Neutral Citation: [2017] IEHC 187

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 634 JR]

BETWEEN

R.S.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

BERNARD MCCABE (SITTING AS THE REFUGEE APPEALS TRIBUNAL)

IRELAND

ATTORNEY GENERAL

RESPONDENTS

(No. 2)

JUDGMENT of Ms. Justice Stewart delivered on the 24th day of March, 2017.

1. This is an application pursuant to s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act, 2000, as amended, which provides that:

> *"The determination of the High Court of an application for leave to apply for judicial review [pursuant to s. 5 of the Act] shall be final and no appeal shall lie from the decision of the High Court to the [Court of Appeal] … except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the [Court of Appeal]."*

The facts of this case are set out in the Court's previous decision in this matter, *R.S. v. Minister for Justice and Equality & Ors* [2016] IEHC 550.

2. The principles and requirements governing the grant of a certificate are set out in Cooke J.'s decision in *I.R. v. Minister for Justice* [2009] IEHC 510 and are as follows:

> A. The requirement goes substantially further than the point of law as it emerges in or from the case currently before the Court. It must be one of exceptional public importance, in being a clear and significant requirement.
>
> B. The jurisdiction to certify such a case must be exercised sparingly.
>
> C. The point of law in question must stand in a state of uncertainty. It must be in the common good that this point be clarified, so as to enable the courts to administer that law, not only in the instant case, but in such future cases.
>
> D. The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.
>
> E. The requirements regarding exceptional public importance and desirability in the public interest are cumulative requirements. Although they may overlap to some extent, they require separate consideration by the Court.
>
> F. The appropriate test is not simply whether the point of law transcends the individual facts of the case, since such an interpretation would not take into account the requirement of exceptionality.

3. The applicant has raised three points on which he seeks a certificate to appeal to the Court of Appeal. The first question the Court will deal with is as follows:

> *"In assessing the applicant's fear of persecution is objectively justified, is an asylum decision-maker obliged to provide a reason or reasons for preferring one relevant piece of country of origin information over others where the latter information is consistent the applicant's claims, even where the personal credibility of the applicant regarding his account of events which occurred in the country of origin and during his travels from the country of origin has been rejected?"*

4. It is well established under the law in this jurisdiction that the assessment of country-of-origin information (COI), and the weight to be accorded to it, is a matter for the decision-maker. The Courts have repeatedly found that a decision-maker does not have to set out every item of COI and state why each item is rejected or accepted. The applicant places heavy reliance on the decision of Edwards J. in *D.T.V.S. v. MJELR & Ors* [2007] IEHC 305 where, at p. 16 thereof, he states that it was not appropriate for the Tribunal Member to arbitrarily prefer one piece of COI over another. However, such a statement must be balanced against the facts of the case currently before this Court, namely the sheer volume of documentation furnished to the Tribunal Member. In my previous decision, I pointed out that little or no attempt was made by the applicant to synopsise or particularise same. Further, during the course of the hearing before the Court, it was conceded by the applicant that not all of the submitted COI (which exceeded some 1,200 pages, bound in 3 large ring binder folders) was relevant. A slim volume of the pertinent material was furnished to the Court in their place. I found that the applicant inundated the Tribunal with a large volume of non-specific documentation and then sought to challenge the Tribunal Member for not addressing all of that information, with the intent of attracting doubt to the process and the work of the decision-maker. I was not satisfied then, nor am I satisfied now, that this was a proper discharge of the applicant's responsibilities as a participant in the asylum process. The assessment of COI, and the weight to be attached thereto, is a matter peculiarly within the remit and responsibility of the Tribunal Member. I am not satisfied that there is any point of law of public importance that would warrant the grant of a certificate of appeal on this point.

5. The next point raised by the applicant relates to the treatment of the SPIRASI Reports. The Court is asked to certify the following question:

> *"In assessing the expert medical evidence regarding torture, may an asylum decision-maker find that the medical practitioner using the Istanbul Protocol did not state with any particularity how and in what circumstances such sequelae, as set out in the medical report, came about and/or may he/she lend the report little or no weight on the basis of other credibility findings related to the applicant?"*

6. I have already found that the manner in which the Tribunal Member dealt with the SPIRASI Report was within his remit and he was entitled to arrive at the conclusions set out in the impugned decision. The applicant is effectively arguing that a definitive statement by the Court of Appeal on how SPIRASI medical reports should be treated by Tribunal Members would be of assistance to asylum applicants and the operation of the Refugee Appeals Tribunal going forward. On the other hand, he has not pointed to any error in the manner in which this Court arrived at its decision. While it could be argued that it would of benefit the applicant if the Court acceded to an application to certify on this point, or indeed any of the other points raised, I am not convinced that there is any point of law of exceptional public importance involved, nor am I satisfied that there is an issue raised before the Court which transcends the facts of this case and would ultimately inure to the benefit of future applicants. Therefore, I will refuse to certify leave to appeal on this ground.

