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

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on 29th April, 2019

1. In *M.Z. (Pakistan) v. International Protection Appeals Tribunal (No. 1)* [2019] IEHC 125 [2019] 2 JIC 1510 (Unreported, High Court, 15th February, 2019) I dismissed an application for certiorari of an IPAT decision refusing subsidiary protection to the applicant. He now seeks leave to appeal and I have considered the caselaw in that regard, 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), and *I.R. v. Minister for Justice and Equality* [2009] IEHC 510 [2015] 4 I.R. 144, *per* Cooke 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).

2. The applicant proposes four issues of what are said to be exceptional public importance and I will deal with these in turn. I have received helpful submissions in that regard from Mr. Eamonn Dornan B.L. for the applicant and from Mr. Peter Leonard B.L. for the respondents.

Is a finding of persecution sufficient to establish serious harm?

3. The applicant's first proposed question of exceptional public importance is: *"where a finding has been made by an international protection decision-maker that an applicant has been subject to an 'act of persecution' is this sufficient to establish that the applicant has also been subject to 'an act of serious harm' for the purposes of subsidiary protection?".*

4. The answer to this question is "obviously not", as a matter of fairly basic international protection law. Furthermore, it has already been subject to appellate court clarification because the relevant definition of subsidiary protection insofar as it relates to inhuman and degrading treatment or punishment overlaps in pertinent part with art. 3 of the ECHR, as applied here by the European Convention on Human Rights Act 2003, in respect of which the Supreme Court has already opined. Charleton J. said in *P.O. v. Minister for Justice and Equality* [2015] IESC 64 [2015] 3 I.R. 164 at para. 39 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".*

5. The applicant's written legal submissions contend at para. 41 that there is no definition in the International Protection Act 2015 of "*acts of serious harm*". That is unfortunately a totally specious point because there is a definition of "*serious harm*". The term "*serious harm*" does *not* have its everyday meaning of harm that happens to be serious. It has a very specific and express definition which unquestionably amounts to a very high bar. Section 2(1) of the 2015 Act provides that "'serious harm' *means (a) death penalty or execution, (b) torture or inhuman or degrading treatment or punishment of a person in his or her country of origin, or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in a situation of international or internal armed conflict."*

6. The applicant's written submissions at paras. 42 and 43 seek to make the point that some provisions of the qualification directive 2004, particularly arts. 4 and 6, and therefore of the 2015 Act, s. 28(6) and s. 30, refer to both subsidiary protection and persecution. However, the applicant's logic then breaks down to the level of saying that two plus two equals five by contending that "*accordingly the acts of persecution and serious harm appear prima facie to be interchangeable*". They are not interchangeable and nor do they appear so.

7. Article 4(4) of the qualification directive treats the two together linguistically but is meant to be read disjunctively in the context of whatever type of claim is being made. Article 4(4) states that *"The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or serious harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.*" What art. 4(4) of the qualification directive and therefore s. 28(6) of the 2015 Act mean in this context is that, in the case of a claim of persecution, the fact that an applicant has already been subject to persecution or to direct threats of such persecution is a serious indication of the applicant's well-founded fear of persecution unless there are good reasons to consider that such persecution will not be repeated; and, in the case of a claim based on serious harm. the fact that an applicant has already been subject to serious harm or to direct threats of such harm is a serious indication of the applicant's real risk of suffering serious harm, unless there are good reasons to consider that such serious harm will not be repeated.

8. The point is argued at para. 45 of the applicant's written legal submission that because the tribunal considered that the applicant was subject to a severe violation of human rights, those acts also meet the definition of inhuman and degrading treatment or punishment. That proposition is completely question-begging because it is a matter for the tribunal to determine whether the acts that constituted persecution also constituted serious harm, as that term is defined in the 2015 Act and the qualification directive. Here, the tribunal did so and held that that was not the case. Furthermore, the point is disingenuous because the tribunal did not itself use the language of severe violation as such. Section 7(1) of the 2015 Act provides that acts of persecution can be either *"(a) sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, or (b) an accumulation of various measures, including violations of human rights, which is sufficiently severe as to affect an individual in a similar manner as mentioned in paragraph (a)."* While the tribunal did find persecution it did not

specify whether that was based on acts which constituted a severe violation of basic human rights or an accumulation of various measures. Most fundamentally of all, however, the tribunal found precisely the opposite to the point being contended for. It expressly considered the question of inhuman or degrading treatment at para. 6.2.B and found that, seeing as the applicant was involved in a fight with his alleged tormentors on only one occasion, his situation was not so humiliating or debasing such as to meet the minimum level of severity as to amount to inhuman or degrading treatment or punishment. That approach was perfectly reasonable.

