Neutral Citation: [2016] IEHC 85

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 44 J.R.]

BETWEEN

I.E.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY AND

REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Mr. Richard Humphreys delivered on the 15th day of February, 2016

1. The applicant was born in Nigeria in 1977, although, when claiming asylum, he stated incorrectly that he was born in 1985.

2. He received a six month visa from the U.K. Border Agency on 28th May, 2009. In July, 2009 he came to the U.K. for two weeks, and says that he returned to Nigeria on 27th July, 2009.

3. His claim of asylum relates to a land dispute that appears to have broken out in early 2012, in which he says an uncle was seeking to steal land belonging to him or his father. He was attacked and hospitalised, and then fled Nigeria.

4. He says he arrived in Ireland in January 2013. He was arrested on 10th June, 2013, and shortly thereafter, on 14th June, 2013 made an application for asylum. This was rejected by the Refugees Application Commissioner, a decision which he appealed to the Refugee Appeals Tribunal.

5. The tribunal rejected his appeal on 15th December, 2014. It is important to note that the appeal to the tribunal was by way of a written procedure only, because the commissioner had made a finding pursuant to s. 13(6)(a) of the Refugee Act 1996, that he had not applied for asylum as soon as practicable after arrival in the State.

6. Leave to seek judicial review was granted by MacEochaidh J. on 16th January, 2015, including an order extending time, and an amended statement of grounds within the terms of the order granting leave was filed on 24th February, 2015.

7. While not strictly relevant to the present application, I note that on 20th November, 2015, he applied for residency in the State based on marriage to an Irish citizen.

Extension of time

8. As noted above, an extension of time was granted by Mac Eochaidh J at the ex parte stage. The respondents have an entitlement to dispute this because they were not represented at that stage (but not otherwise), but they confirm that they take no issue with this. I am grateful to Ms. Emma Doyle B.L. for the respondents for taking a practical approach to this aspect. In any event the application was made only slightly outside the statutory period and I probably would have been minded to regard the extension of time as being appropriate.

Does the tribunal have to decide the "core claim" of persecution?

9. In this case, the adverse credibility finding is based on matters relating to issues such as the applicant's travel arrangements rather than the account of persecution as such. Mr. Michael Conlon, S.C. (with Mr. Garry O'Halloran B.L.) appearing on behalf of the applicant, submitted that the tribunal is under an obligation to decide the "core claim" and in this case failed to do so. By "core claim" I understood him to mean the existence or otherwise of a well-founded fear of persecution. The central element of that question is normally the issue of whether the persecution alleged by the applicant actually happened.

10. The primary authority relied on in this regard was *E.P.A. v. Refugee Appeals Tribunal* [2013] IEHC 85 (Mac Eochaidh J., para. 9), in which the tribunal was criticised for failing to give a "*clear and reasoned finding on the central issue*", the central issue in that case being the sexual orientation of the applicant, which was relevant to his persecution claim.

11. However, in *P.D. v. Minister for Justice, Equality and Law Reform* [201] IEHC 111, Mac Eochaidh J. took a somewhat different approach and emphasised that it was too simplistic to say that the tribunal must always consider the core claim of an applicant.

12. I followed the P.D. decision in my judgment in *R.A. v. Refugee Appeals Tribunal* (No. 1) [2015] IEHC 686, at paras. 34–35, where I pointed out that because asylum claims require a number of elements, it is unnecessary to require a decision-maker to decide on every element when an adverse finding has been made in respect of one such element. That aspect of R.A. was subsequently quoted with apparent approval by Stewart J. in *E.K.K. v. Minister for Justice and Equality* [2016] IEHC 38 at para. 52. The approach taken in R.A. was that if an asylum claim failed to surmount any one of a number of distinct and separate hurdles for the success of such an application, nine of which were identified in the judgment, there is no necessity to go on to consider any other element of the claim. Thus, where an applicant's credibility is rejected generally, the tribunal does not need to make any specific finding on whether the acts of persecution actually occurred or to what extent or whether any other element of the test for a well founded fear of persecution exists.

