THE HIGH COURT
JUDICIAL REVIEW

[2018 No. 917 J.R.]

BETWEEN

N.E. (GEORGIA)

APPLICANT

AND

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

RESPONDENT

(NO. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 18th day of November, 2019

1. In *N.E. (Georgia) v. International Protection Appeals Tribunal (No. 1)* [2019] IEHC 700 (Unreported, High Court, 21st October, 2019) I granted an order of *certiorari* directed to the decision of the International Protection Appeals Tribunal rejecting the appeal of the applicant. Mr. Anthony Moore B.L. for the respondents now applies for leave to appeal and I have heard helpful submissions from him and from Mr. Garry O'Halloran B.L. for the applicant. I have considered the law on leave to appeal as set out in *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., 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).

2. There are two contextual points worth making at the outset. Firstly, I should emphasise that I do not in any way hold it against the respondents that they did not take up the suggestion that I made after the conclusion of the hearing to see if the case could be compromised, a suggestion that I would probably have to admit was made more forcefully than usual in this particular case. I did not hold that against the respondents when giving judgment and I do not hold it against them now. I fully respect the separation of powers and the entitlement of the State, or indeed any litigant, to reject any suggestion from the bench.

3. Secondly, it is worth making the point that in respect of at least nine of my own previous decisions, applicants have been refused leave to appeal both by me in the first instance and by the Supreme Court on leapfrog application: see *J.N.E. v. Minister for Justice and Equality* [2017] IESCDET 86, *Igbosonu v. Minister for Justice and Equality* [2018] IESCDET 51, *V.D. v. Minister for Justice and Equality* [2019] IESCDET 41, *A.M.C. v. International Protection Appeals Tribunal* [2019] IESCDET 88, *Seredych v. Minister for Justice and Equality* [2018] IESCDET 157, *O.A. v. Minister for Justice and Equality* [2019] IESCDET 87, *M.S.R. v. International Protection Appeals Tribunal* [2019] IESCDET 123,

M.E.O. v. International Protection Appeals Tribunal [2019] IESCDET 165 and *U.O. v. International Protection Appeals Tribunal* [2019] IESCDET 166. In terms of equality of arms, it cannot be the case that the State has some preferential entitlement to, or presumption of, a grant of leave to appeal in cases where it, rather than an applicant, seeks such leave, and in fairness to him Mr. Moore totally accepts that.

4. With those points made, this is by some distance the weakest application for leave to appeal made to me by the State to date.

Proposed question arising from ground 2 of the Statement of Grounds

5. The respondents' first proposed question arises from ground 2 of the statement of grounds and is: "*Where a protection decision-maker has made an adverse credibility finding based on an applicant's inability accurately to answer questions pertaining to the assertions materially underpinning his or her application for international protection, is the High Court entitled to conclude that the protection decision-maker ought to have overlooked the said inaccurate answers and treated the applicant's credibility as having been established?"*

6. First of all, this question is tendentious in that I did not conclude that the protection decision-maker ought to have overlooked *"inaccurate answers*" and treated the applicant's credibility as having been established.

7. Mr. Moore stated that the tribunal's concern was how it would assess answers that are partly right and partly wrong and that "*on one interpretation*" the judgment displaces the tribunal's decision-making function and moves the centre of gravity of decision-making to the court. But that is a misunderstanding of the import of the judgment. It is up to the tribunal to assess the weight of the evidence but it must base its assessment on a rational approach to the correct facts in evidence in the individual case. Insofar as the principal judgment is concerned, that is a totally fact-specific point. The tribunal's assessment of the issue of the publication date, to take that example, at para. 4.8 of the tribunal decision, makes no reference to the elaborate kind of argument now launched by Mr. Moore in defence of the decision. It simply says that *"the applicant was clearly uncertain … about the day of the week of publication".* That puts the applicant in the same category as a person who has no idea of the date of publication, but the applicant is not in that category so the decision is not rational on the very specific facts here. There is no point of general importance whatsoever and no wider implications. The judgment was simply a restatement of the basic law that the decision-maker must assess that correct facts. The caselaw relied on by the respondents (*O.O. v. Refugee Appeals Tribunal* [2004] IEHC 426 [2004] 4 I.R. 426, *I.R. v. Refugee Appeals Tribunal* [2009] IEHC 353 (Unreported, Cooke J., 24th July, 2009), *R.A. v. Refugee Appeals Tribunal* [2017] IECA 297 (Unreported, Court of Appeal, 15th November, 2017) and *R.A. v. Refugee Appeals Tribunal* [2015] IEHC 686 (Unreported, High Court, 4th November, 2015) and *M.H.C. v. Refugee Appeals Tribunal* [2016] IEHC 648 [2016] 11 JIC 1406 (Unreported, High Court, 14th November, 2016)) is not in question. There is no conflict in the law as alleged. As Mr. O'Halloran correctly submits, all that I did under this heading and the headings I will discuss below was to apply the "*thorough review*" in terms of the effective remedy against asylum