9. It is also clear that the applicant's interpretation of art. 4(4) is misconceived if one looks for example at the CJEU judgment in joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi, Dier Jamal v. Bundesrepublik Deutschland*, where the court said *inter alia* at para. 96 that "*Article 4(4) of the Directive may be applicable where there are earlier acts or threats of persecution which are connected with the reason for persecution being examined at that stage."* Thus, if there is an act of persecution A, and then a claim of ongoing risk of persecution B connected with the same reason, the presumption in art. 4(4) may apply. Here there was an original act of persecution A, which was held not to amount to inhuman or degrading treatment. That does not create a presumption that there is a risk of future inhuman or degrading treatment. It could however create a presumption of a future act of persecution B, but the tribunal fully acknowledge that at para. 5.3 of the decision and held that it did not create such a read-across due to a lack of Convention nexus; and notably that decision is not challenged in these proceedings.

Must the applicant's medical report be accepted as a material fact?
10. The applicant's second question of proposed exceptional public importance is "*where medical evidence documents that an applicant's physical injury is* 'probably' *due to a cause consistent with his account must this injury be accepted by the International Protection decision-maker as a material fact? Must an International Protection decision-maker have regard to findings in a medico-legal report that an applicant's cognition is possibly affected by mental health issues as an explanation for inconsistencies in an applicant's account?".*

11. This question as it is formulated in fact amounts to two questions. As far as the first question is concerned, again, the answer is "obviously not". The second question does not arise because the tribunal *did* have regard to the applicant's medico-legal report.

12. The opinion of a doctor that an injury is probably due to a cause consistent with an applicant's account is not something a decision-maker *has to* accept, particularly as, on the facts of this specific case, the applicant's evidence actually contradicts the medical report, as discussed at para. 13 of the No. 1 judgment. The punchline is that leaving aside the question of a medical report that is diagnostic, which is not the case here, a fact-finder is entitled to consider that such support, if any, that is given by a report to an applicant's account is outweighed by other evidence having considered all relevant matters in a fair manner. No doubt about that principle has been demonstrated here, and indeed the present case in some ways is a strikingly bad vehicle for further examination of this point because the applicant's own evidence undermined and contradicted the medical report that is (of course) now front and centre of the application for leave to appeal.

13. The subsidiary point made in the proposed question is that the applicant allegedly had moderately limited cognition, possibly affected by depression or post-traumatic stress disorder, and that such stress was a possible explanation for his inconsistencies in his evidence. However, consideration of that explanation is a matter for the tribunal; and the tribunal *did* expressly consider this aspect (see para. 4.10 of the decision). The fact that an applicant puts forward explanations for inconsistencies in his or her evidence does not mean that it is unlawful for a decision-maker, having considered those explanations, not to accept them.

14. Indeed, it might be worthwhile just taking a reality check here as far as the applicant's points are concerned. This is not an unfortunate and meritorious applicant who has come forward with a cast-iron account and a cast-iron medical report and has been outrageously ignored by the tribunal. The following aspects of the case are notable. While some are not directly relevant to the applicant's protection claim, I will recite them for completeness as they put his claim of credibility and merit into a wider and more realistic context.

(i). All of the applicant's submissions and his medical report and material were considered by the tribunal, fully complying with the requirement to consider material advanced (see e.g. *M.M. v. Refugee Appeals Tribunal* [2015] IEHC 158 (Unreported, High Court, 10th March, 2015) *per* Faherty J.)

(ii). Major aspects of the applicant's story were rejected by the tribunal member who saw and heard him.

(iii). The applicant entered into a bigamous marriage of convenience in the UK and fraudulently applied for residence there.

(iv). The applicant remained unlawfully in the UK for four years.

