THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 563 JR]

BETWEEN

R.J.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr Justice David Keane delivered on the 21st June 2019

Introduction

1. This is the judicial review of a decision of the Refugee Appeals Tribunal, now the International Protection Appeals Tribunal ('the IPAT'), dated 4th May 2016 and made under Regulation 8(22)(a) of the European Union (Subsidiary Protection) Regulations 2013 ('the 2013 Regulations'), then applicable, affirming a recommendation of the Refugee Applications Commissioner ('the Commissioner') that the applicant should not be declared to be a person eligible for subsidiary protection ('the IPAT decision').

2. On 25 July 2016, Mac Eochaidh J granted the applicant leave to apply for various reliefs, principal among which is an order of *certiorari* quashing the IPAT decision.

3. At the time when leave was granted, the IPAT was known as the Refugee Appeals Tribunal ('the RAT'). When s. 71(5) of the International Protection Act 2015 ('the Act of 2015') came into force on 31 December 2016, the former was substituted for the latter in these proceedings by operation of law.

4. This is yet another case in which the Minister for Justice and Equality, Ireland and the Attorney General have been made respondents to the application, although no relief is sought against any of those persons, nor is any issue raised in which any of them has a direct interest, as a matter of law, suggesting the indiscriminate use of scissors and paste pot that is so much a feature of the immigration and asylum list. However, nothing turns on it.

Background

5. The applicant is a national of Bangladesh, born in 1969, who claims to have entered the State without permission in March 2009. After he was discovered working unlawfully in the State on 6 October 2009 and was arrested and detained, he applied for refugee status on 21 October 2009, claiming a well-founded fear of persecution on grounds of political opinion. The applicant claims to be a member of the Bangladesh Nationalist Party ('the BNP') and to fear persecution at the hands of the Bangladesh Awami League, members of which, he claims, assaulted him shortly before he left Bangladesh and will kill him, should he return.

6. On 13 January 2010, the Commissioner recommended that the applicant not be recognised as a refugee on the basis that he had failed to establish the credibility of his claim to have a well-founded fear of persecution if returned to Bangladesh. On 14 May 2010, the Refugee Appeals Tribunal affirmed that recommendation on, effectively, the same ground. The Minister refused the applicant's refugee status application on 7 July 2010.

7. On 12 August 2010, the applicant applied for subsidiary protection. After an interval that has not been explained, but in respect of which no complaint is made on either side in these proceedings, the applicant was interviewed on behalf of the Commissioner on 11 November 2014, in accordance with Regulation 5(3) of the 2013 Regulations which had come into operation on 14 November 2013. Under Reg. 3(2) of the 2013 Regulations, any application for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006 ('the 2006 Regulations') upon which the Minister had not made a decision before the commencement of the 2013 Regulations, was deemed to be an application made under the later regulations.

8. The Commissioner's written report on the investigation of the applicant's subsidiary protection claim, required under Reg. 6(1) of the 2013 Regulations, is also dated 11 November 2014. It was subsequently referred to by the tribunal as 'the SP report'; 'SP' presumably standing for subsidiary protection. In very short summary, it concluded that the applicant's claims were not credible and that no substantial grounds had been shown for believing that he would face a real risk of suffering serious harm if returned to Bangladesh. On 25 November 2014, the Commissioner recommended that the applicant should not be declared to be a person eligible for subsidiary protection.

9. The applicant submitted a notice of appeal on 19 March 2015. That appeal was heard on 1 March 2016.

The decision under challenge

10. The eleven-page IPAT decision is dated 4 May 2016 and was furnished to the applicant under cover of a letter, dated 11 May 2016. It concluded that the applicant had failed to establish the credibility of his claims or that there were substantial grounds to believe that he would face a real risk of serious harm if returned to Bangladesh. Thus, it concluded that he was not eligible for subsidiary protection.

Procedural history

11. The applicant sought, and was granted, leave to bring these proceedings on 25 July 2016, based on a statement of grounds dated 20 July 2016 and filed in the Central Office the following day, grounded on an affidavit of the applicant, sworn on 20 July 2016. The Minister filed a statement of opposition, joining issue with the applicant on each of the grounds raised, on 19 May 2017.

