THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 302 J.R.]

BETWEEN

C.M. (ZIMBABWE)

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 23rd day of January, 2018

1. The applicant claims that he was wanted by the Zimbabwean police in August, 2011. His wife stated that on 21st August, 2011, she was the subject of a one-off assault by a police officer, involving being struck on the head and being sexually assaulted.

2. On the 28th August, 2011, the applicant left Zimbabwe for South Africa. He arrived in the State on 24th September, 2011, *via* Saudi Arabia. He applied for asylum and that claim was rejected. On 25th June, 2012, he applied for subsidiary protection and was interviewed on 27th January, 2015. The Refugee Applications Commissioner rejected the claim on 27th March, 2015. That decision was appealed to the Refugee Appeals Tribunal on 2nd June, 2016. On 8th March, 2017, the tribunal rejected the appeal in a 21 page decision by Ms. Emma Toal. A statement of grounds was filed on 5th April, 2017. No challenge whatsoever was made to any of the negative credibility findings. I have heard helpful submissions from Mr. Mark de Blacam S.C. (with Mr. David Leonard B.L.) for the applicant and from Mr. Dermot Manning B.L. for the respondent.

The negative credibility findings

3. The tribunal decision contains a number of negative findings regarding the credibility of the applicant, as follows.

> (i). At para. 5.3, the tribunal member refers to an inconsistency between the subsidiary protection interview and the applicant's evidence before the tribunal. Mr. de Blacam submits there is no inconsistency, but that if there is, it is not of a major nature. However, the tribunal member saw and heard the applicant and is best placed to assess contradictions of this nature. The weight to be attached to the evidence and the evaluation of it is primarily a matter for the decision-maker.
>
> (ii). In para. 5.4 the tribunal member records that the applicant's wife said that the police came to her brother's house looking for the applicant and then took her word that the applicant was not there and left rather than searching the house. This implausible story was not accepted by the tribunal member who said that she would not accept, given the behaviour of the police, that they would not have carried out a search. Mr. de Blacam submits that this is not a strong point either, but it seems to me that that question is a matter for the decision-maker. He also submits that it is implicit in the tribunal member's decision that this involved acceptance of the wife's other evidence. That is not so. Pointing out a contradiction between versions of events does not involve accepting either version.
>
> (iii). In para. 5.5, the tribunal member said that it was not plausible that the applicant would voluntarily go to a location that the police could link him to, such as the family home in his home village. Mr. de Blacam relies on the applicant's explanation that if he went anywhere else he would stand out and people might ask why he was there, and that he did not know the language elsewhere. It seems to me that the tribunal member who saw and heard the applicant is best placed to evaluate whether this explanation should be accepted.
>
> (iv). In para. 5.8 the tribunal member referred to the fact that the applicant said that he left his wife and children at home on the night he was advised to stay away from home, thus putting them in jeopardy. Given the applicant's stated position on the brutality of the police, the decision-maker was well entitled to consider this story to be implausible.

4. The operative principles here are those stated in *S.B.E. v. Refugee Appeals Tribunal* [2010] IEHC 133 (Unreported, Cooke J., 25th February, 2010) at para. 22 in relation to credibility that "*the issue is one which is exclusively for the decision maker to determine*" and that the court is concerned only with the process. A similar statement was made by Stewart J. in *E.Y. (Pakistan) v. Refugee Appeals Tribunal* [2016] IEHC 340 (Unreported, Stewart J., 17th June, 2016), para. 39

The complaint that the applicant should have succeeded given the SPIRASI report in relation to his wife

5. Much reliance was placed by Mr. de Blacam on the SPIRASI report (dated 15th November, 2016) which features in each of the grounds in the statement of grounds. It is not the law that if an applicant comes forward with a SPIRASI report or any medical report he or she is entitled to succeed (see *X.X. v. Minister for Justice and Equality* [2016] IEHC 377 (Unreported, High Court, 24th June, 2016) at para. 111). Evaluation of the SPIRASI report, as with any evidence, is primarily a matter for the decision-maker. I pause to observe that it does not seem to me that this is in any way a balanced report. The author of the report airbrushes reference to the rape of the applicant completely out of the discussion as to what is causing her PTSD, at p. 10. The upshot of the report is that SPIRASI consider that a once-off assault outside her clothes is more likely to cause long term trauma than forced prostitution over a prolonged period involving a rape. The reasons for that possibly surprising conclusion come down to two matters. Firstly, a comment about the alleged content of her nightmares, which is in turn entirely dependant on the subjective account of the applicant. Secondly, there is reference to her reaction when being examined, which certainly does not prove matters one way or the other. The doctor referred to the examination as having appeared to re-traumatise her and said that having her hair braided or having hair extensions brings back memories about the assault. That may well be so, but it would be totally irrational to suggest that that helps one identify what caused the assault.

6. On the core point as to the cause of the assault, the doctor essentially accepted the applicant's story at face value because one cannot objectively verify what an individual patient's nightmares are about. Just because you can find a highly sympathetic doctor to write down what you tell them does not make what you tell them something that a tribunal has to accept. Mr. de Blacam submits that on the evidence of the report it would be irrational to come to any other conclusion. However, it seems to me that the tribunal is

entitled to put the report in the balance with all other evidence. The tribunal position was that the IPAT member was not contending that the applicant was not the subject of an assault of the kind described, but that the report did not rule out the possibility of the cause of the injuries being otherwise. There were a number of negative credibility findings, unchallenged as I have noted, and in the circumstances it was considered that submission of the report was not sufficient to override the credibility findings. The IPAT member referred to the possibility of other explanations, including the wife's evidence that she was forced into prostitution in South Africa and raped. That seems to me to be a perfectly legitimate conclusion, and is well within the decision-making scope of the tribunal member. This is a very different situation from that referred to by Hogan J. in *R.A. v. Refugee Appeals Tribunal* [2017] IECA 297 (Unreported, Hogan J., 15th November, 2017) at para. 60 that where oral testimony is so unsatisfactory it was considered that "*there was no need in the circumstances to consider the documentary evidence*" or at para. 64 that the decision maker "*erred in failing to have regard*" to such material. That is not so here. The documentary evidence was considered and the IPAT Member noted (a) the possibility of alternative causes and (b) in particular her experiences in South Africa. Mr. de Blacam claims the PTSD evidence was not considered but it is clearly considered to some extent at para. 5.12.

