THE HIGH COURT
JUDICIAL REVIEW

[2017 No. 835 J.R.]

BETWEEN

R.S (UKRAINE)

APPLICANT

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

RESPONDENTS
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JUDGMENT of Mr. Justice Richard Humphreys delivered on the 17th day of September, 2018

1. These two applications relate to a husband and wife from the Ukraine. In 2012 the husband applied for an Irish visa under an alternative name. That was refused. In December, 2013 and January, 2014 the husband claims that he was arrested, detained and ill-treated due to involvement in protests in the Ukraine. In February, 2014 the wife claims that soldiers visited the house, warned against involvement in protests and raped her. The applicants came to the State and claimed asylum, in the course of which it was falsely denied that the husband had applied for an Irish visa. The asylum claims were rejected.

2. That was appealed to the Refugee Appeals Tribunal, at which stage it was accepted that the visa application had been made. The appeal being unsuccessful, the applicants then both claimed subsidiary protection but those applications were rejected, and appeals to the International Protection Appeals Tribunal were dismissed on 5th October, 2017. On 6th November, 2017 leave was granted in these two proceedings, the primary relief being *certiorari* of the IPAT decisions in relation to subsidiary protection.

3. I have received helpful submissions from Mr. Mark de Blacam S.C. (with Mr. Eamonn Dornan B.L.) for the applicants, from Mr. Peter Leonard B.L. for the respondents in the husband's case and from Mr. Alexander Caffrey B.L. for the respondents in the wife's case.

The IPAT decisions
4. The well-organised decisions of the IPAT member here, Mr. Byron Wade B.L., illustrate the commendable option of considering matters on an "*even if I am wrong*" basis, which I have referred to and held to be legitimate in *S.I. v. Minister for Justice and Equality* [2016] IEHC 112 [2016] 2 JIC 1517 (Unreported, High Court, 15th February, 2016) at para. 19. Such an approach enables a judicial review court to deal with a situation where two alternative grounds are given for a particular finding such that even if one of those grounds cannot be sustained the ultimate conclusion may survive if the alternative independent ground is held to be valid.

5. The tribunal member held that consistency of a claim with country information is necessary but not sufficient. He took a similar view in relation to consistency of medical reports with the claim being made. He held that the applicants had lied regarding the Irish visa application and given inconsistent explanations regarding that issue and regarding the husband's name change. He considered the husband's explanations at para. 5.14 of the decision in the husband's case and noted that differing explanations had been given on behalf of the husband, and as between the husband and wife. As regards the husband's explanation of how he escaped from custody, this involved what the tribunal member referred to as a "*highly improbable*" story whereby the vehicle in which he was being held was stopped by protesters, the husband remarkably managed to open the door by pulling a lever despite his hands being tied, with the protesters then, coincidentally and conveniently, dragging him away to safety. This remarkably coincidental, if not cliff-hangingly filmic, story was one that the tribunal was entitled to describe as highly improbable.

6. At para. 6.8 of the decision in the husband's case the tribunal member went on to say in effect that if he was wrong about credibility, the fact that a new regime was in place in the Ukraine was a game-changer, and gave rise to a situation whereby the applicants were no longer at risk. At para. 6.13, he held that it had not been shown that impunity applied and at para. 6.14, he held that even if he was wrong about that, and if there was impunity for members of the old regime, that had not been shown to give rise to a risk to the husband. At para. 6.18, he held that without prejudice to the credibility findings, the armed conflict in Ukraine applied to a different region from which the applicants did not hail.

7. As regards a claim that harm would be caused by military service, the tribunal member held that the possibility of being subject to military service did not in and of itself constitute serious harm and said that a case of serious harm under this heading by virtue of a risk similar to that discussed in *B.M. (Eritrea) v. Minister for Justice and Equality* [2013] IEHC 324 (Unreported, McDermott J., 16th July, 2013) at paras. 51 to 56 had not been made out.

8. As regards the wife's claim, the tribunal member's decision was consistent with the findings in relation to the husband, although the distinguishing factors were also discussed, particularly the fact that she herself was neither targeted previously nor currently targeted by reason of political opposition to the regime. He also dealt with her claim of rape, which I will refer to later.

Allegation of no proper regard to medico-legal documentation
9. This arose in the context of an assessment of the applicant's credibility. It is established that the assessment of credibility is quintessentially a matter for the decision-maker: see *S.B. v Minister for Justice and Equality* [2010] IEHC 133 (Unreported, Cooke J., 25th February, 2010), *C.M. (Zimbabwe) v. International Protection Appeals Tribunal* [2018] IEHC 35 [2018] 1 JIC 2304 (Unreported, High Court, 23rd January, 2018), *per* Birmingham J. in *M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192 at para. 27, *B.D.C. (Nigeria) v. International Protection Appeals Tribunal* [2018] IEHC 460 at para. 11.