13. Having said that, there may be exceptional cases where the entire story of the applicant is not rejected, and despite a general absence of credibility, a risk of persecution can arise from such limited "*islands of fact*" as may be left intact despite the lack of

credibility. For example, if it is established that an incredible applicant is nonetheless, as a matter of fact, a member of a particular tribe, who are at risk in a particular country, further analysis may be required by the tribunal, despite what might otherwise be a general rejection of the applicant's credibility (see *M.A.M.A. v. Refugee Appeals Tribunal* [2011] 2 I.R. 729).

14. The approach I have discussed is consistent with a number of other decisions including *Ojelabi v. Refugee Appeals Tribunal* [2005] IEHC 42 (Peart J.); *Imafu v. Minister for Justice, Equality and Law Reform* [2005] IEHC 416 (Peart J.); and *J.X. v. Refugee Appeals Tribunal,* (Unreported, 2nd June, 2005) (Clark J.).

15. For the reasons discussed in my judgment in R.A., I would therefore prefer the approach taken in *E.K.K., P.D., Ojelabi, Imafu and J.X*. to any interpretation of E.P.A. that would suggest that there is any general obligation to provide a specific finding on any issue that the applicant considers essential, such as his or her claim of persecution or any element of that story.

Does the tribunal need to state whether the core claim is accepted?
16. In *M.A. (Nigeria) v. Refugee Appeals Tribunal* [2016] IEHC 16, at para. 16, Stewart J. stated that an applicant was entitled to a clear decision as to whether the core claim was being accepted, and if not, of the reason for rejection.

17. Again, I am not altogether convinced that the expression "core claim" is entirely helpful. As stated in R.A., an asylum seeker must meet a whole series of thresholds, all of which are, in this sense, "*core*". To that extent, every decision of the tribunal must indicate whether the claim is being accepted, as it must state as result. I do not think that the view taken by Stewart J. in M.A. is to be read is indicating that the tribunal must specifically state whether the incident of persecution occurred, or whether the tribunal accepts any other element of the applicant's story that the applicant considers to be core (for example, whether the applicant was a member of a particular tribe or had a particular sexual orientation), because to adopt such an interpretation would be to overstate the obligation on the tribunal, essentially for the reasons I set out in R.A.

18. At para. 15, Stewart J. appears to be placing reliance on the decision of Mac Eochaidh J. in *B.O.B. v. Refugee Appeals Tribunal* [2013] IEHC 187, in which it was said that the decision-maker must specify what part of the claim is being accepted and what part is being rejected. To some extent, Mac Eochaidh J. clarified this suggestion in his subsequent decision in P.D. and I do not think that B.O.B. should be read in isolation from that later decision.

19. If *B.O.B*. was to be read as suggesting that the tribunal is under an obligation to specify what parts exactly of an applicant's story did nor did not happen in a case where the applicant's credibility is undermined generally, then I would respectfully be of the view that such an approach sets the bar too high having regard to the authorities referred to in R.A. and above in relation to the entitlement of the tribunal to reject an application independently of any examination of the claim of persecution beyond rejecting an applicant's credibility. If an applicant is generally believed, and if his or her account is sufficient to sustain a finding in favour of international protection, nothing is to be gained by the tribunal going on to say that perhaps certain elements of the claim might or might not have happened, that it accepts that the applicant was, or was not, involved in a particular incident in some capacity, and so on. The tribunal must not be held to a higher standard than the High Court. The court is entitled to limit itself to matters that are necessary for a decision, and to hold off on making any comment on matters on which the outcome will not turn. Likewise, the tribunal, having rejected the credibility of an applicant generally does not have to specify what particular parts of the story offered (including those which relate to the "core claim" in the sense of the allegation of persecution) might or might not be true.

Can the tribunal reject credibility based on matters other than the "core" claim of persecution?
20. Mr. Conlon submits that the decision rejecting the applicant's credibility is based on peripheral matters which do not go to the core of the claim. The failure to deal with the core issue, he says, is reinforced by the fact that the core issue was addressed in the notice of appeal.

21. Section 11B of the Refugee Act 1996, allows credibility decisions to take into account what might be termed "peripheral matters", namely matters related to the manner of the making of the claim rather that its content.

