[2019] IEHC 786

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 352 J.R.]

BETWEEN

M.S. (BANGLADESH)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 12th day of November, 2019

1. The applicant was born in Bangladesh in 1989. He claimed to have suffered persecution there in 2012, but that account was not accepted by the International Protection Appeals Tribunal. He then obtained a study visa for the UK and lived there between 10th October, 2013 and 4th July, 2017, the latter two months of his stay there being unlawful. Despite the claim of persecution in 2012, he returned home to Bangladesh in 2016. The tribunal was later to accept that the applicant's father was attacked in 2016 but rejected the applicant's story that he himself was threatened in that year.

2. The applicant then came to the State on 4th July, 2017 and applied for international protection here, never having done so in the UK. That application was rejected by the International Protection Office on 2nd January, 2019 and permission to remain was refused. The applicant then appealed to the tribunal and that appeal was rejected on 14th May, 2019. The present proceedings were filed on 6th June, 2019, the primary relief sought being an order of *certiorari* directed to the tribunal decision. I granted leave on 24th June, 2019 and a statement of opposition was delivered on 13th August, 2019. I have now received helpful submissions from Mr. Garry O'Halloran B.L. for the applicant and from Mr. Tim O'Connor B.L. for the respondents.

Alleged failure to make a reasoned assessment of prospect of risk

3. While there is only one numbered ground in the statement of grounds, it consists of two discrete elements, the first of which is that: "*The IPAT erred in law in failing to make and contain a reasoned assessment of the prospective risk of future persecution or serious harm of the Applicant if repatriated to Bangladesh in light of the accepted facts that his father was attacked on 18 March, 2016 in a land dispute, that there was a family element to the dispute, and the Applicant holds a share of the land*". The problem for this claim as pleaded is that the tribunal did not *"fai[l] to make … a reasoned assessment of the prospective risk …in light of the accepted facts".* The accepted facts are acknowledged, the question of prospective risk is considered and reasons are provided.

4. The only authority cited in the applicant's written submissions under this particular heading is the much-discussed decision in *M.A.M.A. v. Refugee Appeals Tribunal* [2011] IEHC 147 [2011] 2 I.R. 729 *per* Cooke J., cited in numerous cases including *B. v. Refugee Appeals Tribunal* [2012] IEHC 487 (Unreported, Clark J., 26th June, 2012), *S.W.A. v. Refugee Appeals Tribunal* [2017] IEHC 40 (Unreported, O'Regan J., 30th January, 2017), *M.A. v. Refugee Appeals Tribunal* (Unreported, MacEochaidh J., 13th February, 2013) and

K.M. (Pakistan) v. International Protection Appeals Tribunal [2018] IEHC 510 [2018] 7 JIC 1005 (Unreported, High Court, 10th July, 2018). At para. 17 of *M.A.M.A*. Cooke J. says: *"The sole fact that particular facts or events relied upon as evidence of past persecution have been disbelieved will not necessarily relieve the administrative decision-maker of the obligation to consider whether, nevertheless, there is a risk of future persecution of the type alleged in the event of repatriation. In practical terms, however, the precise impact of the finding of lack of credibility in that regard upon the evaluation of the risk of future persecution must necessarily depend upon the nature and extent of the findings which reject the credibility of the first stage. This is because the obligation to consider the risk of future persecution must have a basis in some elements of the applicant's story which can be accepted as possibly being true. The obligation to consider the need for 'reasonable speculation' is not an invitation or pretext for gratuitous speculation: it must have some basis in, and connection to, the apparent circumstances of the applicant."*

5. Judgments, even much cited ones, are not statutes; and some nuancing is required here. It is possibly worthwhile making the contextual point that applicants generally seem to be very attached to pro-applicant decisions and *dicta* no matter what the vintage or what has changed in the meantime. And a lot has changed in the eight years since *M.A.M.A.* The Refugee Appeals Tribunal has been replaced under the International Protection Act 2015 by the International Protection Appeals Tribunal, which has engaged in a detailed process with the UNHCR relating to the burden of proof and has developed practices and approaches in that regard which have been upheld after searching scrutiny, most recently in *M.E.O. (Nigeria) v. International Protection Appeals Tribunal* [2018] IEHC 782 [2018] 12 JIC 0714 (Unreported, High Court, 7th December, 2018). Cooke J.'s reference to the assessment of future risk as having *"a basis in some elements of the applicant's story which can be accepted as possibly being true"* is thus not correct in terms of the current law. The assessment of risk of future persecution or serious harm is first and foremost based on the account of past persecution as actually accepted in the given case. An assessment is then made, in the light of those findings, of whether there is a reasonable chance of future persecution or a real risk of serious harm. More or less anything could *"possibly be true"* but the starting point for the assessment of future risk is the finding of facts as to past persecution or serious harm, which is made on the balance of probabilities, accompanied by the benefit of the doubt where that applies. The gist of the applicant's complaint is that an attack in Magura in 2016 was not narratively discussed in the assessment of future risk, but lack of narrative discussion does not equate to lack of consideration. That classic error dooms the applicant's complaint against the tribunal here.

Complaint of irrationality

6. The second element of the applicant's case is pleaded as follows; *"Further and in the alternative, and noting that the Applicant's father died on 27th August, 2018, the finding that* 'Any enmity directed at the appellant's father personally would have ceased on his death' *is irrational".*

7. Irrationality is a high bar; one which is not surmounted here. Relying on *I.E. v. Minister for Justice and Equality* [2016] IEHC 85 [2016] 2 JIC 1505 (Unreported, High Court, 15th February, 2016), the tedious argument is made that the conclusion of the tribunal member (who saw and heard the applicant and who is in a far better position than the court to judge his credibility) is *"both speculative and insubstantial"*. But a finding of fact or the formulation of an opinion is not conjecture or speculation, a point I made in *I.E.* at para. 39. Insofar as assessing future risk is concerned it is the tribunal's function to receive and weigh the evidence and to form its conclusions and views. In the absence of a reliable crystal ball, any exercise in prognostication is to some degree uncertain; but that does not make it irrational or turn it into unlawful speculation or conjecture.

Order

8. The applicant is the familiar figure of the UK-based student who, when his student permission runs out, remembers for the first time that he was subject to persecution, and makes that claim, not in the UK, but only by coming to Ireland. The core elements of his story were rejected by the tribunal member who saw and heard him. No unlawfulness in that exercise has been demonstrated. The application is dismissed.