

**THE HIGH COURT
JUDICIAL REVIEW**

[2016] No. 355 J.R.

BETWEEN

A. O. N.

APPLICANT

AND

**ELIZABETH O'BRIEN SITTING AS THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND
THE ATTORNEY GENERAL**

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 29th day of July, 2016

1. This is an application for leave to seek judicial review of a decision of the Refugee Appeals Tribunal. The applicant claims that she was born in Uganda and asserts a fear of persecution because of her involvement in politics. Following a political demonstration in 2007, she was detained. She says that she was in prison for three months in 2011. She claimed she was locked in a dark place and was sprayed with tear gas. She says that she was interrogated; she was kicked in the chest and gang raped. She was released with instructions to spy on her own political party. Her claim was rejected by O.R.A.C. on credibility grounds.

2. A medical report written by Dr. Mona Sayegh was submitted in connection with the appeal. This report records the applicant's narrative as recounted to the author of the report. In summary the author said:-

"Ms. N. is a 27 year old lady from Uganda who alleged physical abuse and sexual assault by the Ugandan authorities because of her political affiliation. She exhibited scars typical of burns and she had diffuse bruising on her lower limbs which was consistent with her history of being beaten with a baton.

Opinion:

Under the description of the United Nations Convention against Torture, Ms. N. has given a detailed description of ill-treatment including physical and sexual abuse which amounts to torture and she feared for her safety should she be returned to her country of origin.

In my opinion Ms. N. is suffering from a depressive disorder of moderate severity under the International Classification of Disease 10. This depressive disorder is exacerbated and maintained by her current stressors of social and cultural isolation.

In my opinion Ms. N. is suffering with Post Traumatic Stress Disorder. My findings at clinical assessment are highly consistent with her scores on the mental health assessment questionnaires.

I have written to her GP requesting that she be referred to the community mental health team. I have referred her for counselling here at SPIRASI to help her deal with her symptoms of depression and PTSD.

In my opinion a forced return to her country will exacerbate her mental state."

3. The Refugee Appeals Tribunal gave a detailed account of Ms. N.'s narrative and her claim for asylum. It was found that an identity card examined by the Garda Technical Bureau concluded that the card was not genuine. The author refers to Dr. Sayegh's medical report, noting that it found that the applicant had scars consistent with her history of being beaten with a baton. The author concludes:-

"With respect to the above I point out that the examining Physician could only say that the Appellant has scars that are 'typical of burns' and one in particular that was 'highly consistent with a healed burn.' It is not possible to say how these burns, if indeed they were burns, were inflicted or more importantly by whom."

4. The author says in respect of the applicants credibility:-

"I observed the Appellant closely as she gave her testimony, at first she directed her answers away from me, and I asked her to look at me when answering. When she recounted those aspects of her story that had already been covered at interview and in her questionnaire she provided her evidence in a manner that strongly suggested she was recounting a 'learned off' version of events, on the other hand when she was asked about her travel to Dublin, the airline, the colour of uniforms of staff, her evidence was faltering, patchy, she had clearly not prepared for this line of questioning. I have considerable experience in interviewing Appellants and my experience tells me this Appellant was not telling the truth. I also point out that when a question was directed to the Appellant which interrupted her account she became confused, this is a typical indicator of recital of memorized version of events as opposed to a spontaneous recall and recounting of experienced events. She may have experienced some traumatic event or events in her country but I do not believe that it was for the reason or reasons, or by the people or actors, alleged."

5. Having rejected the applicant's credibility comprehensively the author of the report, in relation to the medical evidence, says:-

"The medical evidence can only go so far as to say that she is suffering from 'depressive symptoms of moderate

severity' as well as 'Post Traumatic Stress Disorder by virtue of the fact that she was exposed to a highly traumatic event', I point out that that event could have been the death of a loved one, the witnessing of harm to a loved one or indeed being the victim of physical or emotional violence, the Report cannot verify that she suffered ill treatment at the hands of state agents or for the reasons alleged. To be clear, I am not rejecting the medical evidence, simply pointing out its limitations in terms of constituting corroboration of events alleged to have occurred in another country, or constituting events of the reason for the infliction of wounds that have since healed but have left scars."

Pleadings

6. The ground (e)1 pleads:-

"The First Named Respondent erred in law in failing to have proper regard to the medico-legal documentation from SPIRASI furnished by the Applicant, which raises a rebuttable presumption that the Applicant has suffered serious harm in the past."