decisions envisaged by art. 39 of the procedures directive 2005/85/EC, as referred to by Hogan J. in *N.M. (DRC) v. Minister for Justice and Equality* [2016] IECA 217 [2016] 2 I.L.R.M. 369 at 395 and *R.A. v. Refugee Appeals Tribunal* [2017] IECA 297 at para. 44.

Proposed question arising from ground 1 of the Statement of Grounds

8. Mr. Moore's second proposed question, which arises from ground 1 of the statement of grounds, is: *"Given caselaw that the weight to be attached to documentation submitted by a protection applicant is a matter for a protection decision-maker, is the High Court entitled to conclude that a document ought to be accorded weight in the assessment of credibility on the basis that it is "not easily falsifiable" and, if so, what criteria must the High Court apply in reaching such a conclusion?"*

9. But the judgment did not erect any huge barrier to rejecting any particular category of documents. It merely said that, exceptionally, this document was of a kind that was not easily falsifiable and that this was not "*acknowledged*" in the decision rejecting it. That statement was in any event coloured by the context of the very summary rejection of a document by the tribunal on the ground that it did not have the security features of a passport. Mr. Moore's concern is that if the document is not afforded any weight on a rehearing, the tribunal will be faced with another judicial review and that this could happen in other cases and could encourage applicants to make similar points. But again this point is totally fact-specific. I am not saying that this document or any particular document cannot be rejected if the tribunal so decides; but merely that the proper reasoning process would involve an "*acknowledgement*" of the degree of difficulty of falsifiability of any given document where, exceptionally, there is a material difficulty. That is not a very revolutionary proposition and anyway is completely fact-dependent. The caselaw relied on by Mr. Moore under this heading, *M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192 (Unreported, Birmingham J., 27th June, 2008) and *A.A. (Pakistan) v. International Protection Appeals Tribunal* [2018] IEHC 769 (Unreported, High Court, 18th December, 2018), as to the entitlement of the tribunal to assess the evidence, is not in question. Of course it is for the tribunal to assess the evidence; but it must do so in accordance with a lawful methodology. Ensuring that such lawful methodology has been applied is the proper domain of the court, as emphasised by Hogan J.'s "*thorough review"* in *N.M. (DRC).*

10. Even if I am entirely wrong about this, in the context of ground 1 of the Statement of Grounds, the reference to falsifiability was very much a subsidiary point. The main point in relation to ground 1 was that it was irrational to reject the identity card on the grounds that it did not have "*the security features of, say, a passport*". No suggestion has been raised against that finding as raising any point of law warranting leave to appeal. To that extent, the core *ratio* in relation to ground 1 of the statement of grounds was that unchallenged point, so even if I am wrong about falsifiability, that doesn't take away from the primary basis on which ground 1 was upheld.

Question arising from ground 5 of the Statement of Grounds

11. Mr. Moore's third question which arises from ground 5 in the statement of grounds is *"Where a protection decision-maker concludes that an applicant for international*

protection has failed to give a reasonable explanation for delay in claiming protection, is the High Court nonetheless entitled to conclude that the apparent lack of any external trigger for such an application reinforces the credibility of the claim and that the decision-maker ought to have held accordingly?"

12. Again, this is an over-interpretation of the judgment. I held at para. 15 that there was no "*acknowledgement*" of the lack of an external factor resulting in the delayed application. My comment in the concluding section of the judgment that the fact that the applicant outed herself despite having lived perfectly happily under a false EU identity speaks to a degree of confidence that reinforces her credibility, seems self-evident (all other things being equal), but the proposed question is tendentious insofar as it alleges that I held that "*the decision maker ought to have held accordingly".* I am not dictating the ultimate outcome, simply indicating that the correct reasoning process, as with the first point, has to involve some acknowledgment of the points in favour of the applicant as well as those against her. That is not very radical.

