THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 431 J.R.]

BETWEEN

T.T. (ZIMBABWE)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 31st day of October, 2017

1. The applicant is Zimbabwean and claims to be a supporter of the Movement for Democratic Change (MDC). She claims that she and family members have been persecuted by Zanu-PF. She travelled to Malawi in June, 2007 and came to Ireland in July, 2007. She applied for asylum on 9th December, 2013, some six and a half years later. In July, 2014 her claim was rejected by the Refugee Applications Commissioner. She appealed to the Refugee Appeals Tribunal, which held a hearing on 1st December, 2015 and rejected her claim by decision dated 3rd May, 2016. She obtained leave to challenge that decision from MacEochaidh J. on 21st November, 2016. The application is out of time but that aspect is not being challenged by the respondent. I have heard helpful submissions from Mr. Michael Conlon S.C. (with Mr. Garry O'Halloran B.L.) for the applicant and Mr. Tim O'Connor B.L. for the respondents.

2. Mr. Conlon submits that there is one point in the case, namely the failure by the tribunal to investigate the authenticity of documents presented on behalf of the applicant.

3. In this case the documentation in question was introduced with a view to supporting the claim that the applicant was a member of the MDC. There were two aspects to the rejection of credibility: firstly, aspects independent of the documentation and secondly, aspects related to the documentation.

The applicant's lack of credibility

4. In relation to the independent aspects it seems to me that the tribunal was entitled to reject the credibility of the applicant on the various grounds advanced, namely:

(a) her lack of knowledge of the party she claimed to be a member of;

(b) her lack of awareness of the party symbol;

(c) her inability to identify the party leaders;

(d) the fact that she produced a document complaining about a threat to her sister but did not mention any such sister in her questionnaire;

(e) the six and a half year delay in seeking asylum which the tribunal held was damaging to her credibility; and

(f) the inconsistencies and changes in the applicant's evidence to which the tribunal also drew attention.

5. I turn then to the issues relating to the documents themselves. The tribunal legitimately took the view that the documents produced were inconsistent, both as to time and as to place, with the applicant's own account of events in Zimbabwe. To that extent, it seems to me that even if the documents were accepted as genuine they undermined the applicant's credibility in and of themselves. There was an attempt to retrospectively create a fair procedures point with the suggestion that the conflicts between the documents and the applicant's evidence were not put. However, firstly, this complaint was not pleaded. If it had been pleaded it could have been replied to by the tribunal. Secondly, the complaint has no evidential basis. The only material indicating what happened at the hearing is a largely illegible hand-written note exhibited at exhibit G to the applicant's grounding affidavit. The applicant does not say who made the note but presumably it was the Refugee Legal Service. Mr. Conlon suggested he could get the note typed up but even if it was typed up, it does not purport to be verbatim and it does not get around the point that the fair procedures complaint was not pleaded and is simply not part of the case.

The applicant's shared duty to establish the facts

6. Given that it is established EU law (see *N.M. (D.R.C.) v. Minister for Justice, Equality and Law Reform* [2016] IECA 217) that there is a shared duty as between the applicant and the protection decision-maker, it seems to me there is a serious question as to why it should be acceptable for an applicant to adopt a stance of complete passivity in relation to investigating the validity of queried documents. This was an issue that was touched on by Kozinski C.J. in *Angov v. Holder* (Case No. 0774963, 9th Circuit, December 4, 2013) in which he commented as follows: "*The [immigration judge] found that Nikolay Angov presented forged documents. This is a serious matter that, if true, should not merely result in the immediate termination of Angov's asylum petition, but also in criminal prosecution for immigration fraud. But the [immigration decision makers weren't] fazed by discovery of the fraud; they went on to decide whether Angov's asylum claim could be sustained despite the forgeries. No other adjudicator in the United States would react with such equanimity to finding that a party had tried to bamboozle it. This points to an unfortunate reality that makes immigration cases so different from all other American adjudications: Fraud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated. The reason for this deplorable state of affairs is not difficult to figure out. The schizophrenic way we administer our immigration laws creates an environment where lying and forgery are difficult to disprove, richly rewarded if successful and rarely punished if unsuccessful. This toxic combination creates a moral hazard to which many asylum applicants fall prey.*"

