THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 578 J.R.]

BETWEEN

S.A. (GHANA AND SOUTH AFRICA)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 1st day of February, 2018

1. The applicant was born in Ghana in 1972. He claimed persecution and moved to South Africa in 1999, where he married a South African national. She died in 2003. He became a South African citizen on 9th September, 2004. The applicant claimed that his wife's family threatened him and that he was attacked in early 2008 and again in May, 2008, when his leg was broken. He says he reported this to the police and that no action was taken.

2. He entered into a new relationship and travelled with the same girlfriend to Ireland on holiday in February, 2009. He claims his wife's family were very unhappy about the relationship and the girlfriend broke off that relationship as a result. He claims that a mob was led to him in January, 2012, but he managed to run away. He fled South Africa on 6th February, 2012, arriving in Ireland on 7th February, 2012. He applied for asylum on 11th September, 2013, nineteen months after his arrival.

3. His asylum claim was rejected by the Refugee Applications Commissioner. An appeal to the Refugee Appeals Tribunal was also rejected. He applied for subsidiary protection on 16th January, 2015. That was refused by the commissioner on 3rd December, 2015. On 16th December, 2015, he appealed to the tribunal.

4. A hearing took place on 21st April, 2017, after considerable difficulties with an interpreter, although the applicant had previously furnished information in English without difficulty. Ms. Lisa McKeogh B.L. appeared for the applicant at that hearing. On 26th May, 2017, the International Protection Appeals Tribunal affirmed the rejection of his subsidiary protection claim in an eighteen page decision by Mr. Mark Byrne.

5. On 29th May, 2017, that decision was notified to the applicant. On 24th July, 2017, leave for the present proceedings was granted by O'Regan J. A statement of opposition was filed on 10th November, 2017.

6. I have received helpful submissions from Mr. Gary O'Halloran B.L. for the applicant and Mr. Tim O'Connor B.L. for the respondents.

Relief sought

7. The substantive relief sought is an order of *certiorari* of the IPAT decision refusing subsidiary protection. The written legal submissions identify seven issues, which I will deal with in turn.

The first issue

8. The first issue identified by the applicant is "*whether the IPAT has an entitlement to reject the entirety of the claim in respect of Ghana by reason of credibility findings in respect of events in South Africa"*. The factual premise of this question is incorrect because the tribunal did not reject the entirety of the claim in respect of Ghana by reason of credibility findings, in respect of events in South Africa. It held that the Ghanaian story was not supported by documentary evidence and that the applicant was not entitled to the benefit of the doubt having regard to his incredible account of events in South Africa. To take the question posed by the applicant more broadly, even though it does not arise on the premise suggested, if an applicant gives incredible testimony on any matter it is open to a decision-maker to draw inferences of a lack of credibility generally. Reliance is placed by the applicant on *Meadows v. Minister Justice, Equality and Law Reform* [2010] IESC 3 [2010] 2 I.R. 701, but here the rationale for the decision clearly was set out.

The second issue

9. The second issue is "*whether the decision of IPAT in respect of South Africa can survive in circumstances where the decision (a) contains findings which were arrived at unfairly and/or were erroneous and/or irrational and (b) the decision was cumulative and the Tribunal failed to specify at para. 5. 21 the weight to be attached to the elements of that decision".*

10. This question embodies a considerable number of sub-propositions. Firstly, the applicant has not demonstrated that the tribunal's findings were arrived at unfairly. Secondly, it is not the role of judicial review to determine whether a decision-maker's findings were erroneous as such. This is not a rehearing on the merits. Thirdly, the applicant has not demonstrated that the findings were irrational. Finally, where a decision is cumulative the decision-maker is not required to specify the weight to be attached to each and every individual element of that decision. No such legal obligation exists. High Court judges do not do this when giving judgment and it would be an exercise in arrogance for me to invalidate a tribunal decision for failing to do something that I would not even attempt to do myself. Indeed, such an exercise is virtually impossible to do if there are a number of elements to be considered. That is the position I took in *B.W. v. Refugee Appeals Tribunal* [2015] IEHC 759 [2015] 11 JIC 2708 (Unreported, High Court, 17th November, 2015) paras. 52-56, and while the Court of Appeal arrived at a different result in terms of the order to be made, the approach I took to the specific issue we are now talking about seems consistent with the way in which the judgment of Peart J. in the Court of Appeal approached the question of cumulative reasoning (see *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296 (Unreported, 15th November, 2017), for example para. 70 where there is no suggestion that there is any obligation to specify the weight of each factor).

