Neutral Citation [2016] IEHC 651

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 758 J.R.]

BETWEEN

J.N.E.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, REFUGEE APPLICATIONS COMMISSIONER, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 14th day of November, 2016

1. The applicant came to Ireland from Nigeria in September, 2015 and on arrival was refused entry at Dublin Airport. She was conveyed to the Dóchas Centre where she applied for asylum. Following interviews with the commissioner her application was refused in a decision sent to the applicant on 23rd August, 2016. Unusually, she seeks to challenge the commissioner's decision rather than appeal to the Refugee Appeals Tribunal.

2. The present application for leave to seek judicial review of the commissioner's decision was filed on 5th October, 2016, out of time. There is an affidavit from her solicitor seeking to explain the delay although it is somewhat thin on detail. I will assume for present purposes (without so deciding) that I would be prepared to extend time for the making of the application.

3. The substantial grounds test applies by virtue of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, and I have had regard to the law in relation to that test including *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125 as approved in *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 395.

4. Mr. Conor Power S.C. (with Mr. Paul O'Shea B.L.) in a very able submission for the applicant seeks leave to advance four grounds to challenge the decision, which I deal with as follows.

Are there substantial grounds for contending that the commissioner must consider all aspects of a claim, even if credibility or a well-founded fear is absent?

5. Mr. Power submits that the decision is defective because the commissioner considered only the applicant's nationality, her credibility and the existence of an objective fear, and did not go on to consider other issues such as, for example, internal relocation.

6. I have already comprehensibly considered and rejected the motion that a decision maker is obliged to give "surplus" grounds for a decision, if one determinative ground is found to exist: see *R.A. v. Refugee Appeals Tribunal No. 1* [2015] IEHC 686 (Unreported, High Court, 4th November, 2015). While *R.A.* is under appeal, that aspect of *R.A.* was subsequently quoted with apparent approval by Stewart J. in *E.K.K. v. Minister for Justice and Equality* [2016] IEHC 38 (Unreported, High Court, 29th January, 2016) at para. 52.

7. In *I.E. v. MHE* [2016] IEHC 85 (Unreported, High Court, 15th February, 2016) I rejected the notion that there is any duty to decide the so-called "core claim" (i.e., did the events alleged happen) where an applicant's credibility is rejected.

8. In that case I discussed *E.P.A. v. Refugee Appeals Tribunal* [2013] IEHC 85 (Unreported, High Court, Mac Eochaidh J., 27th February, 2013) (para. 9), which was significantly qualified in *P.D. v. Minister for Justice, Equality and Law Reform* [2015] IEHC 111 (unreported, High Court, 20th February, 2015), in which Mac Eochaidh J. emphasised that it was too simplistic to say that the tribunal must always consider the core claim of an applicant.

9. In terms of the commissioner specifically, in *M.N. v RAT* [2015] IEHC 831 (Unreported, High Court, 21st December, 2015), I also previously rejected the notion that a right to an effective remedy means that the tribunal cannot make new findings on appeal.

10. In *M.A.R.A. v. Minister for Justice and Equality* [2014] IESC 71 (Unreported, Supreme Court, 12th December, 2014) Charleton J. said at para. 15 that an adverse finding of the commissioner challenged in a notice of appeal is displaced by the tribunal decision unless specifically affirmed. That approach does not rule out the tribunal making new findings in such an appeal.

11. The right to an effective remedy, whether under EU law generally, art. 39 of the procedures directive in particular, the EU Charter or the ECHR, is not, as I pointed out in *M.N.,* an endless hall of mirrors where any remedy, in turn, gives rise to a right to an effective remedy against that prior remedy.

12. To take an example from a different field of law, I noted in *M.N.* that Protocol No. 7 to the ECHR provides in Article 2 for a right of appeal in criminal matters. However, Article 2(1) goes on to state that this right does not apply where a person is *"tried in the first instance in the highest Tribunal or was convicted following an appeal against acquittal"*. Applying this reasoning by analogy to the right to an effective remedy in respect of an asylum decision, it is clear that a tribunal which itself provides an effective remedy against a lower body may nonetheless significantly alter the decision made, without that in turn giving rise to a further right to an effective remedy against the decision of the higher tribunal.