7. On the specific issue of corroborating documents, he referred to a document which had certain phone numbers on it apparently relating to a police station as well as official seals, and said "*Angov or one of his friends could have called the numbers and asked whether he'd reached the police station—and then submitted an affidavit to that effect. The same is true about the seals: Angov or*

his friends might have tried to obtain an official copy of the police seal from the Bulgarian government and introduced it into evidence. He did none of these things, perhaps because he knew that the subpoenas were forged".

When does the tribunal have to investigate the authenticity of documents?

8. *Singh v. Belgium* (Application No. 33210/11, European Court of Human Rights, 2nd October, 2012) was a case where applicants arrived in Belgium from India without appropriate entry documents (paras. 6, 8) and were refused leave to land (para. 8). Simultaneously they lodged an application for asylum (para. 9). The application for asylum and subsidiary protection was rejected (para. 13). An appeal was lodged including new documents, and included the emails between their lawyer and the UNHCR (para. 14). The appeal was dismissed on the grounds *inter alia* that the UNHCR documents were easily falsifiable and had not been proven. The judgment states in para. 15 as follows: "*Le 24 mai 2011, le Conseil du contentieux des étrangers (« CCE ») rejeta les recours introduits par les requérants et confirma largement la motivation du CGRA. Selon le CCE, le CGRA avait suffisamment motivé le refus d'accorder le statut de réfugié. En substance, le CCE estima que les requérants étaient en défaut de prouver leur nationalité afghane ainsi que la réalité de la protection accordée par le HCR. Il considéra que les documents du HCR étaient aisément falsifiables et qu'à défaut pour les requérants de fournir les originaux, ils n'avaient aucune valeur probante. Enfin, le CCE jugea que le seul élément incontestable du récit des requérants était leur séjour en Inde et que, dès lors, la crainte de persécution des requérants devait être examinée vis-à-vis de l'Inde et non de l'Afghanistan. Or, il considéra pour établi que la décision de fuir l'Inde n'était basée que sur des motifs d'ordre socio-économique*." The removal decision thereupon became enforceable (para. 16).

9. The court's analysis depended upon an application of art. 13 of the ECHR in conjunction with art. 3. There is, of course, no right to asylum under the ECHR so it was the expulsion decision that triggered the relevance of art. 3, not the refusal of asylum or subsidiary protection as such.

10. The court noted that there had been no real examination of the risk of treatment prohibited by art. 3: in para. 83 it stated: "*Ensuite, s'agissant de la possibilité que les requérants puissent être admis, volontairement ou autrement, par l'Inde, la Cour relève que le Gouvernement belge ne fournit aucun argument convaincant qu'il s'agirait là d'une alternative réaliste. Rien ne démontre d'ailleurs que les autorités belges examineront les risques de traitements contraires à l'article 3 encourus par les requérants dans un pays tiers (voir* mutatis mutandis, Auad c. Bulgarie*, no. 46390/10, § 106, 11 octobre 2011 et références citées)*." The statement that the identity documentation had not been investigated was in the context that no examination of art. 3 risks had been undertaken. As stated in para. 100: "*La Cour note que ni le CGRA ni le CCE ne se sont interrogés, même à titre accessoire, sur la question de savoir si les requérants courraient des risques au sens de l'article 3 de la Convention. Elle remarque que cet examen a été occulté au niveau du CGRA par l'examen de la crédibilité des requérants et les doutes quant à la sincérité de leurs déclarations (paragraphe 13). Si le fait de ne pas accorder plein crédit aux déclarations des requérants et d'instiguer un doute quant à la nationalité et au parcours des requérants relevait à l'évidence de l'appréciation de l'instance d'asile, la Cour observe que le CGRA n'a posé aucun acte d'instruction complémentaire, telle que l'authentification des documents d'identité présentés par les requérants, qui lui aurait permis de vérifier ou d'écarter de manière plus certaine l'existence de risques en Afghanistan."*