7. Lastly, the Court will address the points raised in relation to the negative credibility finding under s. 11B(b) of the Refugee Act 1996, as amended. The applicant asks the Court to certify a question in the following terms:

> *"Are the mandatory provisions of s. 11B(b) of the Refugee Act 1996 only applicable where a claim is made by an asylum applicant that Ireland was the first safe country encountered after he or she departed his/her country of origin?"*

8. The applicant submits that, in its judgment on this issue, the Court departed from the views expressed by other judges, namely MacEochaidh and O'Malley JJ. in *F.T. v. RAT & Anor* [2013] IEHC 167 and *F.O. v. RAT & Anor* [2014] IEHC 123 respectively. It is therefore suggested that there is uncertainty as to the operation of this point of law, which the applicant states is of some importance. The applicant states that s. 11B(b) of the Refugee Act 1996 (as amended) can only apply if he has claimed that Ireland was the first safe country in which he arrived since departing his country-of-origin. I accept the respondent's submission that s. 11B(b) is a mandatory consideration for the second-named respondent in assessing an applicant's credibility.

9. The respondent relies on *E.S. v. R.A.T. No. 2* [2014] IEHC 534 as a basis for severing the s. 11B(b) conclusion from the rest of the decision. In *E.S.*, MacEochaidh J. found that the s.11B(b) conclusion was severable from the rest of the decision because the other findings regarding the applicant's case were sufficiently robust and independent of one another to maintain the validity of the decision, notwithstanding the improper finding under s. 11B(b). MacEochaidh J. specifically refers to the failure of the applicant to satisfy the forward-looking test of future persecution as a sufficiently robust finding to allow the s. 11B(b) finding to be severed. A similar conclusion of failure to satisfy the forward-looking test was made in the impugned decision currently before the Court. However, such an argument goes toward the validity of the impugned decision, which is a question that was settled in this Court's decision on 29th July, 2016. It does not go toward whether or not the law relating to s. 11B(b) is a point of law of exceptional public importance that is in such a state of uncertainty as to warrant a certificate of appeal to the Court of Appeal.

10. When considering any decision, it is important not to divorce its legal reasoning from the facts that gave rise to it. There were a number of factors at play in *F.O.* and *F.T* that are not present in this case. In both of those cases, the Tribunal Member's failure to consider and fully analyse key elements that went to the core of the applicant's claim was a highly influential factor in reaching the decision to grant the reliefs sought. In the impugned decision currently before the Court, all relevant material was fully considered and adjudicated upon, notwithstanding the adverse credibility findings already reached by the decision-maker. The thorough and specific nature of the impugned decision is demonstrated by the following quote at pg. 22 of the impugned decision:-

> *"I reached this conclusion on the basis that it is clear from the Articles of Evidence that the weather was as factor in whether or not he would seek refugee status in Russia. This indicates that he thought about the process and decided not to seek protection in the first available country. That is the reason in my view why the credibility of his position is undermined."*

This can be contrasted against the more generalised and incomplete decisions made by the Tribunal Members in *F.T.* and *F.O.*

11. With regard to the citation of s. 11B(b) as the basis for the respondent's conclusion on credibility, *F.T.* makes it clear that the Minister is entitled to have regard to the applicant's transit through a safe country, provided that she also has regard to any reasonable explanation offered by the applicant for his or her failure to make an application for asylum in that country. In *F.O.*, the lack of regard paid to said explanation constituted an indirect application of the direct-flight rule. In this case, the respondent did consider the applicant's explanation for not claiming asylum in Russia and found it to be unreasonable, as evidenced by the above quote. On these grounds, the facts of the case currently before the Court can be distinguished from the facts in *F.O.* and *F.T.*

12. In assessing whether a conflict exists between two High Court judgments, I have had regard for the following decisions, all of which adjudicate on the validity of a decision that improperly invoked s. 11B(b):-

> - *F.O.(supra), F.T. (supra), E.S. v. RAT No. 1* [2014] IEHC 374 & *No. 2 (supra), S.T. v RAT* [2016] IEHC 250, *A.D. v. RAT* [2015] IEHC 30, *A.T. (DRC) v. MJE* [2015] IEHC 479, *T.U. (Nigeria) v. RAT* [2015] IEHC 61, *S.Z. v RAT* [2013] IEHC 325, *K.A.H. v. RAT* [2015] IEHC 834, *H.K. v. RAT* [2015] IEHC 65, *M.M. (Zimbabwe) v. MJELR* [2015] IEHC 325, *Z.Y. (Pakistan) v. RAT* [2014] IEHC 498, *N.O. v. RAT* [2014] IEHC 509, *S.K.T. v. RAT* [2014] IEHC 572, *M.S.M. (DRC) v. RAT* [2015] IEHC 330, *J.C.O. v. RAT* [2014] IEHC 26, *N.S.M. (Zimbabwe) v. MJELR* [2015] IEHC 440.

