THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 1150 JR]

BETWEEN

M. A.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 31st day of July, 2015

Introduction:
1. This is a telescoped hearing seeking *certiorari* of the decision of the Refugee Appeals Tribunal, dated 9th October, 2011, to affirm the decision of the Refugee Applications Commissioner that the applicant not be declared a refugee.

2. In the submissions on behalf of the applicant, it is noted that the reliefs sought at paras. 2-6, which raise incompatibility issues between the Refugee Act 1996 and Council Directive 2005/85/EC, the Irish Constitution, the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, are no longer being pursued in light of the decisions in *H.I.D. & B.A. v. Minister for Justice [2013 I.E.H.C. 146], S.U.N. (South Africa) v. Refugee Applications Commissioner [2012 I.E.H.C. 338], T.D. -v- Refugee Appeals Tribunal [2010 I.E.H.C. 125] and, Efe v. Minister for Justice [2011 I.E.H.C. 214].*

Background:
3. The applicant is a national of Pakistan who came to the State in October 2007 and applied for asylum in June 2011. He claimed asylum on the ground that he feared his former brother-in-law, who was a gangster and had spent considerable time in prison, in circumstances where the applicant had entered into an arranged marriage with the man's sister and subsequently divorced her after six months.

4. The applicant relied on his relationship with his ex-wife's family to ground his fear of persecution, stating, "I left my wife. After that my relationship with her family became worse and they are determined to kill me." He claimed that either two men, or his brother-in-law accompanied by two men, came to his mother's house and said to her that the applicant would not be spared.

5. The applicant claimed that he reported his fear to the police in Pakistan, but gave varying accounts of the authority's failure to help him. In the ASY1 form it was submitted that the police failed to act as it was a "family problem" and, further, that the applicant was of the view that the police might have acted if he had taken steps to bribe them. It was claimed in the applicant's refugee status questionnaire that the police failed to act by reason of the brother-in-law's status as an "influential person." Finally, in his s. 11 interview he said that the police demanded a bribe in return for their help and it was on that basis that the applicant "gave up on the police."

6. The applicant also submitted varying explanations accounting for his failure to apply for asylum prior to 23rd June, 2011, by which time he had been in the State for almost four years. In his ASY1 form, it was stated that:-

> "- he did not apply for asylum in England because he felt that his life would not be in danger any longer at that time.
>
> - however, he as been in fear for his life since then as [his brother-in-law] is still looking for him – he fears he will be killed should he return (sic)
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> - he has not applied for asylum before this date because he was afraid he would be deported as he had heard different stories about others who had applied
>
> - he is applying now because friends of his have advised him that he would not be deported if he applied now."

7. During the course of his s. 11 interview the applicant submitted the following statement in response to the question: "Why did you not apply for asylum when you went to the UK?":-

> "Firstly, I had no knowledge of asylum. Secondly, I had not told my mother that I left the country. More over, I was hoping that things would improve and I would return."

When asked why he did not seek asylum upon his arrival in the State in 2007, the applicant replied:-

> "I was waiting for things to get better. The sort of person my brother in law is – he is the type who could get killed. If that happened I could go back."

When asked what prompted him to apply for asylum in 2011, the applicant replied:-

> "I won't say that somebody pushed me into it. I wanted to go back to see my Mum and did not want to apply. But I eventually decided I should apply."

The decision of the Refugee Applications Commissioner:
8. The Commissioner found that the applicant had not established a well-founded fear of persecution as required by s. 2 of the Refugee Act 1996. In particular, it was found that there was no Convention nexus on the basis that the applicant's claim would be more appropriately regarded as a criminal matter and does not fall within the remit of the Convention grounds.

9. The Commissioner made a number of adverse credibility findings in relation to the applicant's failure to seek asylum while in the U.K., his return from there to Pakistan, and the delay in claiming asylum when he first arrived in this State. The Commissioner further found that state protection and internal relocation were available options for the applicant. Finally, as the applicant had, without reasonable cause, failed to make his asylum application as soon as reasonably practicable after arriving in the State, he was not entitled to an oral appeal pursuant to s. 13(6)(c) of the Refugee Act 1996.