22. In *M.O.S.H. (Pakistan) v. Refugee Appeals Tribunal* [2015] IEHC 209, at para. 41, Eagar J. commented that s. 11B of the Act is "*not really relied on save in an odd case".* However, by its own terms, s. 11B requires the commissioner or the tribunal to have regard to the matters set out in the section in every case. Those bodies "*shall have regard to*" a list of named issues. It is not open to the commissioner or the tribunal to simply disregard statute law, and to fail in the duty which applies in every case to apply the section, and to have regard to any of the matters thereby arising.

23. As regards credibility issues in relation to travel in M.O.S.H., Eagar J. commented at para. 43 that "[t]he reality is that the Applicant is making an application for refugee status. The Applicant is in the country and raising an issue as a primary finding of a lack of credibility on this ground appears to me to be an unreasonable approach to the issue of the assessment of a person's credibility. It is in my view a peripheral issue but while an issue of a lack of credibility may be found I don't think much weight should be attached to it."

24. Insofar as this decision takes the view that it is an unreasonable approach to condemn an applicant's credibility based on travel-related issues, there is significant authority to the opposite effect which does not appear to have been opened to the court in M.O.S.H. In K.M. v. Refugee Appeals Tribunal [2007] IEHC 300, Edwards J. took the opposite view, and rejected an application for judicial review of a credibility finding which was based on travel-related issues, noting the obligation to apply s. 11B in that context.

25. I previously commented in R.A., at para. 51 that the shaping of the decision is a matter for the decision-maker and not for the applicant. Still less is it a matter for the court. I would not accept that there is anything unreasonable about condemning an applicant's credibility, by reason of an implausible tale related to travel arrangements as was done in this case.

26. In this case, there are a series of issues in relation to which the tribunal had difficulty with the applicant's credibility, in relation to his date of birth, a U.K. visa, travel to Ireland, his Nigerian passport, his entrance to Ireland and the delay in making the application.

27. It is true that none of these relate to the core issue of whether the alleged persecution actually happened. To that extent, Mr. Conlon characterises them as "*peripheral matters".*

28. However, as a matter of logic and first principles, the credibility of an individual in relation to matters that are difficult or impossible to verify can, to some extent, be ascertained by reference to his or her credibility in relation to matters that can be verified. Issues such as the consistency of factual information provided by an applicant, his or her travel arrangements, and timing of any application, are matters which rationally are capable of allowing a decision-maker to form a view as to the credibility of such an applicant. The decision-maker is perfectly entitled, having formed such a view to apply that view to the remaining elements of the

claim overall. Credibility is indivisible. If incredibility is demonstrated in relation to matters which are capable of proof or reasonable inference, the applicant cannot complain if he or she is disbelieved in relation to matters of which there is no other direct evidence.

29. Mr. Conlon relied heavily on a number of passages of Hathaway and Foster *The Law of Refugee Status* (2nd ed., Cambridge 2014). He acknowledged that, to some extent, Hathaway is a "normative" text, by which he meant a text that argues for a position which its authors advocate, as opposed to objectively describes the state of current law, and I would entirely endorse that description. Indeed, Hathaway generally appears to embody rather more of the crusading spirit of the social justice campaigner than can readily be of value in the forensic context. By way of example, at p. 138 of Hathaway and Foster complaint is made regarding the tendency of decision-makers to exaggerate the importance of a few apparent contradictions, hesitations or vague statements in asylum seekers' accounts, relying on *Djama v. Canada* [1992] FCJ 531 (Can. FCA, 1992). However, an examination of the judgment itself shows that these criticisms were made in a context where clear and irrefutable documentary evidence existed supporting the applicant's claim. As presented in Hathaway, the comments are a deprecation of reliance on contradiction and vagueness generally as a ground for impugning credibility. Hathaway has already been disowned as not stating Irish law in relation to the need to put contradictions in evidence (*M.A. v. Refugee Appeals Tribunal* [2015] IEHC 528, *per* Mac Eochaidh J., at para. 20). In general, I would consider Hathaway to be a partisan text, and not one that should be relied on for forensic purposes without significant caution and qualification.