13. In. *F.O.*, O'Malley J. endorsed the findings of O'Keeffe J. in *A.M.K. v. RAT* [2012] IEHC 479, as expressed at para. 39 of that judgment:-

> *"As a matter of basic principle, the failure of an asylum seeker to apply for asylum in the nearest safe country or in the first safe country to which he flees is not a bar to refugee status per se and is not necessarily inconsistent with a genuine fear of persecution. In theory, asylum seekers are entitled to choose their country of asylum. The person may, for example, wish to apply for asylum in a country where his native language is spoken, where his family or close friends have settled, or where there is a community of people from his country of origin or sharing his ethnicity or religion. The person may also wish to distance himself from incursions by authorities of his home (Hathaway, The Law of Refugee Status, at p. 50). The assessment of an applicant's credibility may, however, include an assessment of the*

reasonableness of any explanation given for passing through safe third countries without applying for asylum there."

14. In F.O., the poor treatment received by asylum seekers in Greece could be said to constitute a reasonable explanation for failing to seek asylum there. The Tribunal Member in this case concluded that a reasonable explanation had not been proffered by the applicant, whose considerations included a personal dislike for Russia's weather and food.

15. None of the seventeen decisions listed above involved a scenario wherein improper reliance on s. 11B(b) was the only flaw in the Tribunal Member's decision and the decision was struck down on that basis, notwithstanding that the Tribunal Member had properly adjudicated on the reasonableness of any excuse offered by the applicant for their failure to claim asylum in a safe country that they had travelled through. In *N.S.M.*, this Court found that the improper application of s. 11B(b) is not, of itself, sufficient to quash a decision refusing the grant of refugee status. MacEochaidh J. came to a similar conclusion at para. 24 of *S.Z.*:-

> *"24. Complaint is also made in these proceedings that an unlawful finding under s. 11B(b) of the 1996 Act is made by the Tribunal Member. I disagree with this submission and regard the finding made that the applicant did not apply for asylum in Spain as a matter which the Tribunal Member was entitled to weigh in the balance in respect of credibility. However, it was erroneous for the Tribunal Member then to refer to s.11B(b). That section could only be invoked in the context of a credibility finding where an applicant expressly claims that Ireland was the first safe country encountered in flight from the country of origin. It is clear from the decision in suit that the fact that the applicant spent a month in Spain and did not claim asylum suggested that he was not truly fleeing persecution. The implication here is that a person genuinely fearing persecution will seek asylum in the first safe country encountered. That, in my view, is a logical and lawful conclusion for a Tribunal Member to reach and where a person reaches a safe a country and spends a month there and does [not] seek asylum, it [is] open to a decision maker to draw an adverse inference as to credibility [therefrom]. The inappropriate reference to s. 11B(b) by the [Tribunal] Member in this context is not enough to vitiate the decision."*

16. Faherty J. outlined similar reasoning at para. 40 of *H.K.*:-

> *"40. Had [the reliance on s. 11B(b)] been the only error on the part of the Tribunal Member, it would not of itself be sufficient [to] impugn the Decision but the overall conclusion arrived at in the Decision cannot stand for the reasons set out herein."*

17. The peripheral role played by an improper s. 11B(b) finding in vitiating a decision was also noted in a different context by Faherty J. at para. 88 of *K.A.H.*:-

> *"I am satisfied that the specific reference to s. 11 B (b) of the Act was erroneous [since], to my mind, the asylum record available to the court in this case does not indicate that the applicant, albeit having arrived in Ireland, specifically claimed it was the first safe country he arrived in. Therefore, s. 11 B (b) of the 1996 Act should not have been applied to the assessment of the applicant's credibility. However, this impugned finding relates to a peripheral matter (the applicant's travel route) and would not of itself vitiate the decision if there are other tenable factors to sustain the decision."*

18. I have already found that the questions regarding credibility were within the remit of the Tribunal Member and in accordance with the decisions in *F.O.* and *F.T.* While the determination made by the Tribunal Member on the substantive issue could have been worded differently, it does not detract from the substance of the applicant's core claim. The factual background of his extended stay in Russia (a period of 47 days) and the various reasons furnished the Tribunal Member as to why he did not remain in Russia to claim asylum there have already been set out in this Court's previous judgment. It seems to me that the Court's finding on this point is so inextricably bound up with the facts of this case that, even if I were to accept that a conflict exists between this Court's decision and those of other judgments of the High Court, I cannot be satisfied that a certificate of appeal on this issue could transcend the facts of this case.

19. For the reasons set out above, the application for a certificate of appeal to the Court of Appeal in respect of the above questions is refused.