THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 242 J.R.]

BETWEEN

M.Z. (PAKISTAN)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 15th day of February, 2019

1. The applicant was born in Pakistan in 1969 and lived most of his life in Karachi with his wife and children. His father worked on a market stall and he worked as a fire-fighter and at a mill. He claimed that between 2004 and 2010 his wages were stolen. This aspect was accepted by the International Protection Appeals Tribunal (at para. 4.14 of its decision) to the limited extent that it is accepted that his wages were stolen at least once. However, the tribunal did not accept that this happened more than six times given the applicant's inconsistent evidence on this point (para. 4.15). The tribunal accepted that the applicant's father and other stall-holders in the market were subject to extortion by a group known as MQM on the basis that that was consistent with country information (para. 4.16). The tribunal also accepted the account of at least one fight involving the applicant at the market, and accepted that persons called to the family home after this incident at the market stall and threatened violence. Whether that was directed against the applicant alone or against the applicant's father as a stall-holder was neither accepted nor rejected (para. 4.16). The applicant gave evidence to the tribunal that he was injured in an acid attack while working on the market stall with his father. That was comprehensively rejected by the tribunal. He claimed that the stall was destroyed in January, 2010 and that the father no longer ran it. That aspect was accepted (para. 4.20).

2. The applicant left Pakistan in 2010 and came to the U.K. on a valid visa for a six-month period. In 2011, he bigamously "*married*" a Jamaican national in the U.K. He then applied for residency on the basis of this fraudulent marriage, which was refused, and the marriage was regarded as one of convenience. He remained in the U.K. for four and a half years and was unlawfully present for almost four of those years.

3. He says that in July, 2013 he went to a solicitor to get advice on asylum. He said that a secretary or office assistant advised him and that he left before speaking to the solicitor. This account was deemed incredible by the tribunal. He had also given odd answers in that regard, saying that there was not enough time, that he had to wait for hours and that lawyers were charging. Around the same time as this alleged visit he received correspondence from the Home Office to the effect that he was an over-stayer. The applicant said that he did not remember such correspondence and that he went of his own volition to get advice on asylum and not on foot of any correspondence. He gave inconsistent answers at different times about whether the secretary or office assistant was female or male. His account in that regard was not accepted by the tribunal members who did not believe the claim that the applicant did not receive the Home Office correspondence.

4. In May, 2015, he left the U.K. for Ireland and then made a claim for international protection for the first time on 14th May, 2015 to the Refugee Applications Commissioner here, not having previously applied for asylum in the U.K. He and the second purported "wife" apparently divorced after three years. Asylum was refused by the Commissioner on 15th August, 2016. The applicant did not initially disclose the fraudulent marriage during the Commissioner's proceedings. He appealed from the refusal of asylum on 3rd November, 2016. Following the commencement of the International Protection Act 2015 on 31st December, 2016, he applied for subsidiary protection and was interviewed under s. 35 of the 2015 Act. That application was refused on 12th September, 2017. He then appealed that refusal to the International Protection Appeals Tribunal on 3rd October, 2017. An oral hearing took place on 28th November, 2017. Mr. Ciaran Doherty B.L. appeared for the applicant. The tribunal rejected the appeals on 20th February, 2018. Its decision, as far as it concerns the rejection of the asylum claim, is not challenged; only the aspect of the decision rejecting the subsidiary protection claim.

5. I granted leave on 23rd March, 2018, the primary relief being an order of *certiorari* quashing the decision of the tribunal to the effect that the applicant was not eligible for subsidiary protection. A statement of opposition was filed on 24th July, 2018. I have received helpful submissions from Mr. Eamonn Dornan B.L. for the applicant, and from Mr. Peter Leonard B.L. for the respondents.

