[2020] IEHC 100

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 703 J.R.]

BETWEEN

O.A. (NIGERIA)

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 11th day of February, 2020

1. The applicant was born in Nigeria in 1981. She travelled to the U.K. in 2007, but did not seek asylum there. Subsequently, she spent considerable time in France, but did not seek asylum there either.

2. She came to the State in 2012, again without seeking asylum, and returned to her own country in 2014. She then came back to the State on 2nd January, 2015 but did not seek protection for over a two-year period instead, she got a student visa, valid until October, 2015. In April 2015 she sought an EU Treaty Rights Residents Card on the basis of dependency on an Irish citizen sister. That was refused on 8th July, 2015 and seems to have been then treated as an application for permission to remain based on an Irish citizen relation, which was again refused on 12th November, 2015. On 15th August, 2016 a deportation order was made.

3. The applicant sought to have that order revoked under s. 3 (11) of the Immigration Act 1999. In the meantime, a separate EU Treaty Rights application was made on the basis of dependency on a different sister who was a U.K. citizen. That was refused and a review was sought, which was also refused.

4. She then took a first judicial review action [2016 No. 963 J.R.] against that refusal, but that action was withdrawn in March 2017. Finally, on 15th March, 2017 she applied for international protection for the first time anywhere, based on her alleged sexual orientation. The deportation order was revoked because of the protection application, but the application itself was rejected by the International Protection Office on 21st November, 2018 on credibility grounds.

5. She appealed to the International Protection Appeals Tribunal which held an oral hearing on 30th April, 2019. Mr. Colm Kitson B.L. appeared at that oral hearing for the applicant and the same counsel is briefed in the present judicial review; a helpful practice which invariably assists the court. The applicant was told at the oral hearing that the tribunal "*required sworn evidence*" but she "*declined to swear an oath … and stated that she would instead give her evidence under affirmation*" (tribunal decision para. 2.8). The problem with that is that the applicant *does* have a religious belief that does not preclude swearing, as evidenced by the fact that she has sworn an affidavit in these proceedings, so her refusal to swear to the truth of her account before the tribunal could be taken to

do little for her credibility. While the tribunal member did not expressly say he was taking that approach, it can certainly be said that her casual attitude to the oath does nothing to enhance her case. The law is that an oath is binding and valid whether one has a religious belief or not, but if one wishes to affirm as an alternative one must, under the Oaths Act 1888, either have no religious belief or a religious belief that precludes swearing. On the face of things, the applicant did not meet those criteria so was not entitled to choose to bypass the oath at the tribunal.

6. On 20th August, 2019 the IPAT rejected the appeal. The applicant's account was found not to be credible. On 4th October, 2019 the statement of grounds was filed, the primary relief sought being *certiorari* of the IPAT decision. I have now received helpful submissions from Mr. Kitson B.L. who, as mentioned above, appears for the applicant, and from Mr. Hugh McDowell B.L. for the respondent.

Ground 1: alleged error in reliance on incidental matters

7. Ground 1 contends that "*the respondent erred in law in particular s. 28 (4) of the International Protection Act, 2015 in failing to properly assess the credibility of the applicant's claim by relying solely on matters which were incidental to her account in particular her purported delay in applying for asylum*". The factual premise of this ground is incorrect. The tribunal did not rely "*solely*" on matters incidental to the claim; rather, as put by the tribunal member, "*all of the information and documentation provided has been fully considered*" para. 2.9. That is spelled out further in paras. 4.1 to 4.11, where individual items and materials submitted are considered in detail. More fundamentally, it was open to the tribunal to find against the applicant by reference to factors undermining her credibility although they are not part of her so called "*core*" claim, such as delay in claiming asylum, a failure to apply for protection in another safe country, an implausible tale related to travel arrangements or the consistency of any factual information whether related to the claim of persecution or harm, or not: see *I.E. v. Minister for Justice and Equality* [2016] IEHC 85, [2016] 2 JIC 1505, 2016 WJSC-HC 8936 (Unreported, High Court, 15th February, 2016).

Ground 2: failure to take into account relevant material

8. Ground 2 contends that "*the respondent erred in law in particular s. 28 (4) of the International Protection Act, 2015 in failing to properly assess the credibility of the applicant's claim by failing to take into account the relevant statement in documentation presented by the applicant*". This complaint fails for similar reasons. The tribunal member *did* take into account all statements and documentation presented. In view of the many credibility problems with the applicant's account, it was very much open to the tribunal to decide against the applicant notwithstanding such material as might be thought to be favourable. The imaginative argument was raised that material submitted may have been considered, but it was not taken into account; unfortunately there is no difference, whether legal or semantic.

