Neutral Citation: [2014] IEHC 207

THE HIGH COURT

JUDICIAL REVIEW

[Record No. 2010/1030/J.R.]

BETWEEN

I. G.

APPLICANT

AND

SEAN BELLEW (SITTING AS THE REFUGEE APPEALS TRIBUNAL) AND THE MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 11th day of April 2014

1. This is a 'telescoped' application for leave to seek judicial review of a decision of the Refugee Appeals Tribunal dated 22nd June 2010, refusing the applicant a declaration of refugee status. The applicant's appeal to the Tribunal was considered without an oral hearing on the 'papers only' owing to a finding by the Refugee Applications Commissioner pursuant to s. 13(6)(c) of the Refugee Act 1996 that, without reasonable cause, he failed to make an application as soon as reasonably practicable after his arrival in the State.

Background:
2. The applicant is an Egyptian national who states that his date of birth is the 2nd February 1977. He claims to have arrived in the State by boat, disembarking at Waterford Port in February 2006 and making his way by bus to Dublin thereafter. The applicant claims that he did not apply for asylum immediately on his arrival in Ireland as he was told by people he knew that if he made an application he would be deported back to Egypt. The applicant worked in a series of jobs until he came to the attention of the Gardaí and was arrested and detained in Cloverhill Prison. The applicant was charged with certain offences under the Immigration Act 2004 for failure to produce appropriate identification documents. However, the terms of the Probation Act were applied to the applicant when a verified Egyptian maritime passport was presented to the District Court at the hearing. An application for asylum was made by the applicant on the 20th November 2010.

3. The applicant claimed to have a well founded fear of persecution in his home country on the basis of his membership of a particular social group, religion, race and political opinion. The applicant states that he had a relationship outside of marriage with a young woman who was a member of the Saidi tribe in Egypt. The applicant claims that her family would not allow her to marry outside of her tribe and that an uncle who became aware of their relationship hit him, threatened him and urged him to sever all ties with the girl. Despite this, their relationship continued and after some months together the young woman fell pregnant. The applicant claims that when her family became aware that she was pregnant they came looking for him at his home, however he was at sea at the time. On his return, he stayed away from his home but was told that his girlfriend's family was still searching for him.

4. The applicant claims that he moved to a friend's house but that his girlfriend's family became aware of his whereabouts and that he saw some people entering his apartment block searching for him on another occasion. He managed to avoid them but he states that he was later told that his girlfriend had been killed by her family in an 'honour killing' owing to her pregnancy outside marriage. The applicant claims that at this point he felt he had no option but to flee Egypt, which he did by cargo ship from Alexandria. The applicant also claims that his nephew was kidnapped by his girlfriend's family subsequent to his departure and that he is still missing. The applicant fears that if returned to Egypt he will be killed by his girlfriend's family in an 'honour killing', that nowhere in Egypt is safe for him and that state protection is not available to him.

Submissions:
5. The first complaint levied at the decision by counsel for the applicant Mr. Killian McMorrow B.L., is that the Tribunal Member made an error of fact in finding that the applicant does not possess a passport. In this regard, counsel refers to the affidavit of John Gerard Cullen, the applicant's solicitor, who makes the averment that the applicant possessed a valid maritime passport which was accepted in the context of the District Court proceedings against him. It is clear from the applicant's evidence that he believed that the Gardaí had possession of his passport at all material times in the asylum process. Counsel further submits that the adverse credibility finding of the Tribunal made pursuant the provisions of s. 11B(c) of the Refugee Act 1996 was *ultra vires* as a result of the findings in respect of his passport.

6. Counsel for the respondent Ms. Fiona O'Sullivan B.L., notes that the Tribunal Member did not find that 'the applicant does not possess a passport', rather the Tribunal Member held that "The applicant did not produce any documentation as proof of identity." It is submitted that not only did the applicant fail to produce any identification documentation throughout the course of the process, but also that this matter was clearly raised in the s. 13 report produced by ORAC. It is submitted that the onus was on the applicant to address this issue at the appeal stage and that an applicant is deemed to be automatically on notice of all issues raised by ORAC in the s. 13 report, as per the dicta of Clarke J. in *Idiakhuea v. Refugee Appeals Tribunal* [2005] IEHC 150.