7. The applicant relies on the *obiter dictum* of Faherty J. in *M.M. v. Refugee Appeals Tribunal* [2015] IEHC 158 (Unreported, High Court., 10th March, 2015) para. 21 (relying on Clark J. in *R.M.K. v. Refugee Appeals Tribunal* [2010] IEHC 367, (Unreported, High Court., 28th September, 2010) to the effect that "*Where an applicant provides a story which might be true and the medical evidence tends to confirm his or her story then it is axiomatic that an overall assessment of the evidence should weigh in the applicant's favour*". It is not altogether clear what the reference to weighing in the applicant's favour means in this passage. If it means to be considered as a factor in favour of the applicant it is certainly axiomatic that evidence tending to support a claim potentially weighs in favour of the claimant, all other things being equal; but such evidence is not necessarily decisive and particularly not if all other things are not equal, for example if the applicant's credibility is under challenge.

8. Faherty J. goes on to say that: "*The requirement to more fully address reasons for rejecting medical reports which attach a higher probative value to clinical findings may be less where the balance of the evidence is overwhelmingly in favour of a finding of a lack of credibility*." Here the report was not rejected. Rather, it is held to be insufficiently probative. The decision-maker does use the phrase that "*no weight should be attached to it".* That is certainly not the greatest phrase, but it is clear that what she means is that the medical report is insufficient to outweigh negative credibility findings. That is not the same thing as entirely rejecting the report or refusing to consider it. While the latter proposition enunciated by Faherty J. is fine insofar as it goes, I do not think that the qualification that negative credibility matters must be "*overwhelmingly*" made out can be stood up. It is not the position that one has balance of probabilities for a civil case, a requirement to prove beyond reasonable doubt for criminal cases and some super-special threshold for protection applicants, that they must benefit from the most favourable construction of materials unless there is overwhelming evidence destroying their credibility. Such an interpretation would not make sense jurisprudentially, or at any level. The decision-maker is entitled to decide that the equivocal medical evidence is outweighed by conclusions on credibility, even if those conclusions are an accumulation of matters rather than what might be termed an overwhelming demolition of the applicant's credibility. Having said that, in this case the tribunal member held that one of the credibility points was a core point (para. 5.4) and that particular finding is not challenged in the proceedings.

9. At para. 31 of *M.M.*, Faherty J. refers to a requirement to "*engage with*" findings in the applicant's medical report. While there may be, as Mr. Manning suggests, a semantic dimension to this, I respectfully do not see any jurisprudential basis for a duty to "*engage with*" an applicant's documentation above and beyond considering it and giving reasons for one's views thereon. A decision-maker is of course required to consider the relevant material. That is very much to be distinguished from narrative discussion. There is no general obligation for a decision- maker to involve himself or herself in narrative discussion. The decision-maker is of course obliged to give reasons, which involves an identification of the essential basis of the decision arrived at. However, beyond that, there is no theoretical jurisprudential basis for some form of engagement with the material, still less that each and every one of the points made by an applicant has to be specifically responded to with sub-reasons for the overall reason, or that a preview of the decision has to be afforded. The furthest that any language in the jurisprudence has gone in this regard is the judgment of MacEochaidh J. in *R.O. (an infant) v. Minister for Justice and Equality* [2012] IEHC 573 [2015] 4 I.R. 200 referring to reasons having to be cogent and substantial, but I discussed this in *I.E. v. Minister for Justice and Equality* [2016] IEHC 85 [2016] 2 JIC 1505 (Unreported, High Court, 15th February, 2016) and suggested that a re-wording of that test was more appropriate to bring it in line with conventional jurisprudence. Unhelpfully perhaps, in de Blacam's *Judicial Review*, 3rd ed. (Dublin, 2017) the discussion of this point recites *R.O.* extensively at p. 338 and relegates the reference to the subsequent analysis and re-wording of that test in *I.E.* to a footnote without explanation (n. 63, "C.f., *I.E.*").

The complaint that the applicant was not put on notice that the SPIRASI report was not going to be viewed as sufficient to prove the case

10. A subsidiary point was made regarding fair procedures that it was not put to the applicant that the SPIRASI report did not rule out the possibility of injuries being attributable to other causes. No fair procedures obligation exists to put to an applicant a proposition that his or her evidence is insufficient to prove their case.

Order

11. Essentially, a somewhat artificial and legalistic exercise has been engaged in here. Ms. Toal saw and heard the applicant, and having done so and considered all the material, rejected the applicant's credibility. She considered the SPIRASI report, albeit not in the manner most favourable to the applicant, but that was within the scope of her role. The evaluation of evidence in such a situation is "*quintessentially a matter for the Tribunal Member*" *per* Birmingham J. in *M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192 (Unreported, High Court., 27th June, 2008) at para. 27. It certainly has not been shown that the decision here was unlawful. The order therefore will be that the application be dismissed.