The third issue

11. The third issue is "*whether the IPAT are entitled to ignore guidelines relating to the assessment of credibility produced by the UNHCR and IPAT itself when summarily rejecting explanations for inconsistencies given by the applicant".*

12. First of all, the factual premise for this issue does not arise. The guidelines may not have been referred to but there is no

evidence that they were "*ignored*". Mr. O'Halloran relies on *O.N. v. Refugee Appeals Tribunal* [2017] IEHC 13 (Unreported, High Court, 17th January, 2017), but that is not a case that finds that the tribunal is required to follow UNHCR guidelines. O'Regan J. at para. 36 does no more than follow the decision of the Supreme Court in *V.Z. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 135, *per* McGuinness J. at p. 148, which referred to the entitlement of the court to regard the guidelines contained in the UNHCR handbook as being "*of relevance in considering the arguments made by counsel on both sides in this appeal".*

13. In any event, that was a case relating to the UNHCR handbook, which is a somewhat more definitive document than individual guidelines that may be presented from time to time by individual international agencies. The lack of a basis for a legal obligation to comply with such guidelines is set out by Cooke J. in *N.N. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 234 (Unreported, High Court, 20th May, 2009), at para. 15.

14. More fundamentally, the main point being made by the applicant under this heading does not hold water. Mr. O'Halloran complains that para. 3.1.3 of a document entitled "*Beyond Proof: Credibility Assessment in EU Asylum Systems"* (United Nations High Commissioner for Refugees, Brussels, May 2013) (which is a 283 page document produced by the UNHCR and the EU) suggests that decision-makers should not "*prejudge credibility [nor] approach the task with scepticism*" and they should "*engage in self-assessment so that they recognise the extent to which their own emotional and physical state, values, views, assumptions, prejudices and life experiences influence their decision making*". He also relies on various advices in the document as to why discrepancies might arise otherwise than by lies on the part of an applicant. Mr. O'Halloran inventively draws from this an alleged duty on the part of the decision-maker to affirmatively identify his or her own prejudices and so forth.

15. The passages quoted are no doubt desirable aspirational sentiments which I am sure apply to judges as well as members of the IPAT, or indeed any independent statutory or constitutional decision-maker. Of course decision-makers should try to be aware of their own general predispositions (some might call them prejudices) and keep such issues under review and indeed under control. But while I appreciate that we live in an emoting age, it would take such sentiments to an embarrassing and indeed revolting extreme for decision-makers to have to self-abase by making some sort of express public declaration that they had examined their prejudices, as suggested by Mr. O'Halloran.

16. In relation to the question of credibility, Mr. O'Halloran relies on *Memishi v. Refugee Appeals Tribunal* [2003] IEHC 65 (Unreported, High Court, 25th June, 2003), which is expressly cited in the UNHCR report at para. 3.4. In that case, Peart J. endorsed the proposition that the fact that some important detail is not included in the application form completed by the applicant when he or she first arrives is not of itself sufficient to from the basis of an adverse credibility finding.

17. It is clear that this was an *obiter* statement as Peart J. held that the case turned on its own facts, and indeed the relief sought was refused. In that context I must respectfully differ somewhat from Mr. O'Halloran's interpretation of the wide *obiter* statement relied on. It is a matter for the decision-maker to decide whether or not the omission of important matters goes to credibility, especially where the decision-maker sees and hears the applicant. It is simply not possible to lay down some sort of rule, still less an absolute rule, that omission of matters in application forms cannot be considered. This clearly can be considered, it is a matter for the tribunal which is entitled to give weight and even decisive weight to an omission by an applicant to put forward important facts in his or her initial account, subject of course to considering any explanation offered subsequently, if that occurs. I assume that that is what Peart J. meant by saying the omission is not "*of itself*" sufficient – one should listen to whether the explanation holds water. But the omission initially of a major element of the claim, together with an incredible explanation for the omission, could be a lawful basis to reject the claim.

18. The unreal nature of the exercise Mr. O'Halloran demands is demonstrated by the notion that would follow from accepting this point, which would be that the UNHCR (which is not entirely a disinterested body in the sense that advocacy is a key part of its brief) could produce documents hundreds of the pages long at any time, any fragment of which would be the basis of *certiorari* if not followed to the letter. That would be to set an impossible task for IPAT members.

The fourth issue

19. The fourth issue is "*whether the IPAT have an investigative function such that reliance on the omission of part of the narrative of the applicant in the initial s. 8 interview without requesting ORAC or the Minister to conduct further inquires is impermissible*".