10. The tribunal member held that "*the utility of those medical reports is severely limited for present purposes of proving the truth of the appellant's story. At most, a medical report can only usefully show some degree of consistency or non-consistency with a*

story as told. It cannot directly prove or disprove the story itself, and so I am not relieved of the task of assessing the credibility of that story" (para. 5.6). That is an entirely logical approach. Consistent medical information does not in itself demonstrate the truth of an account, although it can be supportive of such an account. There is of course an obligation to consider medical information but that was done here. The applicants rely on caselaw to the effect that reasons should be given for rejecting medical information: *J.M. (Cameroon) v. Minister for Justice, Equality and Law Reform* (Unreported, Clarke J., 16th September, 2013), *R.A. (Uganda) v. Refugee Appeals Tribunal* [2014] IEHC 552 (Unreported, Eagar J., 25th November, 2014) and *R.M.K. (DRC) v. Refugee Appeals Tribunal* [2010] IEHC 367 (Unreported, Clark J., 28th September, 2010). Those decisions do not help here because reasons were given for holding the medical reports to be insufficient. As in C.M., the reports were medical information which was put in the balance with all other evidence. Insofar as reliance was placed on *I.M. (Niger) v. Minister for Justice and Equality* [2015] IEHC 826 (Unreported, Eagar J., 17th December, 2015) at para. 53, in that case the decision-maker had failed to state what the significance of the medical report was and why it was discounted. That is not so here. The medical report was held to be insufficient because the general credibility of the applicant was rejected having regard to all the circumstances including that medical information. The IPAT is of course in a much better position than a court on judicial review to assess the credibility of an applicant: see *C.M*. and *X.X. v. Minister for Justice and Equality* [2016] IEHC 377 [2016] 6 JIC 2409 (Unreported, High Court, 24th June, 2016) at para. 111.

11. In any event, the tribunal went on to give a separate independent reason for the decision even if it was wrong on the credibility assessment, so even if, counterfactually, the applicant had established a point under this heading, that point is not determinative and could not be a basis for quashing the decision unless the tribunal's other reason also fell.

Allegation that the tribunal misunderstood *O.O.* and *B.O. (Nigeria) v. Minister for Justice, Equality and Law Reform* regarding impunity or lack of redress

12. The fundamental point made by the tribunal under the heading of impunity was that the regime had changed since the events complained of by the husband. Thus, even if there was a failure to punish members of the *ancien régime*, which the tribunal considers has not been made out, that did not on the facts of this particular case constitute a basis for holding that there was a risk to the applicants. While the applicants rely on *P.S. (Sri Lanka) v. Secretary of State for the Home Department* [2008] EWCA Civ 1213 and *Lukombo v. Minister for Justice and Equality* [2012] IEHC 129 (Unreported, Cross J., 27th March, 2012) at para. 46, those cases were ones where the regime that had allegedly given rise to harm to the applicants and the regime that was affording impunity to the previous actors of harm were one and the same. Those were not regime-change cases and thus do not assist the applicants in the present case.

13. It may well be, having said all of that, that the wording of the decision on this particular point is less than entirely clear, although no legal entitlement in favour of the applicants turns on that. The premise of the applicants' argument is that the tribunal member was incorrectly relying on the decision in *O.O. and B.O(Nigeria) v Minister for Justice, Equality and Law Reform* [2011] IEHC 165, but in fact that does not appear to be the case because the reference to that case (incorrectly described as *B.O.*) is prefaced by the phrase "*C.f.*", which suggests that *O.O. and B.O.* decision is contrary authority: see by way of example, the manner in which Mr. de Blacam's text book *Judicial Review*, 3rd ed. (Dublin, 2017) perhaps unhelpfully sought to dispose of adverse authority to the point being contended for by the learned author, by the rather staccato phrase "*C.f.* I.E." at p. 338 n. 63 (*C.M. (Zimbabwe) v. International Protection Appeals Tribunal* [2018] IEHC 35 [2018] 1 JIC 2304 (Unreported, High Court, 23rd January, 2018, para. 9).

Allegations that adverse credibility findings were based on conjecture, speculation, fail to deal with the substantive bases of the claim, were unreasonable, unfair, relied on the applicant's misrepresentations to the exclusion of other factors and dismissed the applicants' explanations.