Extension of time

12. In the Order made on 25 July 2016, Mac Eochaidh J granted the applicant leave to seek, among other reliefs, an order granting an extension of time for the issue of these proceedings. In their statement of opposition, the respondents point out that the proceedings were not brought within the statutory time limit set down by s. 5 of the Illegal Immigrants (Trafficking) Act 2000, as amended, and are out of time because the IPAT decision of 4 May 2016 was furnished to the applicant under cover of a letter of 11 May 2016, whereas the order granting leave was not made until 25 July 2016, strongly suggesting that the application for leave was made well outside the relevant time limit.

13. Section 5, sub-s 2 of the Illegal Immigrants (Trafficking) Act 2000, as substituted by s. 34 of the Employment Permits (Amendment) Act 2014 provides in respect of the judicial review of various types of decision, including, by operation of s. 5(1)(o), a decision of the tribunal under Reg. 8(22)(a) of the 2013 Regulations, that:

> 'An application for leave to apply for judicial review … shall be made within the period of 28 days commencing on the date on which the person was notified of the decision…unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision…is invalid or ought to be quashed.'

14. However, in his grounding affidavit, the applicant deposes to a number of matters that, he submits, amount to good and sufficient reason for extending time. In short, he received the decision on 12 May 2016 and immediately instructed his solicitor to challenge it; he received a letter from that solicitor stating that he or she was unable to do so on 19 May 2016; he looked for another solicitor and obtained an appointment with his present solicitor on 13 June 2016; he understands that counsel was briefed on his behalf on 23 June 2016; he understands that counsel advised that his full file be obtained from his previous solicitors and that it was requested by fax; he understands that the file was forwarded under cover of a letter, dated 29 June 2016, but was not received by his present solicitors until 4 July 2016; he understands that a full set of papers was then sent to counsel on 8 July 2016; he travelled to Dublin to swear his grounding affidavit on 20 July 2016; and the application for leave was made on 25 July 2016.

15. As the extension of time point was argued as part of the hearing on the merits of the application, I propose to address the merits before returning to consider the question of whether an extension of time should be granted.

Grounds of challenge
16. In his statement of grounds, the applicant advances eight separate grounds of challenge to the IPAT decision, which, in his written legal submissions, he helpfully presents as raising the following four questions:

> (a) Was the 'balance of probabilities' the correct standard of proof to apply to past events?
>
> (b) Was the applicant's credibility correctly assessed?
>
> (c) Did the tribunal comply with the obligation to provide reasons for its decision?
>
> (d) Did the tribunal correctly consider the internal relocation alternative?

Analysis
i. the balance of probabilities standard of proof to establish past events

17. The applicant's principal point, according to his counsel, is that the tribunal applied the wrong standard of proof in determining the material facts on the balance of probabilities. As the applicant acknowledges in his written legal submissions, dated 7 November 2017, that point has already been resolved against him by this court in *O.N. v Refugee Appeals Tribunal* [2017] IEHC 13 (Unreported, High Court (O'Regan J), 17th January, 2017) in these terms (at para. 63):

> 'In light of the foregoing principles and having regard to the fact that the balance of probabilities is the civil standard of proof in this jurisdiction, I am satisfied that the principle of equivalence and the principle of effectiveness are both safeguarded by the application of the standard of proof – being the balance of probabilities – coupled with, where appropriate, the benefit of the doubt. Until such time as this State might introduce more favourable standards as contemplated by Article 3 of [Council Directive 2004/83/EC], this is the appropriate standard to apply, i.e. the balance of probabilities, coupled with, where appropriate, the benefit of the doubt.'

18. For my part, I have previously held in *N.N. v Minister for Justice and Equality* [2017] IEHC 99, (Unreported, High Court, 15th February, 2017) that, on the well-established principles recognised by Parke J in *Irish Trust Bank Ltd. v Central Bank of Ireland* [1976-1977] ILRM 50 and reformulated by Clarke J in *Re Worldport Ireland Ltd* [2005] IEHC 189, (Unreported, High Court, 16th June, 2005), I should not depart from the decision of O'Regan J.