30. In relation to the applicant's complaints under this heading, I take the view that the tribunal is entitled, if it has reason to do so, to reject the credibility of an applicant and may do so on the basis of any element of the applicant's evidence that it considers to be fundamentally undermining of the applicant's credibility. There is no general obligation either in law or in logic requiring a decision-maker to make such credibility findings only on the basis of difficulties with the central claim being made. Indeed, the implications of that contention are clearly unacceptable. Such an approach would allow an applicant to dissemble with impunity on any matter other than the central allegation of persecution, which may not be capable of verification, and then complain if his or her credibility is called into question.

31. In *I.R. v. Minister for Justice, Equality & Law Reform* [2009] IEHC 353, Cooke J. said that *"[a] finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation and the reasons drawn from such facts must be cogent and bear a legitimate connection to the adverse finding*" (para. 11.5). He went on to say that "[t]he reasons must relate to the substantive basis of the claim made and not to minor matters or to facts which are merely incidental in the account given" (para. 11.6, emphasis added).

32. I.R. is a very useful guide to many of the major principles in this area and is currently the most-cited judgment in the asylum field, and Mr. Conlon described it as setting out what he called the "*ten commandments*" for asylum cases. However no judgment warrants quite that kind of unapproachable deference, and nor should any judgment, however authoritative, be read as if it were written statutory law. I would respectfully suggest that the formulation of the point just quoted may be open to some refinement in that it elides two separate concepts, the question of whether matters are major or minor and the question of whether they are substantive or incidental, in the sense of relating to the substantive core of the story of persecution being advanced. Of course, credibility should not be rejected because of minor and unimportant discrepancies, of the kind that anybody could make. However significant discrepancies and contradictions may be a basis for rejecting credibility, even if they relate to "*incidental*" matters such as travel arrangements as opposed to what Cooke J. refers to as "*the substantive basis of the claim made*". In the present case, if I were to take this exhortation literally, the tribunal member was not entitled to reject the applicant's credibility based on the whole litany of matters set out in the decision, because these did not relate to "the substantive basis of the claim made". I would respectfully suggest that for the reasons set out above, this element of I.R. should not be followed literally and needs to be construed as referable only to a requirement that an adverse credibility finding should not be based on minor matters. For the foregoing reasons I would prefer to follow the decision in *K.M.* rather than *M.O.S.H.* or any contrary interpretation of the isolated phrase I have referred to in *I.R.*

33. I had previously decided in *B.W. v. Refugee Appeals Tribunal* (No. 2) [2015] IEHC 759 that, as part of a line of authority to the same effect, M.O.S.H. was incorrectly decided on the main point in that case, whether the credibility findings could be severed. I must now hold that insofar as it determines that credibility rejection cannot be based on matters other than the claim of persecution, it was decided per incuriam and incorrectly, in that the decision of Edwards J. in K.M. was not brought to the court's attention in that case. If it had been, I consider that it should have been followed. I note in passing that in *M.O.S.H. v. Refugee Appeals Tribunal* (No. 2) [2015] IEHC 331, the State sought leave to appeal the decision in *M.O.S.H.* in relation to the assessment of the rationality of the credibility finding (para. 5), but this was refused.

The test to be applied for adequacy of reasons

34. In *R.O. v. Minister for Justice and Equality* [2012] IEHC 573, Mac Eochaidh J. developed the I.R. line of thought by setting out certain questions that he posed for a court to address:-

> *"I approach the review of the adequacy of reasons in this case by asking the following questions:-*
>
> *(i) Were reasons given or discernible for the credibility findings?*
>
> *(ii) If so, were the reasons intelligible in the sense that the reader/addressee could understand why the finding was made?*
>
> *(iii) Were the reasons specific, cogent and substantial?*
>
> *(iv) Were they based on correct facts?*
>
> *(v) Were they rational?*
>
> *Returning now to each of the credibility findings, I assess them as follows."*

35. While I have no doubt that Mac Eochaidh J. did not intend to reverse the burden of proof in phrasing the questions the way he did, this seems to have been a possible side-effect of this passage having regard to some of the subsequent case law referring to it (which I should say for the avoidance of doubt that I have also considered for the purposes of the present judgment). As phrased in the R.O. decision, those questions are put in a form suitable for intellectual analysis, but run the risk of reversing the burden of proof if construed literally as a test to be applied by the court as a forensic yardstick. For example, the question as to whether the reasons were based on correct facts might perhaps be better phrased as a question as to whether the applicant has demonstrated to the civil standard that the reasons were based on incorrect facts to such an extent as to vitiate the decision. There is no onus on the tribunal

to show that a decision is based on correct facts. Furthermore, it is clear that certain elements of a decision may be factually incorrect, but the decision as a whole may stand (a point made in I.R. itself and not specifically reflected in these questions – see my decision in B.W. (No. 2)).