Ground 1 - failure to find for the applicant given that the entire story was not rejected

6. Ground 1 alleges that "*the first named applicant erred having made positive credibility findings in the applicant's favour and having found that he was subject to past persecution that he was not at risk of being subject to inhuman and degrading treatment or the risk of execution in the future".*

7. The formulation of this ground is somewhat tendentious because the core of the applicant's story was rejected. The primary claim of persecution or serious harm, namely the alleged acid attack by members of the MQM, was not accepted as being credible by the tribunal.

8. There are three elements to subsidiary protection: (a) risk of death penalty or execution (b) risk of torture or inhuman or degrading treatment or punishment and (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence. Ground 1 only challenges the decision insofar as it relates to execution and inhuman or degrading treatment. The question of indiscriminate violence is raised separately in Ground 3.

9. As regards execution, the tribunal found perfectly lawfully that there was "*no evidence*" that the applicant would "*face serious harm in terms of …death penalty or execution*" (para. 6.7.a). The fact that country information indicates that individuals are sometimes targeted, even fatally in an individual instance of extortion, does not amount to evidence that this applicant is facing a realistic risk of execution or death, particularly in relation to a couple of relatively isolated incidents that occurred eight years before the tribunal decision.

10. As regards inhuman or degrading treatment, it must be emphasised that this involves a significant threshold and is notably more demanding as a test than that for persecution. Speaking of the analogous test in art. 3 of the ECHR, as applied by the European Convention on Human Rights Act 2003, Charleton J. said in *P.O. v. Minister for Justice and Equality* [2015] IESC 64 [2015] 3 I.R. 164 at para. 90 that "*particular, and quite extreme, circumstances will be required before the prohibition against torture and inhuman and degrading treatment as guaranteed by Article 3 of the Convention can be invoked*". Having considered country material, the tribunal member found that the acts of MQM in demanding wages were infrequent and that there was only one occasion when a fight happened, followed by one subsequent visit to the home. That did not meet the minimum level of severity amounting to inhuman or degrading treatment. Such an approach is perfectly reasonable. Insofar as *Saadi v. Italy* (Application No. 37201/06, European Court of Human Rights, 28th February, 2008) (2009) 49 E.H.R.R. 30 is concerned, as relevant to the question of inhuman and degrading treatment, the *Saadi* approach was complied with here. The tribunal carried out a rigorous assessment of both the country situation and the applicant's personal circumstances. It is certainly not the law that if a decision-maker accepts any element of the applicant's story that he or she must make a finding that the applicant is entitled to protection.

11. In terms of the sub-grounds specifically pleaded under the heading of Ground 1, the position is as follows:

> (i). The first sub-ground is opaquely phrased, but the point that appears to be being made is that it was inconsistent to find that the applicant was persecuted but was not entitled to asylum because no Convention nexus exists, whereas at the same time the tribunal also found that no substantial grounds existed for a risk of inhuman or degrading treatment. Unfortunately for the applicant, terms such as "persecution" and "inhuman or degrading treatment" are terms of art, not loose colloquial phrases. Persecution is a much wider concept than inhuman or degrading treatment, *as P.O. v. Minister for Justice and Equality* makes clear. It is true that in *S.N. (South Africa) v. Refugee Appeals Tribunal* [2018] IEHC 234 [2018] 3 JIC 2007 (Unreported, High Court, 20th March, 2018) it was stated that if there was past persecution then the decision-maker needs to consider whether there is good reason to consider that there will not be a future risk. However, that was all taking place within the definition of persecution. It does not imply that past persecution creates a read-across of a presumption of inhuman or degrading treatment, which involves crossing a much higher bar.
>
> (ii). It is alleged that the tribunal acted unreasonably in concluding that there was no risk of death or execution and that such risk was not properly considered. It is a matter for the tribunal to consider all evidence; and the tribunal member was entitled to consider that there was no evidence of a risk of death to the applicant personally, specifically in relation to isolated incidents eight years beforehand.

