[2018] IEHC 681

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 151 J.R.]

BETWEEN

R.A.K. (ESWATINI)

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 27th day of November, 2018

1. The applicant was born in 1983 in Malawi. She then moved to Swaziland, since renamed Eswatini, and married a Swazi man in 2005. They have three children who appear to remain in Eswatini. In 2013 she had a difficult breakup with her husband and in 2014 she says she sold her business and researched study courses in Ireland. She claimed a risk of persecution due to her involvement in PUDEMO, an opposition movement, an involvement which she said began after she was harassed by police in November, 2013 for wearing trousers contrary to local expectations of modesty.

2. On 24th November, 2014 she arrived in Ireland and applied for asylum on 15th December, 2014. On 21st July, 2015 she made a declaration of voluntary return with a view to going back to her home country and on 23rd July, 2015 she withdrew her asylum application, which was then formally refused. On 31st August, 2015, if not before, she indicated an intention to withdraw the request for voluntary repatriation and on 8th January, 2016 the Minister for Justice and Equality consented to the making of a further protection application. On 15th January, 2016 she made a second application for asylum, which was refused on 12th August, 2016. She appealed the refusal to the Refugee Appeals Tribunal but following the commencement of the International Protection Act 2015, the appeal was put on hold pending the consideration of her subsidiary protection application by the International Protection Office. That application was refused by the IPO and the applicant was notified by letter of 29th August, 2017. On 19th September, 2017 the subsidiary protection refusal was appealed to the IPAT and on 27th November, 2017 an oral hearing took place. Mr. Conor Ó Briain, solicitor, appeared for the applicant. The IPAT refused the appeal in a decision of 17th January, 2018.

3. On 19th February, 2018, I granted leave in the present proceedings, the primary relief being *certiorari* of the IPAT decision. A statement of opposition was filed on 30th April, 2018. I have received helpful submissions from Mr. Michael Conlon S.C. (with Mr. David Leonard B.L.) for the applicant and from Mr. Tim O'Connor B.L. for the respondents.

Alleged irrelevance of applicant's motivation for coming to Ireland

4. Complaint is made that it was irrelevant for the tribunal to investigate the applicant's motivation. The tribunal considered that the plan to come to Ireland was completed at the end of October, 2014 when the applicant sold her business, and that she was not motivated by a desire to express her political views more openly. The tribunal said that on her own account she came to Ireland to study in the hope that the difficulties she had with her husband would blow over. There is no specific finding that is rooted entirely on this point, the tribunal just notes that it is "*relevant*". But it *is* relevant to ask why a person has come to the State. A micro-analysis of the wording being used by the tribunal member does not alter that. In any event, the point is only one of a number of features of the case relied on by the tribunal. In itself, it is unproblematic and no illegality arises here. Paragraph 62 of the UNHCR handbook makes the point: "*A migrant is a person who, for reasons other than those contained in the definition, voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee*."

5. It is perfectly lawful for the tribunal to conclude in particular circumstances that a person was motivated by personal factors, so motivation is not at all irrelevant to the task of the tribunal.

Alleged breach of fair procedures regarding t-shirts

6. The applicant avers at para. 35 of her affidavit that it was not put to her or her solicitor that the first time arrests in Swaziland for wearing PUDEMO t-shirts took place was in April or May, 2014 and that, had that been put, she could have referred to country information (other than information that was already before the tribunal, a point I will deal with later) to the effect that there were pre-existing arrests. But the decision does not actually say that the first arrests for wearing t-shirts were in April or May, 2014. That misunderstanding is also contained in ground E(i) of the statement of grounds. Rather, the decision impliedly puts emphasis on there being a proximity between arrests for wearing such t-shirts and the applicant claiming to have been given such a t-shirt, thereby rendering it unlikely that she was given one. On that basis, the applicant has not properly set up the evidential basis for the fair procedures point. I cannot assume that the tribunal member did not put an appropriate question to the applicant under this heading.