14. To some extent, the scattergun nature of grounds 3 and 4 of the husband's proceedings and the corresponding complaint made in the wife's proceedings indicate that the applicants are simply dissatisfied with the decision and are seeking to have it re-examined on a factual basis by the court. Judicial review is not an appeal (*Lennon v. Clifford* [1992] 1 I.R. 382 (O'Hanlon J.)): obviously there is a certain threshold to be reached in terms of demonstrating unreasonableness or breach of fair procedures.

15. Reliance is placed on the judgment of Finlay Geoghegan J. in *V.C. v. Minister for Justice, Equality and Law Reform* (Unreported, *ex tempore*, 4th July, 2003) where reference was made to para. 199 of the UNHCR handbook to the effect that an application should not be dismissed simply because of false statements and that those statements should be assessed in the light of all circumstances. A consistent approach is taken in Hailbronner and Thym, *EU Immigration and Asylum Law*, 2nd ed. (C.H. Beck/Hart/Nomos, 2016) at Part DIII by Judge Dörig at p. 1138. However, as regards the complaint of not dealing with the core story, there is no obligation to address a core account if the credibility of an applicant is lawfully rejected generally. Secondly, findings are not speculation. There is nothing impermissible in the approach taken by the tribunal to the husband's account of escaping from the police vehicle. Furthermore, rejection of credibility is not in itself an unfairness. It is true that where credibility is rejected, a decision-maker may be under a duty to consider future risk if and only insofar as that risk is not dependent on credibility: see *J.M.A. v. Refugee Appeals Tribunal* [2012] IEHC 480 (Unreported, O'Keeffe J., 20th November, 2012). However, here the future risk claimed, apart from that in relation to the military service, was dependent on the applicant's credibility and thus a rejection of credibility does determine that issue.

16. As regards the finding that the wife's dismissal of counselling was a factor militating against her credibility, in relation the account of rape, that does not immediately strike me as a hugely valid approach to that issue. Reliance was placed on the decision of Eagar J. in *F.O. (Nigeria) v. Minister for Justice and Equality* [2015] IEHC 816 (Unreported, High Court, 17th December, 2015) at para. 46. That was a case where an applicant failed to mention an alleged rape to the Refugee Applications Commissioner and then came up with that story for the first time before the Refugee Appeals Tribunal. Eagar J.'s view was that it was so unreasonable for the tribunal member to even take into account the previous failure to mention such an allegation that the decision had to be quashed by *certiorari*. With the utmost respect to the learned judge, I do not think that approach can stand up and it expands the doctrine of irrationality to a point whereby the judicial review court would be substituting its own view of the facts for that of the decision-maker. The question on judicial review is not whether one agrees with the decision or not but whether it is rationally open to the decision-maker (a principle mentioned in *F.O.*, but not one conspicuously consistent with the outcome). Taking into account a failure to mention a rape (or anything else) to the first instance decision-maker is generally well within what is open to a decision-maker. Taking into account a failure to pursue counselling is generally not, because seeking counselling is only one of a number of possible reactions to such a situation.

17. It is thus a matter for the tribunal to assess any explanations made as long as it does so rationally. To some extent, the decision in *F.O.* is unsatisfactory more generally anyway (possibly reflected in the fact that it is not cited in any subsequent cases noted on justis.com), because it imposes an impossibly high standard regarding assessment of a range of issues discussed at paras. 46 – 52 in particular. At para. 49 the learned judge saw no great problem with contradictions in the applicant's account on the basis that there was not "*such a difference that a finding of a lack of credibility could be regarded as cogent and/or reasonable*". That is with respect the court assigning weight to the evidence which the decision-maker who actually saw the witnesses had assigned differently. At para. 50 Eagar J. said that "*This Court has held on a number of occasions that travel findings are peripheral*". Again one would have

to respectfully say that it is not for a judicial review court to assign weight to particular issues, especially not in a blanket and categorical fashion. However the jurisprudential nadir of the decision is reached at para. 51 which states : "*The second named respondent said that she found the first named applicant to be vague and evasive in her manner of answering questions raised by the Tribunal. Her manner of answering such questions appeared to be a deliberate attempt by her to confuse the evidence. However no examples of this are given by the second named Respondent and in these circumstances this Court finds that the finding that the applicant was vague and evasive without giving any examples of this cannot be regarded as being based on either correct facts or on the basis of rationality.*" There is simply no obligation whatsoever for a decision-maker to ensure that "*examples are given*" in a decision, including when rejecting demeanour. No authority is cited in *F.O.* for any of these propositions. Contrary authorities are legion. Weight is generally a matter for the decision-maker (see para. 9 above for a few examples); and in *I.R. v. Minister for Justice, Equality and Law Reform* [2015] 4 I.R. 144, Cooke J. held that "*When subjected to judicial review, a decision on credibility must be read as a whole and the court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in disregard of the cumulative impression made upon the decision maker especially where the conclusion took particular account of the demeanour and reaction of an applicant when testifying in person*" (at 152, para. 10(8)). There is no super-special administrative law for asylum decision-makers separate from general public law, and general public law decision makers don't have to spice their decisions with examples, whether dealing with demeanour or not. Even High Court judges don't feel obligated to do so, and it would be hypocritical and inappropriate to condemn the tribunal for an approach to reasoned decision-making that equals or even surpasses one's own. The finale of the decision at para. 52 strikes down the asylum refusal because it did not "*consider the welfare of the child [or] the medical treatment which might be available to a child*". This simply confuses the issues that arise at the protection stage with those at the deportation stage.