7. The respondent states that it is now clear from the affidavit sworn in these proceedings that the applicant's passport was handed to Garda Halpin of Terenure Garda Station (not of the GNIB) in the context of the District Court proceedings. It is further noted that the passport was handed back to the applicant's solicitor at the conclusion of those proceedings in December 2009 and that his interview with ORAC was conducted later on 21st January 2010. The respondent submits that the applicant could have produced his passport at the ORAC hearing at that time and explained his position fully however the applicant failed to do this and further failed to address the issue in his notice of appeal.

8. Finally, counsel observes that the technical report exhibited to the affidavit of John Gerard Cullen in these proceedings (verifying that the applicant's passport was "*probably* authentic" and produced for the District Court Judge) was not submitted to the asylum authorities and was therefore not made available to the Tribunal Member in making his assessment. As such, it is contended that the

Tribunal made its finding on the basis of the evidence before it at the material time and that the additional information put before this court does not invalidate the earlier decision. In this regard it is asserted that the applicant is not an inactive participant in the asylum process; that he was under a duty to act in his own interests; and that he was not permitted to take a backseat in the process in order to raise complaint at a later date.

Finding:

9. In my view, the Tribunal Member makes a clear finding that the applicant "did not produce any documentation as proof of identity" rather than a finding that "the applicant does not possess a passport" and I concur with the respondent's submissions in this regard. It would appear from the averments in the affidavit sworn by John Gerard Cullen that the maritime passport was returned to him by Garda Halpin on 10th December 2009 at Cloverhill District Court. As such, it is evident that at no time does the passport appear to have been in the actual possession of the GNIB which is presumably why they had no record of it on their system when the asylum authorities made the relevant enquiries. It is particularly of note to the court that the passport was back in the possession of the applicant's legal representatives prior to his s. 11 interview with the Office of the Refugee Applications Commissioner; that the issue was raised by ORAC in the course of its s. 13 report; and yet that the applicant failed to address the issue in his notice of appeal or submissions to the Tribunal.

10. It is clear that there is an onus on an applicant to actively engage in the asylum process and to make reasonable efforts to establish both the truthfulness of his or her claim and the accuracy of the facts on which it is based. In this regard, the Tribunal Member in these proceedings cannot be faulted for relying on the full extent of the material which was placed before him at the relevant time in making his decision. In my view, the Tribunal Member has not strayed into illegality insofar as the conclusions which he reached were based on the facts before him. It is clear that rather than the Tribunal Member being in error in this instance, it is the applicant who has made the honest error of believing his passport to be in the possession of the Gardaí as opposed to the possession of his solicitors from the district court proceedings. I do not fault the applicant personally for misunderstanding who retained the custody of his passport at the time of his s.11 interview, albeit he had the benefit of legal advice throughout the process. However, regardless of the fact that the applicant had an honestly held but erroneous belief that the police authorities had custody of his passport at that time, it does not excuse the failure by the applicant on receipt of the ORAC report to address the issue fully in his notice of appeal and by way of submissions to the Tribunal. In my view, the appropriate remedy for an applicant in a situation such as this where there has been a clear error on his part is not to seek an order of *certiorari* in judicial review proceedings but rather to make an application for re-admittance to the asylum process pursuant to s. 17(7) of the Refugee Act 1996.

11. I reject the claim by counsel for the applicant that the finding made by the Tribunal Member pursuant to s. 11B(c) of the Refugee Act 1996 is somehow *ultra vires* as a result of the finding in relation to the applicant's passport. It is worth recalling that the provisions of s. 11B(c) state that in assessing credibility the Tribunal shall have regard to "whether the applicant has provided a full and true explanation of how he or she travelled to and arrived in the State". In this case the Tribunal Member makes a series of adverse credibility findings independent to his finding in relation to the applicant's possession of a passport. In particular, the Tribunal Member notes that the applicant claims to have been on the cargo ship for the entire three month journey to Ireland and not to have passed through immigration on his arrival in the State. The Tribunal Member did not accept that the applicant remained on the ship at all times from Egypt to Ireland over the three months and was not of the view that he could have travelled from Egypt and then throughout the Mediterranean (on the basis of his evidence) stopping at various ports before landing in Ireland 'without let or hindrance'. I am not of the view that the Tribunal Member has erred in making an adverse finding pursuant to s. 11B(c) of the Refugee Act 1996 where he does not consider that the applicant has given a full and true explanation of how he travelled to and arrived in the state and provided cogent reasons for same. It is clear that the Tribunal Member makes a separate and distinct finding with regard to of the applicant's passport in this context.