11. The UNCHR documentation was probative because it included certificates that the applicants had been registered as refugees by the UNHCR itself: "*Il n'apparaît pas à la Cour que le CCE ait remédié à cette lacune. En vue d'obtenir la réformation de la décision du CGRA, les requérants ont présenté au CCE des documents de nature à lever les doutes émis par le CGRA quant à leur nationalité et leur parcours. La Cour note que ces documents n'étaient pas insignifiants puisqu'il s'agissait de courriels, envoyés par l'intermédiaire du CBAR, partenaire du HCR en Belgique, et postérieurement à la décision du CGRA, par un fonctionnaire du HCR à New Delhi. A ces courriels étaient jointes des attestations du HCR que les requérants avaient été enregistrés comme réfugiés sous mandat du HCR et qui confirmaient les dates déclarées par les requérants pour étayer leur parcours lors de leurs interrogatoires par les services de l'OE. Le CCE n'a accordé aucun poids à ces documents au motif qu'ils étaient faciles à falsifier et que les requérants restaient en défaut de fournir les originaux*" (para. 101).

12. At the kernel of the case is the dismissal of the documents as inconclusive without verifying their authenticity where it would have been easy to do so: "*Or, la démarche opérée en l'espèce qui a consisté tant pour le CGRA que le CCE à écarter des documents, qui étaient au cœur de la demande de protection, en les jugeant non probants, sans vérifier préalablement leur authenticité, alors qu'il eut été aisé de le faire auprès du HCR, ne peut être considérée comme l'examen attentif et rigoureux attendu des autorités nationales au sens de l'article 13 de la Convention et ne procède pas d'une protection effective contre tout traitement contraire à l'article 3 de la Convention*" (para. 104). It seems to me that that phrase "*alors qu'il eut été aisé de le faire auprès du HCR*" is the pivot upon which the result turns. *Singh* was not a case relating to obscure country material generated by national or private bodies. It was a case where verification of records created by an international agency would have been very easy and yet not only did Belgium not do so but it also failed to examine the art. 3 complaint in any real way at all.

13. In that light, Hogan J. in *A.O. v. Refugee Appeals Tribunal* [2017] IECA 51 identifies the crucial issues when in para. 39 of his judgment he notes that "*The Court observed that since the documents were at the heart of the request for protection, the rejection of them without* "checking their authenticity" *fell short of the careful and rigorous review expected of national authorities by the effective remedy requirements of Article 13 ECHR in order to protect the individuals concerned from torture, harm or inhuman or degrading treatment under Article 3 ECHR in circumstances when a simple process of enquiry of the UNHCR would have resolved conclusively whether they were authentic and reliable*". It is the combination of the impact of art. 3, the fact that the documents went to the heart of the claim (they acknowledged that the applicants had already been recognised as refugees) and the simplicity of the process of verification that triggered the violation of the ECHR. That is a fundamentally different context from the misconceived notion that the tribunal has to go mucking about in the world of internal national documents by way of an obligation to verify material created within the recesses of any particular country of origin, such as the political documentation at issue here.

14. However, some of these qualifications are shorn off at the end of the judgment in A.O., in a paragraph commencing with the words "*Summing up*", that continues by saying "*a decision-maker is not* obliged *as a general rule to* conduct his or her own investigations *in order to vouchsafe the authenticity of a document relied on by an applicant for international protection, although there may be special circumstances where this is indeed required. While it is clear from the decision of the European Court of Human Rights in* Singh v. Belgium *that Contracting States may be under such an obligation in particular cases where the authenticity of the documentation is critical and the implications for the claimants otherwise potentially grave, there is, however, no general rule to this effect"* (para. 45). It is clear to me, reading the judgment in context, that para. 45 is simply a thumbnail summary and the operative part of the judgment on this issue is para. 39. Paragraph 45 does not purport to be any new rule and states expressly that it is an attempt to "*su[m] up*" and to outline what is stated in *Singh*. It can be difficult to summarise a longer and more complex set of thoughts in any context lest any difference of emphasis creep in between discussion and summary, but if that happens the operative piece is the longer discussion. It is certainly not the case that if the authenticity of documents is critical and the implications for applicants grave, there is without more an obligation to verify documents whatever they might be. *Singh* certainly does not decide this and insofar as para. 45 states that it is summarising *Singh*, it hardly could be interpreted as an attempt to launch some new rule in that regard without any stated, or indeed apparent, basis for doing so. I read it as doing what it says on the tin,