10. An appeal was submitted against the decision of the Commissioner wherein it was submitted that the applicant's claim fell within the Convention ground of membership of a particular social group. It was further submitted that the application of s. 13 of the 1996 Act is in breach of the Procedures Directives which mandates an effective remedy against a decision taken by the first instance decision maker.

11. It was submitted that the Commissioner had failed to address the core of the applicant's claim by focussing on the applicant's extended presence in the U.K., his brief return to Pakistan, and his delay in seeking asylum in this State, instead of carrying out an assessment of whether or not a real risk of persecution faces the applicant if returned to Pakistan.

12. It was submitted that any separate adverse credibility finding by the Appeals Tribunal would violate due process in circumstances where the applicant was not afforded an oral hearing and was not afforded a reasonable opportunity to offer explanations for any purported discrepancy.

13. Finally, it was submitted that the Commissioner had not pointed to any specific contradictions in the applicant's account which he had not reasonably accounted for, and that internal relocation was not a viable alternative and would not afford the applicant peace of mind in Pakistan.

The decision of the Refugee Appeals Tribunal:
14. The decision of the R.A.T. affirmed the decision of the O.R.A.C. that the applicant be refused a grant of refugee status.

15. Counsel for the applicant submits that in doing so the R.A.T. made a number of completely new credibility findings. In respect of that aspect of the R.A.T. decision counsel for the applicant submits that:-

> "10. The most obvious failure of the Tribunal in making a host of fresh credibility findings was the complete denial of fair procedures – not alone did the Tribunal fail to afford the Applicant any opportunity to respond but it also completely ignore the concerns raised about the denial of an oral appeal raised in the Submissions attached to the Notice of Appeal, contrary to s. 16(16)(a) of the 1996 Act and it further failed to request the Commissioner to make further inquiries in circumstances where it proposed making a host of findings not made by the Commissioner, contrary to s. 16(6) of the 1996 Act…(sic)"

16. The respondents submit in respect of the fair procedures issue that:-

> "19. The fact that the applicant did not have the benefit of an oral hearing on the appeal did not restrict the applicant in making whatever submissions he and his legal advisors considered necessary, or making a detailed statement to the Tribunal had he so wished. The Tribunal is not restricted in the findings which it was entitled to make…
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> …
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> 23…the nature of the adverse findings made, as to the discrepancies in the applicant's evidence (which are not disputed, and are clear from the material which was before the Tribunal) is not such that there was an obligation on the Tribunal to give the applicant an opportunity to consider the potential adverse credibility finding prior to the decision being made."

17. The respondents rely on the decision of Dunne J. in *A.C. v. R.A.T. [2007 I.E.H.C. 359]* where it was held:-

> "…an applicant is not a passive participant in the process. The applicant was aware, from the procedures that had already taken place, of the issues that were relevant to his claim. He has the benefit of legal representation. Accordingly it was not for the Tribunal Member to tease out every issue such as the detail of his last meeting with Hamid.
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> …
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> Given the information that the Tribunal had both by way of evidence before the Tribunal itself and the other material arising from the questionnaire and the interview, I am satisfied that it was open to the Tribunal Member to reach the conclusion that the applicant was vague and lacking in detail without being required to tease out the situation any further with the applicant."

18. Counsel for the applicant submits that the R.A.T. owed the applicant a "standard of extreme care" by virtue of it being a "papers only" decision on the basis of the decisions in *S.U.N. (South Africa) v. R.A.C. [2012 I.E.H.C. 33]. V.M. (Kenya) v. R.A.T. [2013] I.E.H.C. 24, B.Y. (Nigeria) v. R.A.T. [2015 I.E.H.C. 60], S.K. v. R.A.T. [2015] I.E.H.C. 154, and N.T.P. (Vietnam) v. R.A.C. [2015 I.E.H.C. 234].*

19. The respondents accept that great care is required to be taken by the Tribunal in determining an appeal based solely on papers but submit that the Tribunal took sufficient care in determining the appeal as the adverse credibility findings made were based on clear and correct findings of inconsistency in the applicant's evidence. The respondents submit that the ASY1 form, the questionnaire and the s. 11 interview, from which the applicant's varying evidence is quoted at paras. 5, 6 and 7 above, were signed by the applicant, to acknowledge that the contents were correct and that he had been afforded an opportunity to make correction to each document.

