THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 754 J.R.]

BETWEEN

D.K. (SOUTH AFRICA)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 5th day of March, 2019

1. This applicant has clocked up two possible nationalities, two asylum applications in different jurisdictions in the Common Travel Area, at least two solicitors, six names or aliases, seven adverse immigration or protection decisions (refusal of asylum, deportation and exclusion orders and a transfer decision in the U.K. and refusal of asylum, subsidiary protection and an appeal here) and nine convictions and custodial sentences.

2. The applicant Mr. D.K., otherwise among other names D.N.K., claims to be a national of Zimbabwe, born in 1974. This alleged nationality was rejected by the tribunal. He claims that he suffered persecution due to family involvement with the MDC (Movement for Democratic Change). However, he "*could only provide very vague information*" about the MDC and thought that those initials stood for a "*member of democratic changes*" (para. 1.31 of tribunal decision). He claims that he left Zimbabwe for South Africa and then came to the U.K. on what he says was a false South African passport. The tribunal, however, held that the applicant's signature on the South African passport was strikingly similar to his signature on his asylum paperwork in Ireland.

3. Once in the U.K. he applied for asylum. That application was rejected. On 6th August, 2004, he was convicted in the U.K. for handling stolen goods, possession of a false instrument and failing to surrender after bail, for which he received a custodial sentence. On 17th January, 2007, he was convicted of drink driving, obstructing the police and driving while disqualified, which also resulted in a custodial sentence. The final three convictions were recorded on 8th August, 2007, again for drink driving, obstructing police and driving while disqualified, and again a custodial sentence was imposed. A deportation order was made against the applicant in the U.K. on 21st September, 2007.

4. In January, 2008 a Zimbabwean passport which he claims related to him was issued in Zimbabwe at a time when the applicant was in the U.K. The tribunal held that this was an "*unreliable*" document. The Zimbabwean passport shows stamps indicating that its holder travelled between Botswana and Zimbabwe in February and March, 2008, again at a time when the applicant was in the U.K. This amongst other things led the tribunal to cast doubt on the genuineness of the proposition that the Zimbabwean passport related to the applicant.

5. On 30th May, 2008, it is said by the U.K. Home Office that the applicant voluntarily departed from the U.K. in response to the deportation order, and travelled to South Africa (rather than Zimbabwe). That was the version of events accepted by the tribunal. The applicant, on the other hand, claims that he was in the Zimbabwean capital Harare in May, 2008, applying for a visa to return from Zimbabwe to the U.K. and that the 30th May, 2008 was the date on which the visa was refused. He claims that this appeared in the U.K. Home Office information simply due to confusion on their part. He says that the stamp in his passport as being Pretoria (that is, South Africa rather than Zimbabwe) can be explained because, he says, the visa application was sent by the British mission in Harare to the embassy in Pretoria for processing and then returned to Harare. It is not clear that he gave this explanation to the tribunal, although it is set out in a supplemental affidavit in the proceedings. If the applicant had picked up his passport for the first time in or about May, 2008, that would involve the minor difficulty as to how it could be explained that it was used in February and March, 2008. The explanation given to the tribunal, and recorded at para. 2.3 of the tribunal finding, was that *"he is not sure when he returned from the U.K., it was some time in 07 or 08, but that he had applied for this passport - he does not remember when - issued in January, 08 in person at the office in Zimbabwe so he was in Zimbabwe when those stamps were affixed".* It is unclear what point exactly the applicant was making here but it certainly does not amount to an explanation of the difficulty.

6. The Zimbabwean passport describes the applicant as a marketing manager but it has not been demonstrated that he was a marketing manager, and indeed the tribunal was of the view that he was not, and that he had no third-level education (para. 1.43). The applicant's explanation, which did not convince the tribunal, was that "*he did work as a marketing manager but did not think it important to mention it*" (para. 2.3).

7. On 30th September, 2009, an exclusion order was made against the applicant in the U.K. by virtue of the criminal convictions.