Ground 3: alleged error in approach to medical evidence

9. Ground 3 contends that "*the Tribunal erred in finding that no weight could be afforded to medical evidence in particular a letter from a Dr. Nelson which it was accepted by the*

Tribunal was not a forgery and which was corroborative of the applicant's account of past persecution". At para. 4.6 of the decision the tribunal cites the decision of the U.K. Immigration Appeal Tribunal in *Ahmed v. Secretary of State for the Home Department* [2002] UKIAT 00439 (Unreported, Immigration Appeal Tribunal, 19th February, 2002). At para. 31 of that decision, Collins J. for the tribunal stated as follows: "*It is trite immigration and asylum law that we must not judge what is or is not likely to happen in other countries by reference to our perception of what is normal within the United Kingdom. The principle applies as much to documents as to any other form of evidence. We know from experience and country information that there are countries where it is easy and often relatively inexpensive to obtain 'forged' documents. Some of them are false in that they are not made by whoever purports to be the author and the information they contain is wholly or partially untrue. Some are 'genuine' to the extent that they emanate from a proper source, in the proper form, on the proper paper, with the proper seals, but the information they contain is wholly or partially untrue. Examples are birth, death and marriage certificates from certain countries, which can be obtained from the proper source for a 'fee', but contain information which is wholly or partially untrue. The permutations of truth, untruth, validity and 'genuineness' are enormous. At its simplest we need to differentiate between form and content; that is whether a document is properly issued by the purported author and whether the contents are true. They are separate questions. It is a dangerous oversimplification merely to ask whether a document is 'forged' or even 'not genuine'. It is necessary to shake off any preconception that official looking documents are genuine, based on experience of documents in the United Kingdom, and to approach them with an open mind".*

10. I entirely endorse this analysis as a correct statement of the approach as far as Irish law is concerned. Thus, the tribunal is correct in para. 4.6 and saying in effect, that merely because the applicant's documents are not "*a forgery*" does not mean that the contents are correct. That can only be determined "*after looking at all of the evidence in the round*" which is what the tribunal did, notwithstanding the criticisms made by the applicant of the manner in which it expressed itself.

11. Hogan J. (Finlay Geoghegan and Irvine JJ. concurring) in *R.A. v. Refugee Appeals Tribunal* [2017] IECA 297 (Unreported, Court of Appeal, 15th November 2017), raised the possibility of making a definite finding on documents first, and then assessing an applicant's credibility in the light of that. But the circumstances in which such an approach is possible are exceptional to vanishing point. It does not appear that the Immigration Appeal Tribunal decision in *Ahmed* was drawn to the attention of the Court of Appeal in *R.A.*, and it seems to me that the same criticisms of the black-or-white, genuine-or-forgery attitude, that are so tellingly made by the U.K. Immigration Appeal Tribunal would be equally legitimate in the context of any simplistic interpretation of the *obiter* comments of Hogan J. in *R.A. v. Refugee Appeals Tribunal*.

12. It certainly can be said that it is extremely unlikely in practice that an exercise of the type speculatively mentioned in *R.A.*, that is, making a definite decision on documents before assessing an applicant's credibility overall, could meaningfully be undertaken. Of course,

it's very hard to exorcise exceptional circumstances from any area of the law, and the reality is that applicants will claim exceptional circumstances in almost every case (witness the prevalence of reliance on article 8 of the ECHR by unsettled migrants). But overall, with immense respect, it is hard not to feel that Hogan J.'s *obiter* comments in *R.A*. have been misinterpreted by applicants, thereby causing general confusion. The general rule is that an assessment of the reliability of documents *cannot* be separated from an assessment of the credibility of the applicant; and if there are exceptions to that, then they are more theoretical than real for virtually all practical purposes.