13. The claim is made that there is a conflict with the judgment of Herbert J. in *M.Y.G. v. Minister for Justice and Equality* [2010] IEHC 127 (Unreported, High Court, 28th April, 2010) but that is not at all the case. It is clear from p. 2 of that judgment that the applicant "*did not apply for refugee status until May 6th, 2009 and the only reason he did so then was because he was arrested for residing illegally in the State".* That totally reinforces the point I was endeavouring to make because that is precisely the sort of external stimulus that tends to render an explanation for a delay in applying for asylum less than altogether plausible. Outing oneself unprompted despite having lived perfectly happily under a false EU identity is a totally different situation; and all I said in the principal judgment under this heading was that there was no acknowledgment of this. Acknowledgment of points in one's favour is not to be equated with an indefeasible entitlement to win one's case. It will be for the tribunal on remittal to reconsider the matter, giving all due weight to the points in the applicant's favour as well as any points against her. The respondents' submission is over-determined.

Overall problem for the respondents – the applicant succeeded independently of the proposed questions

14. There is an overall problem for the respondents separate from any one of the above issues. The applicant independently succeeded on ground 6. If I am wrong about any one or two of the above three questions, the respondent still fails on the third. But even if I am wrong about all three questions, the fundamental difficulty is that the applicant also won on ground 6, in respect of which no question warranting leave to appeal is raised: see para. 16 of the judgment. The respondents would have lost anyway even if I confined the judgment to para. 16 and said nothing else. Thus this is not an appropriate case for leave to appeal. Overall I might add by way of postscript that exactly the same logic applies if I had confined the judgment to the "*passport*" issue in ground 1, which is not challenged in this application, and said nothing else. The public interest test is not satisfied on that basis either. The present situation is reminiscent of the comment of the Supreme Court in the slightly different leapfrog context, in *Y.Y. v. Minister for Justice and Equality* [2017] IESCDET 38 para. 10 (to which I refer for the purposes of procedural

illumination rather than asserting a precedential value): *"Some of the points are simply tendentious. Others are irrelevant, since even if there was merit in a particular observation in respect to statements made in the judgment, they would not amount to a valid ground of appeal, as even if this Court took a different view it would not result in a different outcome."* Precisely the same situation applies here. The respondents lose anyway on either or both ground 6 and on the primary point in ground 1 even if they are correct in any or all of their complaints about any other observations in my judgment. I could also add that if I have to give leave to appeal simply because I explored all of the questions presented by the case rather than finding for the winning side simply on the most bullet-proof issue, that would quickly become a massive disincentive to engaging in a thorough exploration of the full range of argument. That would put the court in an undesirably defensive posture from the outset, would hamstring the development and clarification of the law, and would be a disservice to appellate courts in the long run. Indeed if the State were to succeed in this particular wheeze, the main beneficiaries in future cases will be applicants, who would thereby be emboldened to scour judgments for appeal points even if those points would not change the result. The State might conceivably come to regret kicking open that particular door.

Further independent problem for respondents

15. Independently of all of the foregoing, there is a separate problem with granting leave to appeal. This asylum application has already been significantly delayed. Mr. O'Halloran makes the point that the application for international protection was made on 18th May, 2015. It is now four-and-a-half years to the day since that date, well beyond a reasonable time, even making every allowance for delays outside the State's direct or indirect control. It is well-established that delay, whether in administrative processes or litigation, amounts to a breach of rights. Whether that is best viewed as a breach of the right to fair procedures, the right to civil trial within a reasonable time, or to both, or to a breach of rights on some other basis, may depend on the circumstances, and for present purposes can perhaps be left for academic debate, but the principle is not in dispute. Delay, especially in the context of a pending oral hearing, means that memories are dimmed and documentary material or other physical evidence becomes less available. To prolong the applicant's international protection application further would inflict additional delay on the applicant without any corresponding and equivalent benefit to the public interest. The concept of the public interest has to encompass a reasonable consideration of the interests of the parties themselves, and that test is not satisfied in the light of the overall balance of justice and fairness. It would be far better for the matter to proceed to re-hearing before the tribunal as soon as possible.

Order

16. To summarise:

    (i). There is no meaningful point of law involved. The decision in this case was entirely fact-specific.

(ii). There is no point of public importance involved. Because the findings turn on the wording of this particular decision, the principal judgment has limited relevance beyond this case.

(iii). There is no conflict of jurisprudence as alleged.

(iv). It is not in the public interest that there be an appeal because the respondents are losing anyway on ground 6 of the statement of grounds and, independently, on the main point in ground 1.

(v). Nor is it in the public interest that there be an appeal given the unfairness to the applicant in prolonging her international protection application further in the absence of any clearly established equivalent benefit to the public in there being an appeal.

17. Accordingly, the application is dismissed.