[2019] IEHC 123

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 371 J.R.]

BETWEEN

A.A.L. (NIGERIA)

APPLICANT

AND

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

RESPONDENTS

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 25th February, 2019

1. In *A.A.L. (Nigeria) v. International Protection Appeals Tribunal (No. 1)* [2018] IEHC 792 (Unreported, High Court, 21st December, 2018) I rejected a challenge to a decision of the tribunal refusing international protection to the applicant. The applicant now seeks leave to appeal and I have had regard to the law in relation to that issue, including *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, MacMenamin J., 13th November, 2006), *Arklow Holidays v. An Bord Pleanála* [2008] IEHC 2, *per* Clarke J. (as he then was), *I.R. v. Minister for Justice and Equality* [2009] IEHC 510 [2015] 4 I.R. 144 *per* Cooke J., *Raiu v. Refugee Appeals Tribunal* [2003] 2 JIC 2603 (Unreported, High Court, 26th February, 2003) *per* Finlay Geoghegan J., *Gritto v. Minister for Justice Equality and Law Reform* [2005] IEHC 75 (Unreported, High Court, 16th March, 2005) *per* Laffoy J., and *M.A.U. v Minister for Justice, Equality and Law Reform (No. 3)* [2011] IEHC 59 (Unreported, High Court, 22nd February, 2011) *per* Hogan J. I have also discussed these criteria in a number of cases, including *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646 [2016] 11 JIC 1404 (Unreported, High Court, 14th November, 2016) (para. 2), and *Y.Y. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 185 [2017] 3 JIC 2405 (Unreported, High Court, 24th March, 2017) (para. 72). I have received helpful submissions from Mr. Mark de Blacam S.C. (with Mr. Garry O'Halloran B.L.) for the applicant and from Mr. Anthony McBride S.C. for the respondents.

Applicant's proposed first question

2. The applicant's proposed first question of exceptional public importance is "*whether in compliance with Article 4 of the Qualification Directive the Tribunal is required to investigate an applicant's repeated assertions of mental illness in circumstances where it would be reasonable to carry out an investigation".*

3. Mr. McBride responds to this point by stating in written submissions at para. 5 that "*the essential difficulty was that the applicant attempted to use this solitary plea as a wedge to make a whole new argument for which leave had not been given".* At para. 6 of the written submissions he makes the point that the ratio of the No. 1 judgment is "*that the pleadings were simply inadequate for the case sought to be made and the Applicant must fail in his application for judicial review on that account."*

4. The problem for the applicant under this heading is that there were four grounds for the decision. Firstly, that the point was inadequately pleaded. Secondly, that he did not make the point to the tribunal, thirdly, there was no evidence of actual mental illness and fourthly, that the point was unmeritorious.

5. On the pleading issue, Mr. de Blacam says I should have allowed an amendment in accordance with *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296 [2018] 2 I.L.R.M. 56, but on the other hand he did not apply for an amendment, so the question of allowing one did not arise.

6. On the question of making the point to the tribunal, it was submitted that it would rewrite the law of judicial review to say that a jurisdictional point needs to be made to the decision-maker. First of all, this is not a jurisdictional point. The statement of grounds pleads breach of the UNHCR Handbook, which is not justiciable, breach of the International Protection Act 2015 (provision unspecified), breach of the Charter of Fundamental Freedoms (provision unspecified) and breach of the ECHR which is not directly justiciable but only by virtue of the European Convention on Human Rights Act 2003, which is not referred to in the statement of grounds. The complaint actually made in the ground as pleaded appeared in substance to be a complaint regarding the reasonableness of the tribunal having failed to apply a specific procedure to the applicant to assess his mental competence. That is not a jurisdictional point. But even if it was, I did not say that all jurisdictional points need to be made to the decision-maker in every judicial review in every field. What I said was that if the applicant wants to make a case of lack of mental capacity then he should make that to the decision-maker, and this applicant did not do so. That is triply problematic here as not only was the applicant legally represented at all times, but also under the third heading of the decision, he still has not provided medical evidence of mental illness or disability even in the context of the judicial review.

7. As Mr. McBride eloquently puts it at para. 9 of his written submissions, "*It is only fourthly and finally, in the event that the Court should have been wrong about all the foregoing, that it went on to consider the question of whether the Tribunal was under a burden to investigate the potential for the Applicant's mental or emotional disturbance. The Court held that the characterisation of the Tribunal as having an 'inquisitorial' function, often used as shorthand in caselaw, did not equate to a free-ranging duty to investigate matters personal to the Applicant and could not affect the well-established meaning of the* 'shared duty' *as operated in Union asylum and international protection law*." The essential point as to the difficulty for the applicant here is again well articulated in para. 19 of the respondents' written submissions that "*to grant a certificate of appeal would mean that the Applicant was able just to circumvent these inconvenient findings against him, even though they are each independently fatal to his case".*

8. There would also be a further problem if leave to appeal is allowable here on the basis of the fourth heading of the judgment because it would disincentivise courts from dealing with issues on an "*even if I am wrong*" basis. Where a judge dismisses an action on a procedural basis (such as, by way of illustration rather than exhaustion, pleading, time, discretion or abuse of process), and goes on to say, if I am wrong, the substantive point is not meritorious, if such a judge finds that expressing a view on the substance amounts to giving material and ammunition to the losing party and a basis for that party to have leave to appeal, one would have to wonder why any judge would do anything other than frame judgments on the narrowest grounds possible. Viewed from the perspective of the interests of the legal system as a whole, such an approach would hardly promote legal clarity and certainty.