13. More fundamentally, as in *C.M. (Zimbabwe) v. IPAT* [2018] IEHC 35, [2018] 1 JIC 2304, (Unreported, High Court, 23rd January, 2018), where the tribunal member had said that the medical reports had no weight, I read that as meaning that such support, if any, as the medical reports provided was outweighed by the general lack of credibility of the applicant. The same language of no weight is used here (see para. 4.9), and one might again consider that particular phrasing to be sub-optimal. Unless there is some legal reason why that phraseology is appropriate, which was not advanced, and is not otherwise apparent to me, one might well legitimately take the view that the paraphrase in *C.M. (Zimbabwe*) is preferable. Nonetheless, the fundamental principle of separation of powers remains. The court must interpret an administrative decision in a way that makes it valid rather than invalid if that is possible, and in a way that makes sense rather than nonsense, see *per* Finlay P. in *Re Comhaltas Ceoltóirí Éireann* [1977] 12 JIC 1402, 1975 WJSC-HC 633 (Unreported, High Court, 14th December, 1977). I do so here by reading para. 4.9 of the tribunal decision in the same way as the corresponding phrase explained in *C.M. (Zimbabwe).*

14. Mr. Kitson majors on a reading of the decision to the effect that the tribunal rejected the applicant's general credibility first, without considering the medical materials. That fails on the facts here because here that material *was* considered; and the reference to the medical documentation having no weight is more an explanation and an articulation of a conclusion, which comes after the general finding. The point needs to be made that it is not a matter for the courts to dictate the format and wording of administrative decisions, much as one might be occasionally tempted to do so.

15. Such decisions have to be structured in some way; and the court should not artificially prevent the decision-maker from laying out his or her exposition of the matter in whatever way seems most appropriate to him or her. Points have to be made in some order and whether one is a judge, a tribunal member or an administrative decision-maker, one is always vulnerable to the entirely bogus argument that points articulated at a later stage of a decision were not taken into account in deciding on points that are articulated at an earlier stage. I do not accept that the *obiter* comments of Hogan J. in *R.A*. dictate any particular sequence for points to be decided in an international protection decision as a matter of law. If, contrary to my view, that is the sense of those *obiter* comments, I would reject such a view as clearly wrong. On the grounds both of its inappropriateness in principle and its unworkability in practice, such a straitjacketed approach cannot be followed and has indeed already been rejected in England.

16. A certain amount of confusion was created there by the Court of Appeal decision in *Mibanga v. Secretary of State for the Home Department* [2005] EWCA Civ 367, [2005] INLR 377, that condemned the structure of the protection refusal in that case. Wilson J. in his judgment in *Mibanga* 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*." Perhaps irreverently, but nonetheless totally appropriately, the U.K. Immigration Appeal Tribunal tackled the logical shortcomings of that Court of Appeal judgment in *H.H. (Ethiopia*) [2005] UKIAT 00164, (Unreported, IAT (Judges Mackey and Lane), 25th November, 2005) at para. 21, holding 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*." That perhaps slightly iconoclastic approach to the Court of Appeal by tribunal judges was logically compelling and was vindicated when the Court of Appeal itself revisited the issue in *S. v. Secretary of State for the Home Department* [2006] EWCA Civ 1153, [2007] INLR 60, a decision which endorsed the approach in *H.H. (Ethiopia*) and held that the outcome in *Mibanga* was extraordinary and exceptional (see paras. 21, 24 and 30).

Ground 4: alleged failure to come to a clear or reasoned decision on a core element of the claim

17. Ground 4 alleges that *"the respondent erred in law by failing to come to a clear and/or reasoned decision on a core element of her claim for international protection namely her sexuality*". That is not so. There is a clear and reasoned finding specifying precisely what parts of the applicant's account are accepted (see para. 4.11). By implication, it is obvious that the other parts of her account are not accepted.

Ground 5: Alleged error regarding approach to credibility of the sexuality claimed by applying the benefit of the doubt principle

18. Ground 5 alleges that "*without prejudice to the generality of the foregoing, the respondent erred in law by failing to provide a properly reasoned decision by rejecting the credibility of the applicant's claimed sexuality solely by reference to not applying the benefit of the doubt to that aspect of her claim without any assessment on the credibility of the statements presented by the applicant*". The problem with this argument is that the claim of sexual orientation was not supported by documentary evidence; therefore, the benefit of the doubt issue properly arose (see s. 28 (7) of the 2015 Act). Mr. McDowell's submissions eloquently summarise the position: *"accordingly the Tribunal is entitled (and in fact obliged by law) to utilise the benefit of the doubt test and having rejected the applicant's general credibility it was also entitled not to accept her claims regarding sexuality".*

19. Even if I am wrong in endorsing that submission, this is in any event only a semantic issue, as it is clear that having seen and heard the applicant, the tribunal did not accept her account in this respect.

Order

20. The application is dismissed.