12. The second complaint raised on behalf of the applicant is that the Tribunal Member erred in concluding that the applicant's delay prior to making an application for asylum is not indicative of a person who has a well-founded fear of persecution. It is submitted that if a person has fled danger in their own country and reached the safety of another, they have achieved, at least in part, the object of their seeking refuge. Counsel contends that it is a rational course of action for a person not to apply for asylum on the basis of what acquaintances have said with regard to the likelihood of deportation on entering the process (which is submitted by counsel to be an accurate summation of the situation in fact given current refugee recognition rates) and the de-facto level of protection offered by illegal residence in the State. Further, counsel submits that the applicant provided 'good reason' for not having sought protection at the earliest possible time and that the Tribunal erred failing to consider the provisions of Reg. 5(3)(d) of the EC (Eligibility for Protection) Regulations 2006 in this regard.

13. Counsel for the respondent states that the applicant did not apply for asylum tmtil November 2009, following his arrest and detention, although he claimed to have entered the State illegally in February 2006. The respondent notes that the applicant claimed that his reason for not applying for asylum earlier was that he was told by others that he would be deported and that he did not know anything about the concept of asylum. Counsel finds that this explanation was considered but was not accepted by the Tribunal on the basis that it was not indicative of a person having a well-founded fear of persecution. The respondent records that the Tribunal considered the applicant's age, education and work experience and his claim to have a maritime passport in this regard. It is submitted that the commentary in the applicant's submissions in relation to the applicant's account of why he failed to seek asylum at an earlier occasion is inappropriate and is not substantiated by any evidence.

Finding:

14. I accept the submissions of the respondent in this regard. In the first instance it is clear that the Refugee Applications Commissioner was of the view that the provisions of s. 13(6)(c) of the Refugee Act 1996 were applicable in this case and that without reasonable cause, the applicant failed to make an application as soon as reasonably practicable aft(r his arrival in the State. In his notice of appeal the applicant sought to address this finding and argued that he was "unaware of the asylum process and requirement that he make an application in a timely manner" and that this was reasonable cause for such failure. The Tribunal Member was not convinced by this argument and considered that a period of delay of almost four years prior to making an application for asylum was not indicative of a person genuinely fleeing persecution. This finding was based not only on the age and life experience of the applicant, but also his level of education and his work history, which by its nature necessitated the applicant to have a maritime passport. The Tribunal Member found that the possession of such a passport was indicative of an appreciation by the applicant of the necessity of having the appropriate documentation in order to enter and remain in a foreign state. I can find no flaw in the manner in which the Tribunal Member reached this finding and its reasoning cannot be said to fly in the face of common sense.

15. I find that the applicant's submission that the likelihood of deportation (owing to current levels of recognition of refugee status) dissuades potential applicants and provides a reasonable explanation for the applicant's failure to apply for asylum in a timely manner was not raised before the Tribunal Member, is unsupported by any facts or evidence and is inappropriate in the circumstances. Finally,

it is clear that the Tribunal Member in making a finding pursuant to s. 11B(d) of the Refugee Act 1996 is not of the view that the applicant has provided a good reason for failing to apply for protection at the earliest possible time and there is no error in respect of the application of the provisions of Reg. 5(3)(d) of the Protection Regulations in this regard.