namely simply as intended, to be an outline summary, but there is more fine detail earlier in the judgment which is the operative part.

15. There is a broader point here in the sense that *Singh* was an art. 3 case (where art. 3 was considered in conjunction with art. 13). It has no automatic relevance to an asylum claim as such. The context in *Singh* was a Belgium procedure which appeared to be a one-stop shop where asylum and deportation were dealt with by way of integrated decisions. Strictly speaking, art. 3 only arises in the Irish context at deportation stage.

16. Insofar as Hogan J. referred to the implications being otherwise potentially grave, that must be referenced back to the removal procedure (as in Belgium) which is what triggered the application of art. 3. At the risk of repetition, there being no right of asylum under the ECHR, the refusal of protection without accompanying expulsion does not trigger art. 3. Mr. Conlon interpreted the phrase regarding implications being potentially grave as meaning every protection case. That renders the qualification meaningless as it applies in every case. Why say it, if it applies universally? To my mind the reference to grave implications is a reference to the kind of situation that arose in *Singh*, namely where the decision involved expulsion which triggered the consideration of art. 3. In Ireland rejection of a protection claim does not automatically lead to deportation and no breach of art. 3 could arise until the deportation stage. If hypothetically, in an individual exceptional case, there was an obligation to consider a document under the *Singh* doctrine that obligation does not arise until the expulsion stage. However, it is nonetheless desirable for the tribunal to apply the *Singh* approach in the "*special circumstances*" (*per* Hogan J. at para. 45) where it might apply, to obviate a situation where the issue of documents has to be revisited from scratch at deportation stage.

17. However, this is not such a case because the documents do not assist the applicant's case by reason of the fact that they contradict her own oral evidence.

18. This case to some extent illustrates the groundhog day that is unfortunately created when one has a general principle that is subject to exceptions in individual cases. While the Court of Appeal decision in *A.O.* clearly sought to indicate that at a general level this point was not well founded (see para. 45 *per* Hogan J.) one might be forgiven for wondering whether every case is now going to be presented to the court as exceptional. In my view this case is not exceptional for numerous reasons:

(i). The documents are not critical in the *Singh* sense. The *Singh* documents were ones that stated that the applicants were recognised as refugees and thus were virtually conclusive. Here the documents merely went to one aspect of the story. Thus the *Singh* doctrine does not apply.

(ii). They are not documents which are extremely easy to verify as in *Singh* – they are documents created by entities in the country of origin and thus in a quite distinct category that defies immediate verification. *Singh* only applies where verification is easily and readily open to the decision-maker, such as where the document is created by an international agency like the UNHCR (see para. 104), not where the document is created by an internal entity within the country of origin. There is no duty to investigate in those circumstances. The *Singh* doctrine does not apply for this reason also.

(iii). The applicant's stance in assisting verification here is one of complete lethargy.

(iv). The applicant's credibility was under challenge more generally.

(v). The tribunal's decision that the applicant lacked credibility was, in my view, clearly lawful even independently of the documents.

(vi). Even if these documents are genuine, they contradict the applicant's evidence and undermine her credibility.

(vii). As noted, art. 3 is not infringed by a protection refusal without a subsequent deportation decision.

19. There were a number of further peripheral points pleaded which do not appear to me to be of any substance but Mr. Conlon has limited his case at the hearing to the one point I deal with above.

Order

20. Consequently the order will be that the application will be dismissed.