It is alleged that:-

"At para. 5.5 of the Impugned Decision, the First Named Respondent dismissed the import of the SPIRASI report and substituted her own theory of the cause of harm."

The pleadings go on:-

"Contrary to the test set out above, the First Named Respondent has provided no adequate reasons for rejecting the probative value of the SPIRASI report other than engaging in unlawful speculation as to alternative sources of harm."

7. The test being referred to in the pleadings appears to be that enunciated by Clark J. in *J.M. (Cameroon) v. The Minister for Justice, Equality and Law Reform* of the 16th September, 2013, where the learned Judge said:-

"The law in relation to the treatment of medical reports is clear. If the report is relevant it must be considered and evaluated with the other evidence and a clear explanation provided if its contents are rejected."

The applicant pleads that the author of the R.A.T. report rejected the SPIRASI Medical Legal Report and gave no reasons for doing so. The opposite happened. Dr. Sayegh's report is fully considered and accepted. Therefore substantial grounds have not been made out.

8. The next ground appears to be as follows:-

"The First Named Respondent did not address at all the Applicant's claim of torture and gang-rape in prison."

At para. 2.9 the author of the R.A.T. report records that:-

"She claims that after this she was blindfolded and taken to an unknown place, she was given a mat and a blanket, water, a shower and food but that night she was kicked in the chest and gang-raped."

Thus it is not correct to say that the decision "did not address at all" the claim of torture and gang rape.

9. The manner in which overall credibility is rejected is expressed as follows:-

"I have made my observations in relation to her testimony and the manner in which it was provided above, it is simply not credible that someone who presents as a person with vivid power of recall in relation to what she alleged where horrific events (I note that it is regularly urged upon me that I must take into account the many studies that go to show that the inability to recall details of horrific events is common in victims that have experienced mental and physical trauma) cannot recall any details at all about her travel to Ireland. She could recall events that occurred as far back as 2006 in considerable detail (again I refer to her repeated reference to the arrest of 4 party members, their detention for four days 'without separating men and women'), but could not recall any details of her travel in 2011. It is not credible that she was able to open the passport and ascertain that the photo in it was hers but could not say what nationality or colour of the passport bore. In giving evidence there was a clear delineation between evidence concerning her experience in Ireland, attending medical services etc. - here she gave testimony in a manner that suggested she was telling the truth, or that she was recalling events that she had experienced, - and the evidence concerning her alleged experiences in Uganda, here she recited her account as though she was reciting a memorised passage.

It is not credible that if the Appellant is who she says she is and experienced what she says she did she would not have made an effort to substantiate her claim with genuine documentation, this might have consisted of a simple letter from a party colleague who could verify that the party arranged for her to travel here and in what circumstances. She could have made an effort to contact her family, she claims they still live in Uganda, it is simply stretching the bounds of credibility to say that a mother who left her child behind would have made no efforts over the past 4 years to confirm that he is still living with her parents and is safe and healthy."

10. The applicant gave no details concerning the alleged gang rape save to make a bare assertion that such had happened. It was not incumbent upon the decision maker to comment upon each factual allegation or assertion made by the applicant. The decision maker was entitled to form an overall assessment of credibility and reject it provided the rejection is explained. This is precisely what happened in this case. The absence of a section in the R.A.T. report dealing expressly with claims of torture or gang rape is not unlawful in the circumstances. Substantial grounds are not made out on this complaint.

11. The next identifiable plea is as follows:-

"The First Named Respondent, erred in fact and in law, including but not limited to, Section 13(5)(a) and 13(6) of the Act; Articles 4.3, 5 and 20.5, of the Qualification Directive; Section 5(1)(b) and (c) and Regulations 6 of the Protection Regulations; and Articles 8.1 and 8.2 and Chapter V of the Procedure Directive."

This is an incoherent plea which could not sustain an application for leave to seek judicial review.