16. The next complaint raised is that the respondent has factually erred by stating that the applicant has not adduced any evidence to show that the Egyptian state is unwilling or unable to provide him with protection. Counsel submits that the Tribunal Member contradicts himself in recording that, "I find that the applicant has not adduced any evidence to show that the state is unwilling or unable to provide protection" while later stating, "General Country of Origin Information that there are difficulties with the police or with the prosecution of honour crimes in Egypt does not amount to...". It is submitted that the country of origin information supplied on behalf of the applicant raises at least serious issues with the extent of legal protection for the victims of 'honour killings' in Egypt and that other extracts corroborate closely the narrative which was recounted by the applicant. Counsel contends that the Tribunal Member failed to address the contents of the country of origin information submitted to him and also failed to stipulate which evidence he accepted and which he did not. It is submitted that this approach was in breach of Reg. 5(1) of the EC (Eligibility for Protection) Regulations 2006. Counsel further submits that the applicant's evidence was that after he left Egypt, his assailants kidnapped his seventeen year old nephew and that despite his family going to the police that "the police did nothing" and this was not considered by the respondent. It is contended that despite mentioning the evidence of the applicant in this regard, the Tribunal Member omits it from his consideration of state protection in Egypt for the victims of these types of 'honour' crimes.

17. The respondent notes that the Tribunal Member stated that the applicant had not adduced any evidence to show that the State was unwilling or unable to provide protection. It is submitted that in this regard, the Tribunal Member accepted that while 'honour killings' may take place in Egypt, he was not satisfied as to the applicant's general credibility as to his purported fear. Counsel asserts that the Tribunal clearly had regard to the country of origin information on the file in making this assessment and that the Member did not accept the evidence of the applicant that he failed to approach the police as they would not do anything for him and that his girlfriend's parents would deny it all. The respondent notes that these findings were made in the context of significant adverse credibility findings against the applicant.

18. It is submitted that the Tribunal did not accept the reason given by the applicant for failing to mention the alleged kidnapping of his nephew until the s. 11 interview unprompted (namely, "you didn't ask me") and that this counted against the applicant's credibility. The respondent notes that the Tribunal Member felt that the kidnapping of a close relative would be a serious matter, particularly where the young man was not seen for a period of two years, however that the account of the kidnapping was inconsistent with the applicant's claim in his s. 11 interview that his girlfriend's family had not been in contact.

Finding:

19. It is noted that the Tribunal Member states: "I find that the Applicant has not adduced any evidence to show that the state is unwilling or unable to provide protection...General Country of Origin information that there are difficulties with the police or with the prosecution of honour crimes in Egypt does not amount to evidence that the Applicant, personally, has a well founded fear of persecution. In any event, this does not detract from the negative credibility findings I have made in relation to the Applicant. I am not satisfied that the Applicant has shown that state protection is not available to him." The Tribunal goes on to state: "I accept that so-called 'honour killings' take place in Egypt. However, I am not satisfied as to the Applicant's general credibility. I do not accept that the Applicant has shown that he, personally, has a real risk of being killed in a so-called 'honour killing'."

20. I do not find any inconsistency in these statements by the Tribunal. It is clear that the Tribunal Member has rejected the applicant's claims primarily on the basis of a general lack of credibility. The Tribunal was not satisfied that the applicant's explanation for failing to seek the assistance of the police was credible or reasonable. I can find no error in the manner in which he carried out this assessment. It is clear that the Tribunal Member has had regard to the country of origin information in finding that 'honour killings' do occur in Egypt, however owing to the applicant's lack of credibility he did not accept that the applicant had shown that he has a real risk of persecution and I can find no breach of Reg. 5(1) of the Protection Regulations in this regard. It is evident that the Tribunal Member accepted that while the applicant may have a subjective fear of persecution, it was not objectively well-founded in the circumstances.

21. Counsel for the applicant also raised complaint that the Tribunal Member failed to consider the applicant's evidence with regard to his kidnapped nephew in the context of his findings on state protection. I accept the submissions of the respondents in this regard. It is clear that the Tribunal Member did not accept as credible the applicant's failure to mention a matter as serious as a close relative being kidnapped and not being seen for over two years at his s. 11 interview until prompted to do so by the Authorised Officer. The Tribunal Member states "I find that this must count against the Applicant's credibility." The Tribunal Member was clear in his consideration of state protection that the applicant's general credibility was to the fore. The Tribunal Member states that, "Viewed in the round, I do not accept that the evidence presented by the applicant has been generally credible. I do not accept his allegation that he did not approach the police as there would have been no point." In my view it is clear that the Tribunal Member considered all of the applicant's poor evidence "viewed in the round" in reaching his conclusion on state protection, including that evidence in respect of his nephew which he had earlier in his decision expressly found to count against the applicant's credibility. I find no error in the assessment of the Tribunal Member in this regard.