Ground 2 - alleged failure to give proper weight to the medical reports

12. Ground 2 alleges that "*the first named respondent erred in law in failing to give proper probative weight to the medico-legal documents furnished by the applicant which raised a rebuttable presumption that the applicant had suffered harm in the past".*

13. It is important when considering this ground to firmly put it in the context that the applicant's account of the alleged acid attack was totally inconsistent. He claimed that he was variously attacked by either one or two boys, or on another occasion four or five people. He was disbelieved by the tribunal member who saw and heard him, and who is in a much better positon to assess credibility than the court. He also gave different accounts of the timing of this incident. He told the Spirasi doctor that it occurred a week or fifteen days after the attack on the home, and in the s. 35 process he said it was two to four months after the incident at the home (para. 4.7 of the decision). He did not mention the acid attack until the s. 35 interview in July, 2017 (see para. 4.8) and in particular he did not mention it in his questionnaire of 13th March, 2017. He sought to explain this by reference to legal advice, but he had legal advice at the time of the questionnaire. Furthermore, the scars that Spirasi thought were caused by the acid were on the applicant's left foot and lower calf rather than further up the leg, which was where the applicant claimed the acid injury was (see para. 4.12). Spirasi thought most of the scars were probably down to heat and the scars that the applicant identified as being due to the alleged acid attack were not the same scars that Spirasi thought were probably due to acid (see para. 4.18).

14. Another contextual matter is that the applicant on his own evidence worked as a fire fighter, so scars were hardly determinative of the correctness of his account even if they were consistent with burns or even acid. Overall it is a matter for the tribunal to weigh the evidence. The applicant's submission alleges that there was an "*improper rejection*" of the medico-legal report (see para. 30), but this conflates failure to find for the applicant with impropriety. A tribunal member is not obliged to find for an applicant simply because the applicant presents a medical report. That would delegate decision-making to the applicant's doctor. It is, of course, different if the injury is diagnostic of the applicant's account; but if the medical report indicates that the applicant's account is merely probable or that the injury is merely consistent with it, then that only provides some support, and the tribunal is entitled to consider that any such support is outweighed by other evidence in particular circumstances, having considered all matters fairly in the round. Indeed, the point was made in *H.E. (DRC)* [2004] UKIAT 00321 (see also *H.H. (Ethiopia)* [2005] UKIAT 00164, 25th November, 2005) by Ouseley J. that "*rather than offering significant separate support for the claim, a conclusion as to mere consistency generally only has the effect of not negating the claim."*

15. A dust cloud of authorities and arguments was stirred up by the applicant in a manner quite repetitive of arguments unsuccessfully attempted in numerous other cases. I have endeavoured to clarify the issue of medico-legal reports, or touched on that issue, in a number of other cases, particularly

> (i). *C.M. v. International Protection Appeals Tribunal* [2018] IEHC 35 [2018] 1 JIC 2304 (Unreported, High Court, 23rd January, 2018)
>
> (ii). *A.M.C. (Mozambique v. Refugee Appeals Tribunal (No. 1)* [2018] IEHC 133 [2018] 3 JIC 0808 (Unreported, High Court, 8th March, 2018)
>
> (iii). *F.M. (D.R.C.) v. Minister for Justice and Equality* [2018] IEHC 274 [2018] 4 JIC 1706 (Unreported, High Court, 17th April, 2018)
>
> (iv). *A.M.C. (Mozambique) v. Refugee Appeals Tribunal (No. 2)* [2018] IEHC 431 [2018] 7 JIC 0902 (Unreported, High Court, 9th July, 2018)
>
> (v). *R.S. (Ukraine) v. International Protection Appeals Tribunal (No. 1)* [2018] IEHC 512 [2018] 9 JIC 1704 (Unreported, High Court, 17th September, 2018)
>
> (vi). *R.S. (Ukraine) v. International Protection Appeals Tribunal (No. 2)* [2018] IEHC 743 (Unreported, High Court, 3rd

December, 2018)

(vii). *J.U.O. (Nigeria) v. International Protection Appeals Tribunal* [2018] IEHC 710 (Unreported, High Court, 4th December, 2018)

(viii). *J.U.O. (Nigeria) v. International Protection Appeals Tribunal (No. 2)* [2019] IEHC 26 (Unreported, High Court, 21st January, 2019).