13. Subject to complying with any other legal requirement, the tribunal is perfectly entitled to make new findings on an appeal, or to put it another way, there is no legal or logical basis to compel the commissioner to issue obiter decisions on all aspects of a claim where it is rejecting the claim on an identified free-standing basis such as credibility.

14. The approach I have discussed is consistent with a number of other decisions including *Ojelabi v. Refugee Appeals Tribunal* [2005] IEHC 42 (Unreported, High Court, Peart J., 28th February, 2005); *Imafu v. Minister for Justice, Equality and Law Reform* [2005] IEHC 416 (Unreported, High Court, Peart J., 9th December, 2005); and *J.X. v. Refugee Appeals Tribunal* [2005] IEHC 167 (Unreported, High Court, Clark J., 2nd June, 2005).

15. I noted in *I.E.* that there may be exceptional cases where the *entire* story of the applicant is not rejected, and despite a general

absence of credibility, a risk of persecution can arise from such limited "*islands of fact*" as may be left intact despite the lack of credibility. For example, if it is established that an incredible applicant is nonetheless, as a matter of fact, a member of a particular tribe, who are at risk in a particular country, further analysis may be required by the tribunal, despite what might otherwise be a general rejection of the applicant's credibility (see *M.A.M.A. v. Refugee Appeals Tribunal* [2011] 2 I.R. 729).

16. *M.A.B. v. Refugee Applications Commissioner* [2014] IEHC 64 (Unreported, High Court, O'Malley J., 13th January, 2014) at paras. 48 to 50 is another decision where a failure to make a finding as to membership of a particular tribe was held to be an infirmity. However the remarks at that passage are clearly *obiter* because there was a separate independent reason for quashing the commissioner's decision in that case. Furthermore the authorities discussed above are not analysed in terms of their impact on this particular issue. *M.A.B.* certainly does not purport to decide that there is any duty to give more than one independent reason for any decision. Furthermore the law has moved on considerably since *M.A.B.* and it has been repeatedly clarified that there is no such duty. An applicant cannot manufacture substantial grounds for a point by taking small *obiter* passages from individual isolated cases where the issues concerned have been directly discussed and addressed in detail in subsequent cases.

17. Mr. Power also relies on the suggestion that in the asylum list, a "test case" has been identified on this particular point*, A. v. Minister for Justice and Equality and Refugee Applications Commissioner* [2016 No. 382 J.R.]. Again, however, the suggestion that there might be a test case on this issue does not relieve the applicant from showing substantial grounds in this present application. A decision in one case to grant leave in a particular case does not automatically mean that all similar cases must benefit from leave if on further examination the point is lacking in substantial grounds.

18. Admittedly, the *R.A.* decision is under appeal, but the general principle it refers to goes well beyond the facts of that particular case. As a matter of law and indeed logic there can be no substantial ground for contending that any decision maker, including the commissioner, is required to make *obiter* findings if it is disposing of an application on a self contained ground.

19. For example, there is no obligation on the High Court to decide all issues, if for example an application is being refused on the grounds that it is out of time. It would be something of a double standard if I were to impose on the commissioner a higher obligation than I am prepared to accept for myself.

20. Mr. Power makes great play of the notion that a first instance decision maker such as the commissioner is under a higher obligation than an appellate body. But precisely the same point can be made about the High Court. While it is true that if the commissioner does not decide a particular issue, having rejected an applicant grounds of credibility for example, and the credibility finding is reversed on appeal, the tribunal will have to consider other aspects such as State protection or internal relocation on a *de novo* basis. However there is nothing to suggest that the limited circumstances in which that would arise will cause such disruption or difficulty for the tribunal that a legal test should be created which would have the effect of invalidating any decision of the commissioner which did not include obiter comments on all issues.