22. Counsel for the applicant next makes two similar complaints in respect of the Tribunal decision, namely that the Tribunal Member failed to have regard to the s. 13 report compiled by ORAC and also that he failed to consider the contents of the notice of appeal submitted by the applicant in line with his statutory obligations. In this regard, counsel points to the statutory provisions contained ins. 16(16) of the Refugee Act 1996.

23. The respondent submits that not only did the Tribunal specifically refer to the s. 13 report at page one of his decision, he also considered the applicant's explanations for the inconsistencies in his evidence and the credibility findings in the s. 13 report. It is asserted that the Tribunal Member did not accept the explanations of the applicant as set out in the decision. Further, counsel submits that the tribunal expressly referred to the grounds of appeal set out in the notice of appeal and the further submissions made on behalf of the applicant by letters dated 24th March, 1st April and 9th June 2010.

Finding:

24. Once again I fully accept and adopt the submissions of the respondents in respect of this claim. I can find no error in the manner in which the Tribunal Member conducted the appeal with regard to the applicable statutory provisions in s. 16(16) of the Refugee Act 1996. I dismiss the applicant's claims in this regard.

25. The applicant also raises complaint that the Tribunal's finding that the applicant could relocate in Egypt is unreasonable and

irrational and that he fails to identify a part of Egypt in which the applicant can reasonably be expected to stay. In this regard, it is submitted that the Tribunal Member made an irrational finding by stating that "I find the applicant has shown not that Egypt would not be safe for him" and it would not be "unreasonable or unduly burdensome for him" to relocate as it was made without reference to objective evidence. Counsel also cites the provisions of Reg. 7 of the EC (Eligibility for Protection) Regulations 2006 with regard to the identification of an area where the applicant could reasonably be expected to stay and claims that the Tribunal Member failed to complete this task.

26. The respondent notes that the Tribunal considered the applicant's claim that he would not be safe anywhere in Egypt but did not accept his account that he was tracked down by his girlfriend's family or that he had demonstrated that Egypt was unsafe for him. Regard was had by the Tribunal Member to the fact that Egypt has a population in the region of seventy million people and that the applicant is young and single. As such, the Tribunal Member found that he could reasonably and safely relocate in Egypt. Counsel notes that the Tribunal Member did not accept the applicant's credibility in the first instance, that he does not have a well-founded fear of persecution and as such, makes a finding on internal relocation in this context.

Finding:

27. The finding of the Tribunal Member in respect of internal relocation 1s worthwhile setting out in full and is in the following terms:

> "The Applicant claims that he would not be safe anywhere in Egypt. Again, I must view these alleged fears in the context of the Applicant's evidence as a whole, and the negative credibility findings I have made concerning the Applicant. I find the Applicant has not shown that Egypt would not be safe for him. I do not accept as credible the accounts that the Applicant gave of being tracked down by his girlfriend's family. I find that he could reasonably and safely relocate in Egypt. In making this finding, I have regard to the fact that the population of Egypt is somewhere in the region of 70 million people. The Applicant is young and single. I do not consider that relocation in Egypt would be unreasonable or unduly burdensome on him. However, I find that the Applicant has not been generally credible in any event."

28. The Tribunal Member's assessment of his ability to relocate in Egypt is predicated on the fact that, quite simply, he does not believe that the applicant has shown that Egypt would not be a safe country for him. In any event, the Tribunal Member does proceed to make a separate and distinct finding in respect of internal relocation even though he did not find that the applicant had a well-founded fear of persecution. In carrying out this task, it is my view that the Tribunal Member was required to identify a particular area to which the applicant could have relocated if the particular provisions of Reg. 7(1) of the Protection Regulations are to be strictly followed. The Tribunal Member's failure to identify such an area within Egypt can be seen as a flaw in respect of his finding on internal relocation in that context. However, I do not deem the perceived flaw in the Tribunal's internal relocation finding to be of such consequence as to condemn the overall decision reached in this case. Although the Tribunal Member may have erred, it cannot be said to be a flaw substantial enough to justify an order of *certiorari* in the circumstances of this case.