19. Nonetheless, in accordance with the custom identified in *O.J. (Nigeria) v Minister for Justice and Equality and Ors* [2012] IEHC 71, (Unreported, High Court (Cross J), 3rd February, 2012) (at para. 26), the applicant formally raised the point to protect his position in the context of any appeal that might be available to him.

20. Having duly noted that the argument has been raised, I reject it in reliance upon the authorities already cited.

ii. the assessment of credibility

21. This point amounts to little more than a bald assertion that the tribunal failed to properly apply the requirements of Regulation 5 of the 2006 Regulations, transposing Article 4 of Council Directive 2004/83/EC ('the Qualification Directive'), or the principles identified by Cooke J in *IR v Minister for Justice, Equality and Law Reform and Anor* [2009] IEHC 353 (Unreported, High Court, 24th July 2009), to the assessment of the credibility of the applicant's claims. It seems to me that it was the 2013 Regulations, and not the 2006 ones, that transposed the relevant provisions of the Qualification Directive at the material time, although I do not think that anything turns on it.

22. Having read the six-page portion of the tribunal's decision that was directed towards an assessment of the applicant's credibility, I can find no substance in any of the applicant's criticisms of it. It is a reasoned analysis of the inconsistencies and contradictions identified in the applicant's various accounts and of the explanations that the applicant provided when those inconsistencies and contradictions were put to him. I reject the unsupported assertion on the applicant's behalf that it was based merely on instinct or

gut feeling, in breach of the fourth of the ten principles identified by Cooke J in *IR*.

23. The applicant goes on to complain that the tribunal failed to consider all relevant facts as they relate to Bangladesh when it made its decision, contrary to Reg. 5(1) of the 2006 Regulations. It seems to me that, by application of Reg. 3(2) of the 2013 Regulations, that obligation arose at the material time under Reg. 13(1) of those Regulations (transposing Art. 4 of the Qualification Directive in respect of an application for subsidiary protection) and not under the 2006 Regulations. In any event, the applicant doesn't identify any relevant facts that the tribunal failed to consider, and I am not aware of any.

24. The applicant contends that the tribunal failed to have regard to the written submissions that it had received on his behalf. Again, he does not mention any specific matters in those submissions that the tribunal disregarded. Having read those submissions, which were exhibited to the applicant's grounding affidavit in these proceedings, I am satisfied that the tribunal engaged extensively – indeed, painstakingly – with them. Thus, I can find no basis for that complaint.

iii. the obligation to provide reasons

25. This point, too, amounts to no more than a bald assertion; in this instance that the tribunal failed to give reasons for its decision. I am quite satisfied that it did give the following clear reasons; that it did not accept the credibility of the applicant's claims by reference to the identified inconsistencies and contradictions in his narrative, and that he had failed to establish substantial grounds for believing that he would face a real risk of suffering serious harm if returned to Bangladesh.

26. The applicant argues that the tribunal failed to give a reason, not for its decision, but: first, for its specific finding that, considering his evidence in the round, it was unable to give him the benefit of the doubt concerning his claimed membership of, and involvement with, the BNP; and second, for its alleged disregard of the applicant's hearing difficulties; the applicant's limited level of education; and the passage of time from the events concerned, in its assessment of his evidence.

27. I am satisfied that the tribunal did give reasons for its finding that it could not give the applicant the benefit of the doubt concerning his membership, and involvement in the activities, of the BNP. The tribunal summarised the applicant's evidence in that regard, and the difficulties with it, over several paragraphs of its decision (paras. 5.6 to 5.9).

28. I am further satisfied that the tribunal did not disregard the applicant's hearing difficulties and lack of education, or the passage of time since the events he was being asked to recall, in rejecting the credibility of his evidence concerning those events. The relevant part of the decision states (at para. 5.9):

> 'The Tribunal had regard for the [applicant's] hearing difficulties, his limited level of education and the passage of time, and having considered the [applicant's] evidence and the submissions of both parties, the Tribunal finds on the balance of probabilities that the [applicant's] claim that he was attacked, threatened and consequently fled Bangladesh in fear of his life to be lacking credibility and it is not accepted.'