16. It would be tedious to repeat that discussion here, so it can be taken as incorporated by reference. There is no lack of clarity as to how medical reports are to be dealt with, although you would not necessarily know that from the applicant's submissions here, which as I say are eerily familiar from a whole series of other cases. The bottom line is that, leaving aside a medico-legal report that is diagnostic, a fact-finder is entitled to consider that such support, if any, is given by a report to an applicant's account is outweighed by other evidence, having considered all relevant matters in a fair manner.

17. On the specific sub-points pleaded under Ground 2, the position is as follows:

(i). It is claimed that the tribunal acted unfairly in not accepting the applicant's account due to failure to mention the acid attack at an earlier stage. But that is not unfair. Failure to mention something in an earlier account is a legitimate feature of evidence which may assist a fact-finder to weigh the credibility of a particular account.

(ii). It is claimed the tribunal acted unfairly in rejecting that part of the report that said that some scars were probably due to caustic acid. But this again misunderstands the concept of fairness. The tribunal considered that point and weighed it against all the evidence. Not upholding the applicant's claim under this heading is the tribunal's considered assessment having taken into account all the evidence and having had the benefit of seeing and hearing the applicant. The statement of grounds conflates the concept of fairness of procedure with a non-existent right of an applicant to win his case. Furthermore the report was not "rejected" in the sense of the applicant's pleadings. The tribunal did not accept the applicant's account of persecution or serious harm. That is not necessarily to be equated with denying that some incident caused the scars – just not an incident entitling the applicant to international protection.

(iii). It is claimed that the tribunal unfairly dismissed the documentation on the basis of the applicant's testimony and erred in not granting the applicant the benefit of the doubt. This misunderstands the concept of the benefit of the doubt. As the tribunal found, the applicant's credibility generally was not accepted; therefore the benefit of the doubt could not be extended as explicitly provided for in the qualification directive, s. 28(7)(e) of the International Protection Act 2015 and para. 204 of the UNHCR Handbook, as indeed was made clear in cases such as *J.U.O.* and *R.S. (Ukraine)*. Mr. Dornan's point under this heading was thus a misconception. The fact that the applicant's credibility was accepted on some points does not amount to the establishment of his general credibility and does not entitle the applicant to the benefit of the doubt. Nor is it unfair to decline to extend the benefit of the doubt in such circumstances. Indeed, such an approach is positively required if general credibility is not established. Insofar as it seemed to be being argued that the issue of general credibility was only one of a number of factors to be taken into account, this unfortunately overlooks the word "*and*" at the end of s. 28(7)(d). The criteria in sub-section (7) are cumulative, not alternative, and if any one of them is not satisfied the benefit of the doubt does not apply. That is clear from both the ordinary meaning of the English language (not that that deters the applicant) and from international law and practice.

Ground 3 - alleged error or inconsistency in finding that the applicant was not at risk due to indiscriminate violence.

18. Ground 3 alleges that "*the first named respondent erred and acted inconsistently in finding that the applicant would not be at risk on return as a civilian due to indiscriminate violence in a situation of internal armed conflict".*

19. This arises out of art. 15(c) of the qualification directive, which provides for subsidiary protection in the event of "*serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict".* It is important to stress that that is a very high bar and that such situations are few and far between. The illuminating report of the European Asylum Support Office, *"The Implementation of Article 15(c) QD in EU Member States"* (July, 2015), indicates how art. 15(c) is applied in practice. Statistical information on p. 6 indicates that in respect of only one country, Syria, do a majority of EU member states recognise art. 15(c) as applying throughout the country. In relation to only two countries, Iraq and Somalia, do a majority of member states recognise indiscriminate violence in at least a part of the country. In all other cases there is no majority recognition of the applicability of art. 15(c), even in part of the country of origin concerned. As far as Pakistan is concerned, only five EU member states out of 28 recognised a state of indiscriminate violence as of March, 2015, and none of those involved the whole country, so by definition we are talking about that being confined to a region if it arises at all.