8. The applicant's South African passport was issued on 10th September, 2010. The applicant claimed it was in fact issued in 2014. It has a number of stamps for travel between those years. The applicant claimed that the stamps were backdated and he only used it when travelling to Ireland in 2015. On his account, he returned to Zimbabwe and suffered further torture and injury and again fled to South Africa sometime in 2012 or 2013. The applicant came to Ireland in April, 2015 and applied for asylum. Again the original interview under s. 8 of the Refugee Act 1996 records the basis of his claim as difficulties arising from his association with the MDC.

9. On 9th August, 2015, he left the State in breach of his legal obligations and sought to enter the U.K. but was detected at Birkenhead Port in Liverpool. On 25th November, 2015, the Refugee Applications Commissioner informed the applicant's legal advisers that the State had agreed to a request to take back the applicant. The standard form for a request for taking back, which is dated 6th October, 2015, and was apparently agreed to on that date, states five aliases for the applicant apart from the name used in these proceedings, making six names in total.

10. The asylum claim was then processed in the State following the applicant's return, and he was informed on 2nd September, 2016 that the commissioner had rejected his application. The commissioner accepted the applicant's evidence of being attacked but indicated that he could internally relocate. That was appealed on 23rd September, 2016 to the Refugee Appeals Tribunal. Following

the commencement of the International Protection Act 2015, the applicant applied for subsidiary protection on 9th February, 2017. In the course of the subsidiary protection interview on 10th January, 2018 the applicant was asked why he returned voluntarily from the U.K. to South Africa. In response to that he denied that he went to South Africa but he said that he instead went to Zimbabwe. On 25th January, 2018, the applicant was informed by the International Protection Office that the subsidiary protection claim had been refused. The credibility of the applicant's account was generally rejected, in particular his evidence of being an MDC supporter. His Zimbabwean nationality appears however to have been accepted at that point.

11. On 15th February, 2018, the applicant appealed to the International Protection Appeals Tribunal in relation to the subsidiary protection finding. On 22nd May, 2018 the tribunal wrote to the applicant's solicitors, noting "*the U.K. authorities were of the view that there was nothing to suggest his South African I.D. was not genuine, please be prepared to deal with the issue of nationality*". An oral hearing took place on 25th June, 2018, and by letter dated 9th August, 2018, the applicant was notified that the tribunal had refused the appeals in a decision dated 8th August, 2018.

12. The grounds of that refusal were somewhat wider than those in the decisions of the commissioner and the International Protection Office in the sense that the tribunal rejected the applicant's claim to be Zimbabwean and held that it was "*more likely*" that he was South African (para. 3.6). Following that adverse decision, the applicant dispensed with the services of his then solicitors, the Legal Aid Board, and instructed his present solicitors. Consequently, his current lawyers were not in much of a position to illuminate greatly what happened before the tribunal.

13. Notice of the adverse decision was deemed to have been received on or about 13th August, 2018 and the present proceedings were filed on 19th September, 2018. The primary relief sought is an order of *certiorari* quashing the decision of the tribunal that the applicant should be refused refugee status and subsidiary protection.

14. I granted leave and an extension of time on 8th October, 2018 and sensibly the respondents have not in oral submissions taken issue with the very minor time extension, particularly seeing as the decision was notified during the long vacation. As time has already been extended it does not seem to be necessary to make that order again now, but if it was, I would do so. A statement of opposition was filed on 12th December, 2018 and subsequent to that I allowed a supplementary affidavit from the applicant exhibiting the full purported Zimbabwean passport and other relevant documentation. I have received helpful submissions from Mr. Garry O'Halloran B.L. for the applicant and from Mr. Glen Gibbons B.L. for the respondents.

Ground 1- irrationality, conjecture and error
15. Ground 1 alleges that "*the decision should be quashed because the IPAT's determination that the Applicant is not the Zimbabwean national he claims to be is irrational and/or based on conjecture and/or based on error and/or made without carrying out an assessment or investigation commensurate with the nature of the determination*."

16. No particular argument was addressed to this ground. In any event, the decision is not irrational and is not based on conjecture or error. Rather it is a reasoned and valid assessment of the facts and circumstances by the tribunal member. The issue of the need for an investigation is best considered under Ground 2.