20. The essential case made by the applicant is that the Tribunal Member should not have made new credibility findings against the applicant on a papers only appeal without reverting to him and putting these issues to him. I reject this argument. Where the Tribunal intends to make negative credibility findings based on the statements made by the applicant during the asylum process, whether on a papers only appeal or on an oral appeal, there is no obligation to revert to the applicant to give him or her an opportunity of explaining a perceived inconsistency, a contradiction, an implausible suggestion or any other circumstance arising from what the applicant has personally said, during the application process, which causes the Tribunal Member to conclude that credibility should be rejected. The Tribunal is no more required to do this than would a judge be required on hearing implausible testimony or on noticing an inconsistency in evidence to warn a witness that a negative credibility finding is imminent. The fact that the negative credibility finding is made on a

papers only appeal is irrelevant. Counsel for the applicant has referred to certain Canadian authorities said to be authority for the proposition that:-

> "the intention to make a negative credibility assessment on the basis of any perceived evidentiary inconsistency must be disclosed in a timely way, and the applicant given a fair opportunity to respond to same". [see page 158 and footnote 427 of Hathaway & Foster, "*The Law of Refugee Status*" (2nd edition)].

I am not of the view that this is the law in Ireland. In any event, I note that negative credibility findings were made in the s. 13 report, yet none of these were specifically addressed in the notice of appeal and the accompanying written submission to the R.A.T..

21. The complaint in this case maybe based on a misconception of the requirement that certain matters must be "put to" a witness. A witness should be given an opportunity of commenting on evidence to be given by another witness which contradicts his or her own evidence. Breach of this rule of fair procedures may result in the other evidence being excluded.

22. No reliance could be placed on material unknown to an applicant to defeat a claim for asylum. Thus, country of origin information which contradicts an applicant's narrative must be disclosed and an opportunity afforded to address it. Contrarily, it must be assumed that an applicant is aware of what he or she has said during the asylum process. It is noted that an applicant has full opportunity in an appeal, even a "papers only" appeal to address any inconsistency, contradiction, implausibility or any other problem arising from what has been said during the asylum application process.

23. No negative credibility finding was made based on material unknown to the applicant because he is taken to be aware of what he has said personally, and because he was aware of the basis of the rejection of credibility in the s. 13 report, and he had adequate opportunity to address relevant issues during the appeal to the R.A.T..

24. Counsel for the applicant also makes submissions in respect of the following aspects of the R.A.T. decision:-

> "11. In making wholly unreasoned findings with respect to the delay in applying for asylum in either the UK or Ireland and in returning voluntarily to Pakistan, the Tribunal failed to state any reason for the rejection of the explanations given by the Applicant…
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> 12. In failing to consider the claim in light of known country conditions pertaining in Pakistan, the Tribunal acted in breach of fair procedures and acted contrary to Reg. 5(1)(a) of the European Communities (Eligibility for Protection) Regulations 2006, providing that "*all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection*" be taken into account by the decision-maker…
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> 13. The internal relocation finding fell far short of the requisite legal principles set out in *KD [Nigeria] v Refugee Appeals Tribunal* [2013 IEHC 481] *(Clark J., 1 November, 2013) at para 28, and I v MJELR & Refugee Appeals Tribunal* [2014] IEHC 27 *(Mac Eochaidh J., 30 January, 2014)*. Further, in making this finding the Tribunal failed to consider the fact that the Commissioner's finding had been made in circumstances where it was perceived that the Applicant feared 'one individual' only, without any regard to the evidence that the 'one individual' was the leader of a criminal gang and further that he had connections with a national political party. In such circumstances the standard held as appropriate by Mac Eochaidh in *I* is the appropriate standard applicable herein.