Alleged error of fact regarding emails

7. The tribunal decision says that emails presented by the applicant were "*from 'hotmail' and 'gmail' addresses of a kind that could be created by anyone with access to a computer and the internet" and "could quite easily be created by anyone with access to a word processor and the internet"* (para 4.20). On the one hand, the email of 9th September, 2016 purports to be from an address of cosatu.org.za, which is not a gmail or hotmail address. On the other hand, the document produced by the applicant could nevertheless have been created by someone with a word processor. It is obviously possible to produce a piece of paper purporting to come from any particular email address. Furthermore, the COSATU email is not particularly personal to the applicant. While purportedly sent to her email alone, the content is not specifically addressed to her and is somewhat more generic, appearing more to be addressed to a group audience.

8. Even if there is an infelicity in the wording at para. 4.20, one has to look at the decision in the round. Of particular note is the fact that the applicant produced a purported police summons that was rejected by the tribunal on the basis that it "*was apparently produced using a word processer"* (para. 4.15). This document is highly suspicious in that it demands attendance at a police station without giving any date or time for such an attendance. Furthermore, the tribunal did not think it was consistent with the applicant's

account. None of that is challenged. Under those circumstances, the tribunal's suspicions regarding the email documents produced by the applicant are amply justified. In real life, if a person produces a dud document and is caught red-handed doing so, that casts suspicion on the next document they produce. In those circumstances I would prefer to read the decision as referring to the possibility of the emails being manufactured rather than exclusively referring to their purported addresses.

9. One has to take into account the fact that the world of international protection throughout the globe is riven with manufactured documents on an industrial scale. For various reasons ranging from a misplaced and unworkable interpretation of fair procedures, simple naïvetés, sentimentality, conscious or unconscious attitudes to migration, or just an old-fashioned lack of knowledge, decision-makers are not always alive to this reality. While applicants will always insist that their documents are genuine, the reality is that the ease of manufacture of most documents and their typical lack of verifiability has to significantly reduce the amount of reliance that can be placed by expert decision-makers on many of them in any reality-based system. As put by the US Court of Appeals for the 9th Circuit in *Angov v. Holder* (Case No. 0774963, 9th Circuit, December 4, 2013), published in amended form as *Angov v. Lynch*, No. 07-74963, 2015 WL 3540764 (9th Cir. June 8, 2015), *per curiam*: *"The [immigration judge] found that Nikolay Angov presented forged documents. This is a serious matter that, if true, should not merely result in the immediate termination of Angov's asylum petition, but also in criminal prosecution for immigration fraud. But the [immigration decision makers] weren't fazed by discovery of the fraud; they went on to decide whether Angov's asylum claim could be sustained despite the forgeries. No other adjudicator in the United States would react with such equanimity to finding that a party had tried to bamboozle it. This points to an unfortunate reality that makes immigration cases so different from all other American adjudications: Fraud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated. The reason for this deplorable state of affairs is not difficult to figure out. The schizophrenic way we administer our immigration laws creates an environment where lying and forgery are difficult to disprove, richly rewarded if successful and rarely punished if unsuccessful. This toxic combination creates a moral hazard to which many asylum applicants fall prey."*

10. The court went on to say: "*Would-be immigrants almost never get prosecuted for presenting forged documents in support of asylum petitions, unless they commit some additional misconduct. … Consequently, immigration fraud is rampant. … Cases involving fraudulent asylum claims are distressingly common. See, e.g., Cheema v. Holder, 693 F.3d 1045, 1046–47 (9th Cir.2012); Dol v. Holder, 492 F. App'x 774, 775 (9th Cir.2012); Zheng v. Holder, 672 F.3d 178, 180–81 (2d Cir.2012); Fernandes v. Holder, 619 F.3d 1069, 1074–76 (9th Cir.2010); Ghazali v. Holder, 585 F.3d 289, 290–91 (6th Cir.2009); Ribas v. Mukasey, 545 F.3d 922, 925–26 (10th Cir.2008); Siddique v. Mukasey, 547 F.3d 814, 815–16 (7th Cir.2008); Rafiyev v. Mukasey, 536 F.3d 853, 855–57 (8th Cir.2008); Dhital v. Mukasey, 532 F.3d 1044, 1047–48 (9th Cir.2008) (per curiam); Chen v. Mukasey, 527 F.3d 935, 938–39 (9th Cir.2008); Ahir v. Mukasey, 527 F.3d 912, 914–16 (9th Cir.2008). And for every case where the fraud is discovered or admitted, there are doubtless scores of others where the petitioner gets away with it because our government didn't have the resources to expose the lie."*