9. The complaint made by the respondents that the applicant's case has mutated significantly is well-founded. As it is elegantly put at para. 18 of Mr. McBride's submissions, "*The judicial review began as a challenge to a credibility assessment on the part of the Tribunal. When written legal submissions were received on 6 December 2018, the case had apparently morphed into a claim that the Tribunal was obliged under §§206-12 of the UNHCR Handbook and/or the European Convention on Human Rights to investigate whether medical evidence should be obtained in relation to the Applicant's mental state. At hearing on 21 December 2018, the Applicant's counsel for the first time raised the inquisitorial function of the Tribunal and claimed that this was actually the true origin of this obligation. Out of the blue, he presented a welter of authority on the subject of the inquisitorial function, including cases from other jurisdictions having no relevance to protection law processes either there or in this State. These cases were picked over for suitable quotes to collect together and to patchwork a principle that none of them on their own supported, namely … the Tribunal's inquisitorial function imported a free-ranging duty to investigate matters personal to the Applicant. The shared duty was mentioned once in the Applicant's written submissions. The Qualification Directive was not mentioned at all … And yet somehow it is proposed that these proceedings, having begun as they did, should now culminate in an appeal on issue of the procedural obligations on the Tribunal under Article 4 of the Qualification Directive. This is not supportable and, when looked at … in the round, clearly amounts to an abuse of process.*"

10. Even leaving aside all of these problems, the applicant has not made out any ground for uncertainty as to the law in relation to the shared duty, and indeed the core of his submission under this heading is a misreading of the judgment. It is claimed that there is an error in para. 20(iv) of the judgment where I said that "*Insofar as information regarding the country situation is concerned, Member States have an investigative burden with regard to the information listed in art. 4(3) of the qualification directive: see EASO judicial analysis. This is closer to the traditional understanding of the inquisitorial function*". That is a reference to the EASO Judicial Analysis, "*Evidence and credibility assessment in the context of the Common European Asylum System*", 2018, at para. 4.2.5 which states: "*Member States have an investigative burden with regard to information listed in Article 4(3) QD (recast) which is separate from the applicant's duty to substantiate the application. Article 4(3)(a) requires the assessment of applications for international protection to take into account 'all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied'. This norm applies, inter alia, to obtaining information about the country of origin obtaining such information as part of the member states investigative burden*".

11. Paragraph 20(iv) read in context clearly does not exclude a role for the State in relation to personal factors relevant to the applicant. It deals with the State's obligations in the context of the country situation. Paragraphs 20(v) to (vii) set out the situation regarding the personal factors and indicated the primary role in that regard is that of the applicant. It is simply a misreading in terms of ordinary English to suggest that the judgment in general, or para. 20(iv) in particular, absolves the State from any role whatsoever in any circumstances in assembling or corroborating any element of a claim that is personal to the applicant. The judgment simply does not say that and on any fair reading that is dealt with separately in the context of such personal matters being primarily, although not necessarily exclusively, a matter for the applicant. The reason that such matters are primarily matters for the applicant is firstly, that protection bodies cannot investigate material personal to an applicant in almost any circumstances without disclosing to third parties the applicant's status as a protection seeker contrary to the statutory obligation of confidentiality; and secondly, because protection bodies are unlikely to be better placed than an applicant to substantiate such elements of the claim.

12. Nonetheless, the decision-maker may have a role to seek clarification of an applicant's mental state in certain circumstances but a meaningful threshold would need to be surmounted by an applicant before any such duty could realistically or properly arise. That is not met by an applicant simply asserting that he or she is unable to remember matters, is "*not that sharp*", is mentally confused or is "*mentally sick*", especially when he or she tries to remember the alleged persecution. That is consistent with the point made by Clark J. in *R.A.E. (Cameroon) v. Refugee Appeals Tribunal* [2013] IEHC 538 (Unreported, High Court, 30th September, 2013) at para. 22 that "*in the circumstances of this case, depression, flash backs, sleep disturbance and memory loss (all self reported) do not equate to the mental disability envisaged by the UNHCR Handbook. … The fact that the applicant claimed to suffer from memory loss which was connected in some way with the injuries which he had suffered was not ignored. It was separately considered and was found not to be a credible part of his claim*". A similar point *mutatis mutandis* could be made here. Attempt was made to rely at p. 59 para. 4.2.7 of the EASO Judicial Analysis regarding engagement of experts, but that is permissive rather than mandatory, and failure to operate such a possibility is not a ground for *certiorari*. For the court to say that an applicant should have leave to appeal on the ground that the tribunal failed to direct medical investigations of someone whose solicitor and counsel did not ask for such and did not raise a medical issue and did not substantiate a medical condition, either before the tribunal or the High Court on judicial review, would simply be an unreal procedure.

Applicant's proposed second question

13. The applicant's proposed second question of exceptional public importance is "*whether, in compliance with the Directive, the Tribunal is entitled to rely on the absence of medical evidence in support of a claim of mental illness as a reason to support its finding that the applicant's application lacked general credibility".*

14. No particular submission was made orally directed to this point and it is hard to discern much in the applicant's written submission about it either. It is telling that the proposed question does not identify any specific provision of the directive. If an applicant makes a medical claim but then does not provide any evidence of that claim, that can be considered like any other evidential problem with an applicant's case. Anyway, the point was not enormously central to the decision and was in the context of an account of "*the utmost vagueness*" (see para. 4.17).

Order

15. The application is dismissed.