25. I accept the respondent's submission that that the Tribunal was not required to have regard to country of origin conditions in Pakistan in circumstances where the applicant was found not to be personally credible, not to have a well founded fear of persecution and no Convention nexus was found for the alleged persecution. Further, the respondents correctly submit that where the Tribunal has rejected the credibility or well-foundedness of the applicant's claim, it is not necessary to apply the principles set out in *K.D.*. Alternatively, if the internal relocation finding is unlawful it is severable from the rest of the decision, which rejects the credibility of the applicant in trenchant terms.

The time issue:
26. The applicant seeks an order providing for an extension of time insofar as same is necessary and in the event of objection to the twenty-nine day extension required, counsel relies on the decision in *S.A.B. v. R.A.T.* [2014] I.E.H.C. 495 wherein Barr J. states at paras. 10 and 12:-

> "10. In the circumstances, where it has taken over four years for the application to come on for hearing and where no prejudice has been caused to the respondent by the delay in instituting the proceedings, I am satisfied that there are substantial grounds for extending time for lodging the within proceedings up to and including 20th January, 2010, which appears to be the date on which the notice of motion issued.
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> …
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> 12. In *M.B.B. v. Refugee Appeals Tribunal & Ors* (*Ex temopore*, High Court, 20th June, 2013), Mac Eochaidh held as follows:-
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> *'17. There is one further submission which I should address on behalf of the respondent and that was the submission that there is no affidavit of translation to support the grounding affidavits in the case. In this respect, the respondent refers to the decision of Cooke J in Saleem v. Minister for Justice (Unreported, High Court, 2nd June, 2011).*
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> *18. I reject the argument made for two reasons. In the first instance it is not a matter that is pleaded in the statement of opposition. It seems to be a case that was made for the first time in the written submissions in this case and then repeated orally. In my view, where a point such as that is sought to be made, whether it is a time point or a translation point, it behoves the respondent to move expeditiously to move to strike out the proceedings if they have such an argument and that should be done by motions in limine in the proceedings, or at the very least, it should be actively pleaded, and then if pleaded, appropriate action be taken to bring the defect in the proceedings to the attention of the court at the first possible opportunity. This did not happen in this case.*
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> *The second reason for rejecting the argument is that in the Saleem case there was clear evidence available to the court that the applicant did not understand the content of either of the affidavits sworn because the applicant confessed to that in the second affidavit in that case.*

There is no evidence before this Court that the applicant do not understand the contents of the affidavits sworn. There is evidence that the affidavits have been sworn with the assistance of a person who speaks both their native language and English. But there is no evidence that the applicants do not have enough English to understand these affidavits or did not have sufficient assistance with the swearing of them.

There was clear evidence in the Saleem case because the applicant in that case admitted that they did not speak English. If the respondent wishes to bring a Saleem point, they need to produce evidence to the court that the person who swore the affidavit did not understand it. When that evidence is available, an application to strike out the proceedings based on the unreliability of the grounding affidavit might well be appropriate but only if that evidence is clearly available. It would be disproportionate to strike out proceedings on the basis of a hint or suggestion that the person's English is not up to scratch.'"

27. In respect of the time issue, the respondent submits that as the applicant states that he was notified of the Tribunal decision, which was sent on the 20th October, 2011, and as these proceedings were issued, out of time, on the 1st December, 2011, and as no explanation is given for the failure to institute the proceedings within time, there is no "good and sufficient reason" as would be required in order to extend the time pursuant to s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000. Accordingly, the respondents rely on the decision in *G.K. v. Minister for Justice* [2002] 2 I.R. 418, wherein Hardiman J. held as follows at p. 424:-

> "The application is grounded on two affidavits sworn by the applicants' present solicitor. Neither of these affidavits addresses in any way the question of the delay in applying to quash the decision of the 15th February, 2000.
>
> In those circumstances, no basis whatever for extending the time for proceedings in relation to the first decision has been put before the court, quite apart from any question of underlying merits."

28. The Court acknowledges that it has no jurisdiction to extend time in the absence of some expression of "good and sufficient reason" being advanced by or on behalf of the applicant. Given that I have decided to refuse this application for judicial review on substantive grounds, I leave over to another case the question of whether the decsion of the Supreme Court in *G.K.* requires the reason for the extention of time to be on affidavit, as suggested by the respondent.

29. I refuse this application for judicial review.