21. Mr. Power also submits that for the commissioner not to give an opinion on all aspects of the case would be to change the nature of the appeal and to potentially dilute the effectiveness of it. I do not consider that there are substantial grounds for contending that this changes the nature of the appeal. It is a matter for the appellate body to decide how to proceed, and indeed the tribunal has jurisdiction to refer certain matters to the Commissioner for investigation if thought necessary, although it is not obliged to do so as I held in *M.N.* Thus there are no substantial grounds for contending that the effectiveness of the appeal would be impaired, that the applicant has been deprived of an effective remedy, or that there is any illegality in the commissioner's decision.

22. This element of the application seems to me to be simply an attempt to re-run the *R.A.* case in the context of the commissioner; and indeed to do so for the second time, a first attempt having failed in *M.N.* The court should be slow to find substantial grounds for this sort of endless legal groundhog day.

Are there substantial grounds for contending that the Commissioner should apply a test of "reasonable degree of likelihood" rather than balance of probability?

23. Mr. Power submitted that the Commissioner erred in determining the application on the balance of probability, relying on *R. v. Secretary of State for the Home Department Ex Parte Sivakumaran* [1998] 1 AC 958: *Karanakaran v. Secretary of State for the Home Department* [2003] All ER 449. It is also suggested that test cases have been identified on this issue, *N. v. Minister for Justice and Equality* [2016 No. 422 JR] and *N. v. Minister for Justice and Equality* [2016 No. 320 JR].

24. If this is a good point, it is equally good as regards a decision of the tribunal. There is no compelling necessity for judicial review to lie against the commissioner's decision on this ground; nor is judicial review the more appropriate remedy. The applicant should first take her case to the tribunal, and if unsuccessful there, she can seek leave at that point in relation to this issue, if substantial grounds for it can be established.

Are there substantial grounds for contending that the commissioner inadequately assessed the applicant's circumstances?

25. In this case, the applicant complains that the assessment of persecution, which turned in her particular circumstances on her sexual orientation, was defective and failed to comply with art. 4(3)(c) of Directive 2004/83/EC, art. 13(3)(a) of Directive 2005/85/EC, para. 5 (1) of S.I. No. 518 of 2006 (implementing the 2004 qualification Directive) and the judgment of the Court of Justice of the European Union in case C-277/11 *M.M. v. Minister for Justice, Equality and Law Reform* [2012] EUECJ (22nd November, 2012).

26. However the difficulty for the applicant is that the assessment of an applicant's account is the bread and butter of the work of the commissioner and the tribunal. Judicial review simply does not lie against the commissioner for an allegedly defective assessment of the facts where there is available the considerably more convenient option of appeal to the Tribunal: see *B.N.N. v. Minister for Justice Equality and Law Reform* [2009] 1 I.R. 719 (Hedigan J.); *A.D. v. Refugee Applications Commissioner* [2009] IEHC 77 (Unreported, High Court, Cooke J., 27th January, 2009); *O.A. v. Refugee Applications Commissioner* [2009] IEHC 296 (Unreported, High Court, Cooke J., 25th June, 2009); *C.E. v. Refugee Applications Commissioner* [2012] IEHC 3 (Unreported, High Court, Hogan J., 11th January, 2012).

Are there substantial grounds for contending that the commissioner incorrectly failed to make a finding regarding the applicant's pregnancy?

27. As part of the complaint about the assessment of the applicant's circumstances, it is said that the commissioner wrongly failed to uphold her claim that she was pregnant, even though she was treated as pregnant in correspondence from the commissioner's office. Even apart from the fact that the applicant herself failed to provide information that was readily available to her in relation to this aspect of the claim, an appeal to the tribunal is clearly a more appropriate remedy for any incorrect findings of fact by the commissioner. The basis for rejecting leave in relation to the third ground also applies here.

Order.
28. For the foregoing reasons, I will order

(i). that the application for leave to seek judicial review be refused;

(ii). that the matter be listed for any application for leave to appeal, which, if made, should be on notice to the respondent; and

(iii). that the applicant serve the C.S.S.O. with a copy of this judgment within 7 days in any event.