29. Thus, I conclude that, in full accordance with the requirements of fair procedures identified by the Supreme Court (*per* Clarke J at 739) in *EMI Records Ltd. v. Data Protection Commissioner* [2013] 2 IR 669 the applicant had ample information to enable him to assess whether the decision was lawful; to consider his chance of successfully challenging it; and to adequately present his case for that purpose. Similarly, I conclude that, in compliance with the obligation to give reasons, as a corollary to the principle of respect of the rights of the defence under EU law, confirmed by the ECJ in Case C-417/11 *Council v Bamba* ECLI:EU:C:2012:718, the applicant was provided with sufficient information to make it possible to ascertain whether the decision was well-founded or vitiated by a defect that would allow its legality to be contested before, and reviewed by, the appropriate court.

iv. internal relocation

30. The final argument raised by the applicant is that the tribunal failed to properly address or apply the test for internal relocation, as an aspect of the availability of adequate state protection, in rejecting the applicant's claimed entitlement to subsidiary protection in the State.

31. The applicant relies on Reg. 7 of the 2006 Regulations, which provides as follows:

> '(1) As part of the assessment of protection needs, a protection decision-maker may determine that a protection applicant is not in need of protection if the applicant can reasonably be expected to stay in a part of his or her country of origin where there is no well-founded fear of being persecuted or real risk of suffering serious harm.
>
> (2) In examining whether a part of the country of origin accords with paragraph (1), the protection decision-maker shall have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.'

32. However, it seems to me that, while little turns on it in substance, the relevant provisions in this case are the following in Reg. 13 of the 2013 Regulations:

> '(5) The Commissioner or, as the case may be, the Tribunal may determine that an applicant is not in need of protection in the State if the applicant can reasonably be expected to stay in a part of his or her country of origin where there is no real risk of suffering serious harm.
> (6) In examining whether a part of the country of origin accords with paragraph (5), the Commissioner or, as the case may be, the Tribunal shall have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.'

33. Both Reg. 7 of the 2006 Regulations and Reg. 13 (5) and (6) of the 2013 Regulations transpose the requirements of Art. 8 of the Qualification Directive.

34. The applicant also relies on the UNHCR *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* (23 July 2003), which stipulate (at para. 7) that the relevant assessment should include a 'reasonableness analysis' whereby the decision-maker should consider if the claimant, in the context of the area of relocation within the country concerned, can lead 'a relatively normal life without facing undue hardship.'

35. The applicant then invokes the broader principles on the internal relocation alternative identified by Clark J in *K.D. (Nigeria) v Refugee Appeals Tribunal & Anor*. [2013] 1 IR 448 and the judgment of Mac Eochaidh J in *E.I. (a minor) & Anor v Minister for Justice, Equality and Law Reform & Anor* [2014] IEHC 27, dissenting on the issue of whether the nature or rigour of the required 'internal relocation alternative' assessment might reasonably differ on the basis of the context in which it arises. The applicant asserts that there is a conflict between those two decisions on the proper interpretation of Art. 8 of the Qualification Directive and that I should consider a preliminary reference to the European Court of Justice under Art. 267 of the Treaty on the Functioning of the European Union ('TFEU').

36. I am satisfied that no such issue arises on the facts of this case. That is because the tribunal made unequivocal findings that the applicant's claims were not credible and that there was no substantial basis to believe that the applicant would face a real risk of serious harm if returned to Bangladesh. The tribunal considered the applicant's evidence on the unavailability or unreasonableness of an internal relocation alternative (at para. 5.10) solely in the context of an assessment of his general credibility and not in the context of any discrete assessment of the availability of adequate state protection. Since no assessment of the latter kind arose or was conducted in this case, any issue on the principles that would govern it, if it did, is moot.

