, must be interpreted as meaning that the periods which have elapsed between, on the one hand, the lodging of the application for asylum and, on the other, the adoption of the decisions of the determining authority and of the competent court or tribunal of first instance, may be justified by legislative amendments made in the Member State during those periods and, if that is not the case, whether the unreasonable nature of one or other of those periods may, by itself, entail the annulment of the decision of the competent court or tribunal of first instance.'

12. The CJEU's analysis of these questions follows, at paras. 74-84 (inclusive). The CJEU then concludes, at para. 85:

> 'In the light of the foregoing considerations, the answer to the fourth and fifth questions is that EU law, in particular Article 23(2) and Article 39(4) of Directive 2005/85, must be interpreted as meaning that...[i] the periods which have elapsed between, on the one hand, the lodging of the application for asylum and, on the other, the adoption of the decisions of the determining authority and of the competent court or tribunal of first instance, cannot be justified by national legislative amendments made during those periods, and [ii] the unreasonableness of one or other of those periods cannot, by itself and in the absence of any evidence that the excessive duration of the administrative or judicial proceedings affected the outcome of the dispute, justify setting aside the decision of the competent court or tribunal of first instance.'

13. I do not myself see how a period of 3 years and 7 months from the date of Mr X's application to the date of a decision on appeal could be described as other than unreasonable in the circumstances of this case. The reason for the delay in this case appears to have been due to legislative changes that were adopted/commenced during the relevant period and the CJEU expressly states that this is no justification for delay.

14. As mentioned above, the CJEU in answering my fourth and fifth questions indicated among other matters as follows, at para. 85:

> 'In the light of the foregoing considerations, the answer to the fourth and fifth questions is that EU law, in particular Article 23(2) and Article 39(4) of Directive 2005/85, must be interpreted as meaning that... the unreasonableness of one or other of those periods cannot, by itself *and in the absence of any evidence that the excessive duration of the administrative or judicial proceedings affected the outcome of the dispute*, justify setting aside the decision of the competent court or tribunal of first instance.' [Emphasis added].

15. If I might rephrase the emphasised portion of the CJEU's above-quoted observation in the form of a question, is there any evidence that the excessive duration of the administrative or judicial proceedings affected the outcome of the dispute? I consider that there is, and in this regard I cannot better the following reasoning offered by counsel for Mr X in his written submissions, which I respectfully adopt:

'The Applicant made his claim for international protection on...2nd July 2015. The Applicant had a legitimate expectation that his claim would be adjudicated upon within a reasonable time, and in accordance with Article 47 [CFEU]....It is submitted that such a "reasonable time" would generally be somewhere in the region of one year from the date of the application. By that reckoning the Applicant's application should have been determined by the Tribunal in or about the month of July 2016. The Applicant's claim for subsidiary protection was rejected largely on the basis of country information published in 2017, which was not in existence at the time the Tribunal decision *should* have been taken. While elsewhere the Applicant criticises the actual interpretation and application of this country information, and maintains those criticisms [which, I note, are well founded], and indeed [with justification] challenges its use on the basis of it being out of date at the date of taking the decision, it is nevertheless submitted, in this context, that the use of country information dated *after* the date upon which a decision *should* have been made, is in breach of the Applicant's rights of defence. It is not possible to accurately envisage what the decision *might* have been had it been made on the basis of country information that should have been before it on the date the decision should have been made, but these facts illustrate in the Applicant's submission, the excessive duration affected the outcome'.

E. My Seventh Question – Concerning the General Credibility of an Applicant

16. In its judgment, the CJEU observes as follows at para. 86:

'By its seventh question, the referring court asks, in essence, whether Article 4(5)(e) of Directive 2004/83 must be interpreted as meaning that a false statement, contained in the initial application for international protection, which was explained and withdrawn by the applicant for asylum at the first available opportunity, is capable, by itself, of preventing the applicant's general credibility from being established, for the purposes of that provision.'

17. The CJEU's analysis of these questions follows, at paras. 87-94 (inclusive), including the following observations at paras. 92-94:

‘92 ...[A]s the Advocate General observed, in essence...the assessment of the general credibility of the asylum seeker cannot be limited to taking into account those conditions set out in Article 4(5)(a) to (d) of Directive 2004/83, but must be carried out, as the German Government has pointed out, by taking into account, in the context of an overall and individual assessment, all other relevant factors of the case.

93 In the context of such an analysis, a false statement in the initial application for international protection is indeed a relevant factor to be taken into account. However, this alone cannot prevent the general credibility of the applicant from being established. The fact that that untruthful statement was explained and withdrawn by the applicant for asylum at the first available opportunity, the claims which replaced that false statement and the subsequent behaviour of the asylum seeker are all equally relevant.

94 Lastly, if the assessment of all the relevant factors in the case in the main proceedings were to lead to the conclusion that the general credibility of the asylum seeker cannot be established, statements by that applicant which are not supported by evidence may therefore require confirmation, in which case it may be for the Member State concerned to cooperate with that applicant...in order to enable all the elements capable of substantiating the application for asylum to be assembled.’

18. The CJEU then concludes, at para. 95:

‘In the light of the foregoing considerations, the answer to the seventh question is that Article 4(5)(e) of Directive 2004/83 must be interpreted as meaning that a false statement, contained in the initial application for international protection, which was explained and withdrawn by the applicant for asylum at the first available opportunity, is not capable, by itself, of preventing the establishment of the applicant’s general credibility, for the purposes of that provision.’

19. When I look to the impugned decision, in one sense Mr X’s credibility was rejected by reference to several factors, namely the withdrawn statement, the omission to mention the bomb blast at the funeral, and the failure to apply for asylum in the UK. However, all

those factors it seems to me are interlinked factors. But even if this were not so, even were I to conclude that the withdrawn statement did not in and of itself prevent the establishment of Mr X's credibility that would still leave the fact that the issues touched upon by the CJEU at paras. 92-94 of its judgment (as quoted above) were not addressed adequately or in the manner contemplated, especially as to the cooperation point.

F. Conclusion

20. For the reasons stated in the preceding pages, I will grant an order setting aside the decision of the IPAT of 7th February 2019 and remit this matter to that body for fresh consideration.