20. While the formulation of the issue does not make entirely clear what point is being advanced, Mr. O'Halloran stated in oral submissions that it is to do with the contradictions in the evidence and information provided by the applicant at various stages. The applicant had every opportunity to give oral evidence, which could have clarified the matter. There is no substance to this point. Insofar as there is any contradiction between the various accounts offered by him, it is a matter for the tribunal to assess. The tribunal is not obligated to somehow refer the matter back to the commissioner, still less the Minister. No legal basis for such an obligation has been demonstrated.

The fifth issue

21. The fifth issue is "*whether the IPAT is required to arrive at a decision which clearly sets out which elements of the applicant's narrative are deemed credible or incredible*". Under this heading, Mr. O'Halloran relies on *Muia v. O'Gorman (sitting as the Refugee Appeals Tribunal) & Ors.* [2005] IEHC 363 (Unreported, High Court, 11th November, 2005). But that was a decision on special facts. Paragraph 3.5 of the judgment of Clarke J. makes this clear; "*the decision maker appears to have been satisfied that the applicant had a well founded fear of the Mungiki but that such fear was not for a convention reason. On that basis it would seem that it might be inferred that at least some of the more significant aspects of the applicant's account were regarded as credible. In those circumstances it is difficult to ascertain from the decision, with any sufficient precision, precisely what aspects of the account were regarded as being established and what aspects were not regarded as credible."* Thus, there is no read-across from that decision, which is in the context of a finding of part-credibility and part-incredibility, to decisions more generally, and there is certainly no read-across here because the decision-maker specifies precisely what aspects are incredible and why. There is no obligation to give a detailed, micro-granular account of what individual items are being rejected if an applicant's credibility is being rejected generally. Again, High Court judges do not do this when rejecting the credibility of witnesses and it is a pencil-pushing suggestion to demand that the High Court should hypocritically impose such a requirement on administrative decision-makers. In any case, considerable details are provided in the decision of the tribunal members as to what is being rejected, specifically at para. 5.21: *"the material facts of the appellant's claim as they relate to South Africa".*

The sixth issue

22. The sixth issue is "*whether the IPAT is required to consider documents and country reports capable of corroborating or otherwise supporting the applicant's claim*". Obviously the answer to this question is "*yes*" (see e.g. *I.R. v. Minister for Justice Equality and Law Reform* [2009] IEHC 353 (Unreported, Cooke J., 24th July, 2009), but here all documents submitted were considered (see para. 3.20 of the decision). In accordance with the judgment of Hardiman J. in *G.K. v. Minister for Justice, Equality and Law*

Reform [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401, where the decision-maker has stated that all material was considered, the onus is on the applicant to displace that, which has not been done.

23. I accept Mr. O'Connor's submission that "*a decision maker need not deal with each and every piece of evidence as if ticking each one off a list*". He relies on the judgment of Hedigan J. in *J.A. v. Refugee Appeals Tribunal* [2008] IEHC 310 (Unreported, High Court, 15th October, 2008) at paras. 18 to 19. I made the same point in *Walsh v. Walsh (No. 1)* [2017] IEHC 181 [2017] 2 JIC 0207 (Unreported, High Court, 2nd February, 2017) in the context of *ex tempore* judgments, but the point has a wider significance, namely that "*it is the issues that are of importance to the judge that need to be specified rather than all of the issues identified by the parties"* (see para. 10 of *Walsh v. Walsh* citing *Eagle Trust Company Ltd v. Pigott-Brown* [1985] 3 All E.R. 119; *English v. Emery* [2002] EWCA Civ. 605; Munby LJ, as he then was, in In *re A. and L. (Children)* [2011] EWCA Civ. 1611 at para. 30). The same point was also made by Birmingham J. in *Muanza v. Refugee Appeals Tribunal* (Unreported, High Court, 8th February, 2008). A decision-maker is "*not obliged to list every argument which he is rejecting or every fact the significance of which he is discounting".*

The seventh issue
24. The seventh issue is "*whether the IPAT has a duty to consider the applicant's exposure to future harm in the light of his ethnicity and/or nationality*". The IPAT does have a duty to consider the risk of future harm, but no credible risk of exposure to future harm in South Africa could arise from his South African nationality, as suggested by the question. As regards his non-South African ethnicity, if one looks at the decision at para. 6.6 the tribunal did consider the ethnic origin issue in terms of the risk of xenophobic attacks but held that "*such attacks are not sufficiently widespread to result in a finding that the appellant would face a real risk of serious harm solely on account of his Ghanaian origins if he returned to South Africa".* Thus the case is fundamentally different from *O.N. v. Refugee Appeals Tribunal* [2017] IEHC 55 (Unreported, O'Regan J., 9th February, 2017) where the tribunal failed to consider the forward-looking risk issue at all.

Order
25. For the foregoing reasons the order will be that the application be dismissed.