36. I would also respectfully question whether there is any legal obligation to give "specific, cogent and substantial" reasons as suggested. The formulation of reasons is a matter for the decision-maker. The weight to be attached to particular elements is not a matter on which the court can substitute its view. For present purposes, the obligation to give "specific" reasons might be construed as an obligation to indicate specifically which parts of an applicant's account are accepted and which are rejected. For the reasons set out in this judgment, I would not accept that such an obligation lies, or automatically lies, on the decision-maker.

37. Having regard to the foregoing, I would respectfully suggest that the questions set out by Mac Eochaidh J. in *R.O.,* at para. 30, be replaced by an alternative form of question for the court to apply, namely: whether the applicant has discharged the burden of proof to show that the reasons offered for the rejection of the claim are so absent, so unintelligible, so trivial, so tainted by factual error or so irrational, in circumstances where any untenable element of the decision cannot be severed, as to warrant the quashing of the overall decision in all of the circumstances.

Allegation that the tribunal engaged in conjecture
38. Mr. Conlon criticises the standard of reasoning of the tribunal in this case, and suggests, among other criticisms that it involves conjecture, speculation or irrationality.

39. However, the formation or expression of an opinion is not conjecture (see *A.A. v. Refugee Appeals Tribunal* [2009] IEHC 445, per Clark J. at para. 28, citing *Okeke v. Refugee Appeals Tribunal* [2006] IEHC 46, per Peart J.). There is no conjecture involved in a reasoned formulation of an opinion as to lack of credibility. Nor has any irrationality been shown.

Did the tribunal adequately consider matters set out in the notice of appeal?
40. The onus is on the applicant to show that the decision-maker failed to consider matters which by statute they were required to have regard to (see G*.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418, per Hardiman J.). I am not satisfied that this has been shown in the present case.

Error in the introductory section of the decision
41. In the introductory part of the decision, the tribunal member incorrectly states that the commissioner rejected the application under s. 13(6)(a) of the Refugee Act 1996 (no or minimal basis for the application), rather than s. 13(6)(c) (failure to apply as soon as reasonably practicable). This is clearly an error. Can it be severed from the rest of the decision? A papers-only appeal requires "extreme care" (see *V.M. (Kenya) v. Refugee Appeals Tribunal* [2013] IEHC 24, per Clark J.; and *S.K. v. Refugee Appeals Tribunal* [2015] IEHC 176, per Faherty J.). At one level, the error was in an introductory section rather than a binding part of the analysis, so in principle is severable. However, in R.A., at para. 31, I adverted to the situation that where an error in one part of a decision could contaminate an otherwise valid decision overall, the erroneous part should not be severed from that overall decision. In this case, whether one considers the matter in terms of perception or substance of a fair hearing, the possibility that a tribunal member approached the appeal on the incorrect basis that it had already been rejected as having no basis or a minimal basis is something that clearly has the potential to contaminate the decision overall. It puts a negative spin on the appeal from the outset that could not sustain confidence that the correct approach was being adopted or that the perception of due fairness was being afforded. For that reason I would grant the relief sought on this ground alone.

Order
42. For the foregoing reasons, I will order:-

(i) that an order of certiorari do issue removing for the purpose of being quashed the decision of the Refugee Appeals Tribunal dated 15th December, 2014, refusing the appeal of the applicant;

(ii) that the said appeal be remitted to the tribunal for re-hearing;

(iii) that the parties be afforded an opportunity to make any consequential applications; and

(iv) that a party intending to make such an application is to give the other party advance particulars in that regard.