37. In the relevant portion of the judgment in *K.D.* (at 463), Clark J identified the situation that arises in the large number of decisions that consider the internal relocation alternative, notwithstanding a prior finding that there is no well-founded fear of persecution on credibility grounds, on an 'even if the claim were credible' basis. Clark J expressed the view that: 'These "even if" findings are *not* internal relocation alternative findings requiring adherence to [Reg. 7 of the 2006 Regulations] but are part of a general examination of whether an applicant has a well-founded fear of persecution.' As such, Clark J concluded later (at 465-6), that the context in which 'internal relocation' comes to be considered is all important, and that 'an "even if I am wrong" finding *which goes on to suggest internal relocation* is not the equivalent of carefully exploring an antidote to a well-founded fear of persecution for Convention reasons and is often merely a facet of credibility' (emphasis supplied).

38. In *E.I.,* Mac Eochaidh J stated:

> '9. […] I fully agree with the comments of Clark J. with respect to the redundancy of making internal relocation findings in situations where credibility is rejected. The practice of making negative credibility comments in asylum decisions followed by an internal relocation assessment is commonplace. It is not the function of the High Court to direct inferior Tribunals as to how they should take their decisions in future. A clearly expressed credibility finding without equivocation leading to a rejection of the applicant's claim is self-evidently a desirable outcome when justified by the evidence. However, it is understandable that decision makers often make equivocal findings in respect of credibility. In such cases, it is not surprising that such findings are then followed by an internal relocation assessment. Clark J. expressed the view that where an internal relocation finding is made, notwithstanding a rejection of credibility, that internal relocation assessment is not to be tested for compliance with the provisions of Regulation 7 of the EC (Eligibility for Protection) Regulations 2006. With the greatest respect to my learned and experienced colleague, I am not convinced that any assessment of internal relocation should escape full-blooded scrutiny in judicial review, nor am I convinced that the provisions of Regulation 7 should apply to some but not all internal relocation assessments. In any event, in my experience, most internal relocation assessments which follow negative credibility findings rarely follow clearly expressed comprehensive rejections of credibility. They are usually credibility findings such as those which appear in this case. In other words, they are equivocal. The Tribunal Member has doubts as to the credibility of the applicant but does not appear to be in a position to reject fully the applicant's narrative because of the weaknesses observed. In those circumstances, the decision maker, quite naturally, feels compelled to proceed to examine the question of internal relocation, if the facts and circumstances justify such a consideration.
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> 10. In this case, my view is that the internal relocation assessment was required to comply with the provisions of Regulation 7 and the general legal principles which have been observed over the years governing the correct approach to such portion of the protection decision making process.'

39. Insofar as there is a conflict between the two decisions, it is one that is of no relevance to the resolution of the present case because this is not one in which the tribunal participated in what Mac Eochaidh J identified as the commonplace approach of making 'negative credibility comments' or 'equivocal findings in respect of credibility', followed by an internal relocation assessment. For what it is worth, I agree with the assessment of MacEochaidh J that, in such circumstances, the internal relocation alternative should not escape full-blooded scrutiny in judicial review. But that is not the situation that arises here, where there was an unequivocal adverse credibility finding and an unequivocal finding that there was no substantial basis to believe that the applicant would face a real risk of serious harm if returned to Bangladesh.

40. In those circumstances, even if the relevant portion of the tribunal decision (at para. 5.10) could be construed as a purported assessment of the internal relocation alternative (and I do not think it can), and as one conducted otherwise than in accordance with the requirements of Art. 8 of the Qualification Directive informed by the *UNHCR Guidelines on Internal Flight* (which, it is probably fair to say, it would then be), it would be a finding completely severable from the first, separate and free-standing one that there was no substantial basis to believe that the applicant would face a real risk of serious harm if returned to Bangladesh; see *I.G. v Refugee Appeals Tribunal* [2014] IEHC 207 (Unreported, High Court (Mac Eochaidh J), 11 April, 2014) (at para. 29).

Conclusion

41. As I have rejected the applicant's claims on the merits, it is unnecessary to consider the separate issue of whether good and sufficient reason exists to extend the time within which the application can be made, and I do not propose to do so.

42. I refuse the application.