Ground 2 - failure by the tribunal to make further enquiries
17. Ground 2 alleges that "*the IPAT decision if (sic) further impugned due to the failure of the IPAT to make further inquiries with respect to the validity of the Zimbabwean passport in circumstances where this singular issue determined the entirety of the Applicant's claim for protection."*

18. Mr. O'Halloran alleges that the passport issue called for more investigation than was afforded by the tribunal. The legal basis made in submissions for this argument rested entirely on an alleged ECHR duty on protection decision-makers to investigate under the doctrine in *Singh v. Belgium* (Application no. 33210/11, European Court of Human Rights, 2nd October, 2012) (see *A.O. v. International Protection Appeals Tribunal* [2017] IECA 51 (Unreported, Court of Appeal, 27th February, 2017). But there is no such duty for the simple reason that there is no ECHR right to asylum (see *T.T. (Zimbabwe) v. International Protection Appeals Tribunal* [2017] IEHC 750 [2017] 10 JIC 3105 (Unreported, High Court, 31st October, 2017) and *M.S.R. v. International Protection Appeals Tribunal (No. 2)* [2018] IEHC 692 (Unreported, High Court, 4th February, 2019)). *Singh* was a deportation case, not just a protection case, and that makes all the difference for ECHR purposes because deportation engages art. 3 of the Convention whereas refusal of protection does not, a pivotal issue overlooked in *A.O.* At most, it may be desirable for ECHR purposes for the tribunal to anticipate any such enquiries in exceptional cases, to obviate the necessity for further investigation of such cases at the deportation stage, but only if that can be done without breaching the confidentiality of the identity of a protection-seeker, which is normally not possible.

19. Separately from the ECHR and *Singh*, which does not apply here, there may be a duty to investigate in certain limited circumstances as an aspect of the "shared duty" by virtue of the qualification directive 2004/83/EC, as discussed in *A.A.L. (Nigeria) v. International Protection Appeals Tribunal* [2018] IEHC 792 (Unreported, High Court, 21st December, 2018). As I indicated in that decision at para. 20(vi) and (vii), the primary responsibility to describe the facts and events which fall into an applicant's personal sphere is that of the applicant, and if the applicant fails to assemble the elements of his or her claim that are personal to him or her, the State has only a limited role in supplying the deficit as it is unlikely to be in a better position to do so than the applicant (see Case C-277/11 *M.M. v. Minister for Justice and Equality* (22nd November, 2012)), before we even get to the confidentiality problem.

20. No particular duty to investigate under the qualification directive is pleaded, and indeed the entire legal basis of the claim as set out in the pleadings (as opposed to submissions) is somewhat opaque. The operative part of the claim in relation to the duty to investigate as pleaded in Grounds 1 and 2 is that the circumstances were such that the decision on nationality was determinative of the claim. But just because an issue is determinative does not mean that the decision-maker is required to take any, still less extraordinary, measures to investigate or verify it. Here the tribunal did consider all relevant matters very carefully. Mr. O'Halloran suggests that the tribunal should have asked the Home Office what exactly was the source of their information and whether visa applications made in Harare are sent to and stamped in Pretoria. It is not at all established that this case was made to the tribunal; or that the applicant made any enquiries with the Home Office or otherwise himself in relation to these issues; or, fatally for present purposes, that he ask the tribunal to do so. It would not be a legitimate procedure to quash a decision for failure to make enquiries when an applicant did not ask the decision-maker to make such enquiries.

21. The applicant cannot succeed for that reason but independently of that difficulty there are a number of further problems for the applicant, primarily that the information from the Home Office was not the only basis for rejecting the applicant's alleged Zimbabwean nationality. That was "*but one indicator of a lack of reliability*" (para. 3.7) alongside a number of others. As it was put in Mr. Gibbons' submission, "*the applicant's U.K. immigration history sits more comfortably with South African nationality than Zimbabwean".* The tribunal saw and heard the applicant and is in a much better position than the court on judicial review, which is of course not an appeal, to assess the credibility of his account, including as to nationality. In this case the tribunal has done so in a lawful manner.

Order
22. The application is dismissed.