20. The tribunal here concluded that there was a state of internal armed conflict affecting Karachi (see para. 6.2) and that that was indiscriminate (para. 6.3) but did not accept that there was a serious threat to the applicant's life or person arising from this. The tribunal applied the approach in Case C-465/07, *Elgafaji v Staatssecretaris van Justitie* (CJEU Grand Chamber, 17th February, 2009), at para. 45, to the effect that there was a sliding scale involved in the sense that the greater and more exposed the applicant's personal circumstances were, the less an applicant needed to show a high level of violence.

21. The tribunal held that the applicant was not a member of a group or organisation that was being systematically targeted and recalled that it had rejected major elements of the applicant's account (para. 6.5). It concluded that the applicant was "*unable to show that he has been specifically affected to a high degree and it concludes that the actions to which [he was] subject were generally directed towards others as well".* Thus the applicant had to show a level of violence so indiscriminate that merely by reason of his presence in Karachi, he would face a real risk to his life or person (para 6.6).

22. As illustrated by the judgment of Faherty J. in *F.S. v. Minister for Justice and Equality* [2017] IEHC 621 (Unreported, High Court, 30th June, 2017), sporadic incidents of persecution do not necessarily meet the *Elgafaji* test. The tribunal noted country information that extortion and targeted killings had "*dropped markedly*" (para. 6.7) and said that "*the COI demonstrates that there is not such a high level of indiscriminate violence orchestrated by MQM in Karachi that the applicant merely by his presence there can be said to have shown substantial grounds*" of real risk (para. 6.7). It also noted updated COI in 2017 showing an improvement in the security situation (para. 6.8). Thus there is no error or inconsistency in the decision as alleged.

23. The tribunal, for what it's worth, did not deal with the question of internal flight or relocation; but did not have to do so because it rejected the claim. Pakistan is of course a large country and even if, counterfactually, there was some difficulty for the applicant in

Karachi, I might observe that it is not readily apparent why he couldn't have moved elsewhere.

Discretion
24. The applicant has been involved in a flagrant abuse of the immigration systems of the common travel area. He entered into a bigamous marriage of convenience in the U.K., for which he was never prosecuted, for the purpose of fraudulently claiming derived EU Treaty Rights. He concealed this initially, gave incredible evidence to the Commissioner and the tribunal, and drip-fed aspects of his story. He cooked up a protection claim for the first time in this country having lived in the U.K. for many years without seeking protection, and only made such a claim after legal pressure had been applied in that country. He also incredibly denied that he had received correspondence from the Home Office, which had prompted him to seek legal advice. Agreed, some aspects of his story were accepted, but the important feature is that the core element was rejected.

25. Having regard to the foregoing, it is not necessary to decide this case on the question of discretion, but insofar as the statement of opposition expressly relies on the entitlement of the court to refuse relief on a discretionary basis (para. 16), given the level of fraud, deception and concealment on the part of the applicant I would have upheld that plea if, counterfactually, there was some minor or legalistic problem with the tribunal decision. No particularly injustice would thereby be demonstrated to the applicant, in particular since I noted in passing above that even if there was some such problem with the tribunal's finding that there was no real risk of harm in Karachi, Pakistan is a large country, and it is hard to immediately identify why the applicant could not relocate. It is also relevant in that regard that the rejection of the applicant's claim of persecution is not challenged. Overall, the tribunal decision is robust, well-reasoned and coherent, and it is therefore not necessary to decide the case on discretionary grounds, although I would have done so had that arisen.

Order
26. Accordingly, the application is dismissed.