18. In the present case, if the approach of the tribunal to the question of the wife's failure to seek counselling was the only basis of the decision, matters might arguably be different; but two points need to be made. The point of lesser importance is that this was in the context of dealing with somebody who admitted that they had misled the protection process. The wife had implied that she had had a previous husband, which was not the case. She denied that the husband that she did have had made a visa application. She only admitted to the true situation under questioning from the tribunal and after the husband had been detected as having lied about the matter, rather than by way of volunteering the information. She gave evidence about the husband's name-change which was inconsistent with the husband's account. So the unsatisfactory nature of the tribunal relying on the failure to seek counselling is somewhat diluted by the fact that there are a host of other legitimate findings against the wife on the credibility issue. Having said all that, I accept the validity of Mr. de Blacam's point that it is perfectly possible for a victim of an offence to simply take a stoical view and to not wish to deal with that issue by way of counselling.

19. More fundamentally, the tribunal member gave an independent reason for rejecting the wife's application, which was that even if he was wrong about the wife's credibility, she was not currently at risk in view of the regime change. Mr. de Blacam's reliance on the Court of Appeal decision in *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296 [2018] 2 I.L.R.M. 56 is misplaced because the present case is not a situation where one is taking a view of the decision in the round and seeing if one can stand up a decision based on multiple factors combined, even if some element of that combination is knocked out. This was the process on which *B.W.* pivots, as appears from the core finding at para. 70 of the judgment of Peart J. that "*[t]he greater the number of such reasons that are found to be flawed, the more likely it is that the foundations of the overall decision reached on a cumulative basis are undermined to the extent that it must be set aside.*" Combining different factors to form a composite conclusion, as in *B.W.*, is totally distinct from having two independent and water-tight bases for the outcome. In the latter context, one of those bases can be demolished completely without thereby laying a glove on the other, independent basis. The present case is a situation where there are two independent grounds for the decision, the validity of the second one being wholly divorced from that of the first. So thus even if the credibility assessment could not be sustained, the applicant would have to additionally show invalidity in relation to the reliance placed by the tribunal on the regime change, which has not been done.

Alleged failure to apply the benefit of the doubt

20. As para. 204 the UNHCR handbook makes clear, the benefit of the doubt only applies if the applicant's general credibility is accepted, which is not the case here (see *B.D.C. (Nigeria) v. International Protection Appeals Tribunal* [2018] IEHC 460 para. 9). Again, even if the approach to this question was in some way flawed, which it was not, the tribunal gave an independent reason for the applicants not being currently at risk.

Alleged failure to have regard to the risk to the applicants in the light of the international armed conflict in the Ukraine and/or the risk of harm arising from being drafted

21. The tribunal member's approach was that severe punishment for draft evasion could be serious harm in a particular case but there was no evidence to that effect in this case. In *V.B. (Ukraine) v. Secretary of State for the Home Department* [2017] UKUT 79 the Upper Tribunal took the view that there could be aggravating circumstances in particular cases giving rise to such a risk. However, the applicant, as found by the tribunal, simply did not establish such a case. *V.B.* itself was a case where the applicants were the subject of criminal convictions, had outstanding prison sentences and, in one case, was a previously serving soldier. The husband in this case has not received a military call-up, has not evaded the military, does not have Ukrainian convictions and does not have an outstanding prison sentence to serve, so the claim of harm under this heading is speculative and the tribunal member's finding that it had not been proved has not been shown to be unlawful. Overall V.B. militates very much against the applicants' submission here, insofar as it found that, absent such aggravating factors, "*[a]t the current time it is not reasonably likely that a draft-evader avoiding conscription or mobilisation in Ukraine would face criminal or administrative proceedings for that act*" (para. 87).

Order

22. For those reasons the applications are dismissed.