(v). He claimed implausibly that he went to a solicitor to get advice on asylum but then left the office after being advised by an office assistant without waiting for the solicitor.

(vi). He gave inconsistent answers about how this occurred.

(vii). He denied having received correspondence from the Home Office around this time which put legal pressure on him as an over-stayer.

(viii). He gave inconsistent information about whether this alleged office assistant was female or male.

(ix). He only realised he had been subject to persecution and serious harm warranting an international protection application for the first time five years after leaving Pakistan having come to Ireland for that purpose, never having claimed asylum in the UK.

(x). He did not disclose the fraudulent marriage initially.

(xi). His core story regarding an alleged acid attack was rejected as incredible.

(xii). He gave totally inconsistent accounts of the alleged acid attack, variously by one or two boys or by four or five people.

(xiii). He gave inconsistent accounts of when this attack occurred, variously either a week to fifteen days after an attack

on his house, or two to four months thereafter.

(xiv). He claimed inconsistencies in his evidence were due to a lack of legal advice; but he had legal advice when completing the application for protection questionnaire.

(xv). Spirasi thought that the scars caused by acid were on the applicant's left foot and lower calf but the applicant himself gave evidence that the injury was further up the leg. The scars the applicant thought were due to acid were not the ones that Spirasi thought were due to acid.

(xvi). He worked as a fire fighter anyway, so even if he had burns due to acid that was hardly determinative.

(xvii). He failed to mention the acid attack at the outset of his protection claim.

(xviii). Even if there was, counterfactually, some difficulty for the applicant in Karachi, I noted in passing that it was not readily apparent from the papers as to why he couldn't have moved elsewhere. The tribunal didn't have to deal with that issue because it rejected the claim on its merits.

Was the tribunal entitled to deny the applicant the benefit of the doubt?
15. The applicant's third proposed question of exceptional public importance is "*where mostly positive but some adverse credibility findings have been made, is a protection decision-maker entitled to deny an applicant the benefit of the doubt in relation to an uncertain material fact".*

16. Again, we are back to very basic international protection law. The conditions for the benefit of the doubt are *expressly* set out in the qualification directive and the 2015 Act and require the establishment of the applicant's general credibility. That is not the case here. There is simply no statable basis to suggest that an applicant who fails that necessary condition is entitled to the benefit of the doubt. The fact that some aspects of his story were accepted is irrelevant. Indeed, the characterisation of the findings that is articulated in the question that the findings were "*mostly positive*" is spurious. The applicant's core story was rejected.

17. Mr. Dornan suggested that his point was a matter of first impression, but he used that formula somewhat repetitively to in effect suggest that the points that were obviously wrong were matters of first impression. Simply because a point is so bad that no-one has been mistaken enough to advance it before does not make it a matter of first impression.

Does discretion apply here?
18. The applicant's fourth point of exceptional public importance is "*under what circumstances may a judicial review court exercise discretion to deny an otherwise meritorious application for certiorari of an impugned international protection decision*".

19. Of course this question doesn't arise because this is not "*an otherwise meritorious application".*

20. For what it's worth, I did not refuse the application on discretionary grounds. I merely observed *obiter*, rightly or wrongly, that while it was not necessary to decide the case on the question of discretion, the statement of opposition expressly relied on a plea to refuse relief on a discretionary basis (para. 16); and that 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 given that no particular injustice would thereby be demonstrated to the applicant. That is discretion in the "*applying the proviso*" sense and is not hugely problematic in principle. I can hardly have been said to have been "*wrong*" on this issue in isolation because I said I would only have refused the application on a discretionary basis if there had been a minor or legalistic problem with the decision, and I did not think that there was a problem of that (or indeed any) nature. I would have to have been wrong about that prior finding before it could be said that I was wrong about whether a discretion could have been a basis for an order dismissing the proceedings. Discretion is less relevant to a protection case if there are grounds to apprehend a real risk to an applicant; but that is not the case here. However, even if I could be said to have been wrong on this point, that is not relevant for present purposes because I did not make the order on that basis.

Order
21. Even by the loose standards that are generally urged on the court in the leave to appeal context, the present application is particularly unmeritorious, and is refused.