29. In any event, it is possible to sever the internal relocation finding made in this case from the various separate credibility findings made by the Tribunal Member. In my view, the various credibility findings and the finding on internal relocation are distinct and are not dependent on each other. As such, a flaw in the finding on internal relocation does not infect the credibility findings made by the Tribunal in this case as it is severed from the other robust findings. In reaching this conclusion I have regard to the decisions of *A.A. [Pakistan] v. Refugee Appeals Tribunal* (Unreported, ex tempore, Mac Eochaidh J., 18th September 2013) and *Talbot v. An Bard Pleanala* [2009] 1 I.R. 375 on the severability of findings.

30. Finally, the applicant makes complaint that the Tribunal Member failed to have regard to the applicant's psychological condition and to a medical report submitted by the Refugee Legal Service on the applicant's behalf. It is submitted that the Tribunal Member's conclusion that the medical report "is not diagnostic" is clearly incorrect and that it is contradictory then to state that the report "does not prove how the applicant's traumatic state was caused". The applicant relies on the decision of Clark J. in *K. v. Refugee Appeals Tribunal* (Unreported, High Court, Clark J. 28th September 2010) in relation to the correct approach to be taken in the assessment of such medical reports.

31. The respondent submits that the Tribunal Member expressly considered the contents of the medical report dated 4th June 2010. Counsel notes that the applicant left his country of origin in November 2005 and that he claims to have arrived in Ireland in February 2006. In this light, counsel observes that the psychologist noted that the reason for the applicant's referral in January 2010 was distress, that he reported insomnia and nightmares and that the trigger for his symptoms appeared to be his contact with the Garda. The respondent submits that the weight to be attached to the report was a matter for the decision maker and that he made the correct assessment in his decision by recording that the report was not diagnostic and nor did it prove how the applicant's traumatic state was caused. In this regard, counsel contends that the Tribunal Member considered all of the applicant's evidence in the round.

Finding:

32. The Tribunal Member expressly considered the medical report submitted on the applicant's behalf and clearly quotes relevant passages therefrom in drawing his ultimate conclusion that, "I have carefully considered and had regard to this report. I must view this report in the context of the Applicant's evidence in the round. I find that this report is not diagnostic or does not prove how the Applicant's traumatic state was caused." I find no inconsistency in the comments of the Tribunal Member in this regard as the medical report of Irin Mc Nulty, the psychologist who examined the applicant, clearly states "His presentation supports a formulation of post trauma stress." It is evident that, on its face at least,. the report does not appear to be diagnostic in the sense that the psychologist does not in fact make a specific diagnosis of the applicant and label the applicant with a medical condition and nor does the psychologist speculate as to how any stress was caused. In any event, such matters are more properly to be weighed in the balance by the Tribunal Member and it is outside the jurisdiction of this court in judicial review proceedings to make findings with regard to the content of such a medical report. I agree with the dicta of Clark J. in *K v. Refugee Appeals Tribunal* (Unreported, High Court, 28th September 2010) that:

> "22. There is a long line of authority on the general subject of the weight to be accorded to medical reports in asylum cases. While it is always a matter for the decision maker to assess the probative value of the contents of such reports, it is incumbent on the decision maker to provide reasons for rejecting the contents. A report which is in general terms has obviously little weight requires no great explanation for its rejection. However, while medical reports are rarely capable of providing clear corroboration of a claim it is well recognised that there are occasions when examining physicians report on objective findings and use phrases which attach a higher probative value to those findings. Such reports are capable in an objective way of supporting the claim."

33. Taking into account the above and with regard to the particular role of the court in judicial review, I do not find any error in the

manner in which the Tribunal Member addressed the medical report submitted on behalf of the applicant in these circumstances.

Conclusion:
34. Having regard to the above findings and this being a 'telescoped' application, I refuse the applicant leave to seek judicial review in these proceedings.