12. The applicant has elaborated a claim in the written submissions based on an alleged breach of Article 5(2) of the Protection Regulations, and giving the applicant the benefit of the doubt, I assume that the written submissions on this point are connected with the plea set out above. The argument made in written submissions is that the unlawful rejection of the probative value of the SPIRASI report caused the respondent to fail to consider the compelling reasons test comprised in Article 5(2) of the Protection Regulations. The meaning of Article 5(2) was set out by Cooke J. in *M.S.T. v. Minister for Justice and Equality* [2009] IEHC 529, at para. 29:-

"The ordinary meaning of the additional wording appears to be that, what might be called a 'counter-exception' to para (ii) above is created to the effect that, even if there is no reason for considering that the previous serious harm will now be repeated, the historic serious harm may be such that the fact of its occurrence alone gives rise to compelling reasons for recognising eligibility."

13. Though that judgment is frequently cited as an authority for the meaning of Regulation 5(2) of the Protection Regulations, the result of the application of the law is rarely referred to. Having set out the meaning of the rules, Cooke J. said as follows:-

"There remain then the further questions as to whether there was in the information available to the Minister on the application for subsidiary protection, material which put him on enquiry as to whether Regulation 5 (2) as so construed was applicable in this case and whether the suffering experienced including the 'second incident' recorded in the medical report of Dr. Clarke could in any event qualify as 'previous serious harm' so as to require it to be considered on that basis.

Clearly, no purpose would be served by quashing the Minister's refusal with a view to having him reconsider the application if the evidence relied upon is in any event incapable of constituting proof of the fact of previous serious harm."

14. Then it is recalled that para. 33 of the judgment provides:-

"The Court is accordingly satisfied that the additional wording [in the Irish Regulations] does have some limited effect in extending the possible scope of application of article 4.4. In particular, the wording appears to be designed to grant some latitude to the Minister to recognise eligibility for subsidiary protection in a case of proven previous serious harm giving rise to compelling reasons for according international protection notwithstanding the fact that there may exist some doubt as to the likelihood of risk of repetition of that previous serious harm."

15. The duty on the decision maker to make inquiry and to apply the counter exception in Regulation 5(2) only arises in circumstances where there is proof of past persecution or serious harm, as defined in the Directive and the Regulations. The only evidence of past persecution or serious harm in this case was that offered by the applicant. This was rejected on credibility grounds. In those circumstances, there was no acceptable evidence of past persecution or past serious harm and, therefore, the obligation to consider the counter exception in Article 5(2) did not arise.

16. The SPIRASI report was not evidence of past persecution or past serious harm. A medical report can only describe the injury and a SPIRASI medical report may be evidence as to whether the injury observed is consistent with the narrative of the patient and description of how the injury was inflicted. In a case where credibility is rejected, as it is here, mere consistency between the applicant's claim as to the circumstances in which the injury was inflicted and the injury as observed by the doctor is not a circumstance which would trigger an inquiry under Regulation 5(2) of the Protection Regulations.

17. The next plea of illegality is as follows:-

"The manner in which the First Named Respondent made adverse credibility findings was unlawful and/or vitiated by unfairness in that the adverse credibility findings were grounded on speculation, gut instinct and conjecture."

The decision maker is entitled to make findings as to credibility based on demeanour provided these are fully explained and based on accurate observation. There was no conjecture or speculation about factual events as recounted by the applicant. No illegality attaches to a decision which accepts that a person is scarred but suggests that events other than those described by the applicant caused these injuries. Such reasoning does not constitute unlawful speculation or conjecture where the reason for the rejection of the applicants account is given. Self evidently, something caused the injuries but not the events described by the applicant, according to the decision. I do not read the decision as one which speculates as to what actually caused the injuries.

18. It is further pleaded:-

"The First Named Respondent's determination that the Applicant's demeanour, signs of distress, and consistency in her testimony about traumatic events are in fact indicators of dishonesty is unlawful as unreasonable and lacking in fairness."

Once the decision maker had decided that the applicant was not telling the truth, but nonetheless displayed emotion such as crying and distress, she was entitled to attribute these expressions to matters other than those in the applicant's narrative which was decided to be a false claim for asylum.

19. Finally, it is pleaded that:-

"The finding by the First Named Respondent that the Applicant 'may have experienced some traumatic event or events in her country but I do not believe that it was for the reason or reasons, or by the people or actors, alleged' is unfair and/or irrational and has no evidential basis."

This claim or comment by the tribunal member does not require an evidential basis. It is a comment which logically follows the rejection of the applicant's narrative, notwithstanding the existence of injury in her mind and on her body. The decision merely makes the trite observation that the injuries were caused by some traumatic event but not the event described by the applicant. No illegality could attach to such a comment.

20. The application for leave to seek judicial review is rejected.