THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 270 J.R.]

BETWEEN

J.U.O. (NIGERIA)

APPLICANT

AND

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

RESPONDENTS

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of January, 2019

1. In *J.U.O. (Nigeria) v. International Protection Appeals Tribunal (No. 1)* [2018] IEHC 710, I rejected an application for *certiorari* of a tribunal decision refusing the applicant international protection. The applicant now seeks leave to appeal pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000. I have considered the caselaw on leave to appeal as set out in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, MacMenamin J., 13th November, 2006) and *Arklow Holidays v. An Bord Pleanála* [2008] IEHC 2, *per* Clarke J. (as he then was). 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. Eamonn Dornan B.L. for the applicant and from Ms. Sarah Cooney B.L. for the respondents.

The applicant's first question

2. The first proposed question of exceptional public importance is "*is an international protection decision-maker entitled to make a determination that an applicant has not suffered "serious harm" based on general adverse credibility findings where undisputed medical evidence documents that the applicant's physical and/or psychological injuries are* "highly consistent" *with her account?".*

3. That is not an issue in the case. As Ms. Cooney correctly submits at para. 10 of her written submissions, "*the manner in which the questions are worded are fundamentally based on an incorrect hypothesis and misunderstanding of the Tribunal's decision. It is not correct to say that the medical evidence was* "undisputed" *in the sense that they were indisputably indicative of the truth of their contents. Equally for a medical advisor to say that an applicant's account is highly consistent does not equate to it being indisputable medical evidence".*

4. The applicant did not argue that the tribunal was not entitled to make a determination that the applicant had not suffered serious harm in circumstances where the evidence was that the injury was highly consistent with her account. The ground pleaded at para. E1 of the statement of grounds was that the tribunal "*erred in law in failing to give proper probative weight to her medico-legal, medical and counselling reports furnished by the applicant which raises a rebuttable presumption that she had suffered serious harm in the past."*

5. It is not the law anyway that the tribunal is precluded from making a finding that the applicant did not suffer serious harm merely because a medical report speaks of the injury being highly consistent with the account. Such an approach contradicts EU standards and would delegate responsibility for the grant of protection from the tribunal to whatever medical advisors an applicant can obtain. Unless a report is diagnostic of the account there can always be other explanations for it.

6. Mr. Dornan very properly and helpfully draws my attention to the Court of Appeal judgment in *S. v. Secretary of State for the Home Department* [2006] EWCA Civ. 1153, which reinforces many of the points I made in the No. 1 judgment and makes clear that the medical report in *Mibanga v. Secretary of State for the Home Department* [2005] EWCA Civ 367 was extraordinary and exceptional: see paras. 21, 24 and 30. The judgment makes the point at para. 24 that the structure of the decision in the *S.* case did not fall foul of the artificial separation and structural failing in *Mibanga*.

7. At para. 32 it endorsed the point made in *H.H. (Ethiopia)* [2005] UK IAT 00164 (25th November, 2005) at para. 21 that *Mibanga* was "*not intended to place judicial fact-finders in a form of forensic straightjacket. In particular, the Court of Appeal is not to be regarded as laying down any rule of law as to the order in which judicial fact-finders are to approach the evidential materials before them. To take Wilson J.'s "cake" analogy, all its ingredients cannot be thrown together into the bowl simultaneously. One has to start somewhere"*. The reference to Wilson J. is to his judgment in *Mibanga* in which he said at para. 24, "*one cannot make a cake with only one ingredient, so also frequently one cannot make a case, in the sense of establishing its truth, otherwise than by combination of a number of pieces of evidence".*

8. *H.H.* also referred to *H.E. (DRC)* [2004] UK IAT 00321 in which Ouseley J. said "*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."*

The applicant's second question

9. The applicant's second question of proposed exceptional public importance is "*where general adverse credibility findings have been made, is an international protection decision-maker nevertheless required to make an assessment of past harm, and serious risk of future harm, based on medical evidence which is undisputed?"* The formulation of this question again confusingly obscures the issues involved. First of all, it again was not argued in that form. Ground 2 of the statement of grounds argues that the tribunal erred "*in making an unreasonable determination in relation to her claim that she had been sexually abused by both her uncle and Mr. [E.]"* and "*unfairly rejected in disregard of the medical reports the applicant's accounts of having been stabbed".* This is an allegation of unreasonableness and of unfairness and of disregarding medical evidence, not an allegation that the tribunal was obliged to make a favourable finding based on the applicant's medical evidence because that evidence wasn't positively rejected.

10. The answer to the question is in any event that the decision-maker is required to make an assessment of past harm and risk of future harm insofar as that is its function in assessing a protection claim. That applies whether general adverse credibility findings

have been made or not, as impliedly asked by the question as formulated. The more disingenuous part of the question is the suggestion that such findings must be *"based on medical evidence which is undisputed".* The medical evidence here was not rejected but was held to be insufficient to establish the applicant's claim. A decision-maker is not obliged to make a favourable finding simply because some elements of the claim presented are not positively rejected. That is not a credible point or one of substance whether for the purposes of appeal or otherwise.

11. The applicant's submissions claim a conflict in caselaw, but I dealt with this in the No. 1 judgment at para. 11, noting that firstly the report was not rejected here and secondly, reasons were, in any event, given for not accepting it as decisive. The applicant's submissions also predictably claim a conflict between R.*O. v. Minister for Justice and Equality* [2015] 4 I.R. 200 and *I.E. v. Minister for Justice and Equality* [2016] IEHC 85 [2016] 2 JIC 1505 (Unreported, High Court, 15th February, 2016). Again, I anticipated that at para. 17 of the No. 1 judgment, and dealt with it there. The applicant has the burden of proof to show that reasons are unlawful. That is not a controversial proposition.

12. The applicant also appeared to be making, for the purposes of the present application, an argument that because she had a medical report, she must have suffered harm of some kind from somebody, even if it was not inflicted in accordance with her story, so that therefore the refusal of subsidiary protection was not lawful. That was not an argument that featured in the substantive case or in the grounds on which leave was granted, so she can't have leave to appeal on that point; but more fundamentally merely having an injury does not entitle one to international protection. More fundamentally, "serious harm" is not a colloquial term; it has a specific definition which encompasses matters such as the death penalty, torture and the like, or a serious and individual threat arising from indiscriminate violence (see reg. 2(1) of the European Union (Subsidiary Protection) Regulations 2013). It does not equate to any harm that happens to be serious.

13. Thus there is no point of public importance in the case, let alone one of exceptional public importance; but if there was it would not be in the public interest for leave to appeal to be given. As helpfully put by Ms. Cooney at para. 29 of her written submissions, *"critically, there was an avalanche of adverse credibility findings made against the applicant, seventeen of which are listed at paragraph 5 of the Court's judgment. …a number of those adverse findings are unchallenged in the present proceedings, some of which relate to the core of the applicant's claim for international protection".* Even if there is some uncertainty as to how medical reports should be dealt with, which there isn't, this case is not an appropriate vehicle to elucidate any such question.

Order
14. The application is refused.