11. The Court of Appeals referred to the asylum process as "*a system where there are pervasive, structural incentives for fraud"* and said that a restrictive evidential approach towards efforts to counter such frauds (which was what was at issue in that case) "*favors the canny, the dishonest, the brazen and those who have the means and connections to purchase or create fraudulent documents, such as Angov's compatriot, Pavlov. See p. 13–14 supra. Nor does such a rule ultimately help asylum seekers, as it's hard to believe that Congress will long allow the program to continue when it rewards people who lie their way into the United States. Eventually, Congress and the public will catch on that asylum has become a fast-track vehicle for immigration fraud, and the asylum statute will be repealed or amended so as to make it even more difficult for honest asylum seekers to obtain relief. The ultimate victims will be the tired, poor, huddled masses who will find the golden door slammed in their faces."*

Alleged error of fact regarding t-shirts
12. As mentioned above, the tribunal member notes in para. 4.10 of the decision the country information that arrests regarding t-shirts occurred in April/May, 2014, whereas the applicant claims that PUDEMO documentation and t-shirts were given to her in June, 2014. The tribunal member considered that, given that PUDEMO was alive to the dangers of possessing such materials, it was not coherent that it would continue to issue t-shirts as of June, 2014. That implies that the tribunal placed weight on the proximity between the arrests for wearing t-shirts and the applicant's claiming to have been given a t-shirt, which created a consequent implausibility in the applicant's account. The point made by the tribunal member would not hold to the same extent or possibly at all if arrests for wearing t-shirts had been going on for some time but people were wearing them anyway. Complaint is made on behalf of the applicant that country material that was before the tribunal makes clear that there were previous arrests in such a situation. In particular, country information furnished to the tribunal indicated that Mr. Sipho Jele was arrested on 1st May, 2010 for having worn a PUDEMO t-shirt and subsequently died in custody. While some might quibble with the fact that this information took the form of a Wikipedia page, that particular reference is appropriately footnoted and referenced on that page. Thus, the complaint regarding an error of fact under this heading is made out because the tribunal did not factor in the material regarding the previous wearing of t-shirts and implied that there was a significance in the proximity between the particular arrests referred to and the applicant's story of being given a t-shirt. On that basis, I would uphold ground E(ii) of the statement of grounds. Maybe the tribunal had some rationale for distinguishing between earlier and later arrests but it is not apparent from the terms of the decision.

Alleged illogicality of the finding regarding possession of membership cards
13. Para. 4.10 of the decision goes on to say that "*sometime later again*" after the applicant claimed to have been given a t-shirt in June, 2014 *"the PUDEMO party decided that it was too risky to issue membership cards to party members…if the PUDEMO party was alive to the dangers of possessing membership cards it makes no sense that it was not alive to the dangers of possessing party t-shirts just a month after the "PUDEMO 7" were arrested in relation to this very allegation*". It is accepted that country information indicates that PUDEMO stopped issuing membership cards in January, 2016. There is, therefore, something of a lack of reasoning in the decision. It is not apparent how a decision to stop issuing membership cards in January, 2016 illuminates the thinking of PUDEMO in June, 2014, so on that basis I would uphold ground E(iii) in the statement of grounds insofar as that ground can be read as making a complaint of a lack of reasons.

Order
14. Given the way the various parts of the decision are interlinked, it is not possible to sever the problematic parts of the decision from the remainder, so the order will be one of *certiorari* removing for the purpose of being quashed the IPAT decision and remitting the matter to another member of the IPAT for rehearing.