THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 70 J.R.]

BETWEEN

R. T.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

AND

THE ATTORNEY GENERAL IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice O'Regan delivered on the 5th day of April, 2017

Issues
1. The applicant herein secured leave on 15th February 2016 to apply by way of *certiorari* for an order quashing the decision of the first named respondent, on appeal, refusing a grant of refugee status to the applicant, which decision was notified to the applicant on 15th January 2016 together with an order remitting the relevant appeal for a fresh determination by a separate member of the Refugee Appeal Tribunal. The leave application extended time within which to bring the application.

2. The grounds upon which relief is sought are that:

(a) the central credibility finding at paragraphs 5.3 and 5.6 are irrational,

(b) the credibility finding at 5.7 to 5.12 are based on conjecture,

(c) the finding at paragraph 5.8 is factually incorrect,

(d) the findings in respect of travel were peripheral matters and further the Tribunal failed to consider the plausibility of the applicant's claim in the light of country of origin reports and failed to consider the comprehensive grounds of appeal.

Background
3. The applicant herein is a Nigerian national born in 1970. She arrived in Ireland on 21st November 2013 and applied for asylum on that date. The basis of her application was to the effect that on 15th October 2013 she was kidnapped and held captive for in or about three weeks when she managed to escape. She was assisted by an unknown gentleman for a number of weeks and thereafter was further assisted in leaving Nigeria and coming to Ireland.

4. Her initial application before ORAC was rejected on 10th March 2014 on the basis that there was no convention nexus, internal relocation was available and adverse credibility findings in respect of a United Kingdom visa and travel documents. At that stage her claim of persecution was based upon a political opinion.

5. An appeal was lodged on 14th March 2014 and at which time the applicant sought to enlarge her claim of persecution based upon being a member of a particular social group.

6. The first named respondent made a decision in or about 17th December 2015 which was notified to the applicant on 15th January 2016 being a refusal of refugee status on the basis of a lack of credibility in relation to the alleged kidnapping, captivity, escape and travel.

The impugned decision
7. The decision is eleven pages. At paragraph 3.3 it is noted that the applicant claimed that on 15th October 2013 she was kidnapped by some men when she was selling them cold water. They put a 10 lira note in her hand and she did not know what happened to her then. Thereafter she found herself in a building with other women and young girls and was there for almost three weeks.

8. This aspect of the matter is again taken up at paragraph 5.3 when it was held that her account of the kidnapping was not credible. The Tribunal decision states that by implication she had claimed that she was rendered unconscious by touching the currency note.

9. In paragraph 5.6 the Tribunal indicated that it did not accept her account as to how she was allegedly rendered unconscious and the Tribunal found that the remainder of the applicant's account of her captivity for three weeks is not credible.

10. The decision then goes on to deal with the account of the escape from captivity, the assistance of a third party gentleman, the failure to report matters to the police, the inconsistencies in her evidence as to whether or not she held a passport and whether or not she previously secured a visa, the identity of the water seller in Lagos who she could not name but yet secured the assistance of a unnamed church goer in Dublin to approach that water seller and to secure the applicant's documents and the difficulty in accepting the applicant's evidence vis-à-vis travel from Lagos to Ireland.

Submissions
11. In my view the Counsel on behalf of each of the parties approached the matter in a pragmatic and helpful manner. Counsel on behalf of the applicant accepted that there were credibility issues in respect of the applicant's account, such as, for example, the

passport which the applicant initially denied ever having and which subsequently was found to be inaccurate as based upon a particular passport the applicant had previously secured a U.K. visa.

12. Counsel on behalf of the applicant concentrated in the main on the content of paragraph 5.3 and paragraph 5.6 and argued that the findings in these paragraphs were so materially significant to the core of the applicant's evidence of past persecution that if the Court finds that the content of paragraph 5.3 and 5.6 is inaccurate or is otherwise vitiated by being an irrational or unreasonable finding then it is not possible to serve same from the balance of the decision so that the decision as a whole would be quashed.

13. The respondent argues that in the first instance in accordance with the judgment of Henchy J. in the *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 the decision at paragraph 5.3 and 5.6 should be upheld.

14. In the Keegan judgment aforesaid it was held that the Court could only quash a decision on the grounds of unreasonableness and/or irrationality if:-

> 1. it is fundamentally at variance with reason and common sense;
>
> 2. is indefensible for being in the teeth of plain reason and common sense;
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> 3. because the court is satisfied that the decision maker has breached his obligation whereby he "must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision".

15. The respondent argues, in the alternative, that even if the Court cannot support the decision made in paragraph 5.3 and paragraph 5.6 of the impugned decision then nevertheless the balance of the decision can survive so that there is no necessity to quash same. In this regard the respondent relies on the judgment of Fennelly J. in *Talbot v. An Bord Pleanála & Ors*. [2008] IESC 46 to the effect that the issue involved in paragraph 5.3 and 5.6 of the impugned decision can be contained in a water tight compartment.

16. In the events the applicant also relies on paragraph 29 of Fennelly J.'s judgment aforesaid to the effect that because the kidnapping and captivity are so central to the applicant's core claim it would not be appropriate for the Court on a judicial review application (as opposed to a straight forward appeal) to intervene and assume that the decision of the decision maker would stand even if paragraphs 5.3 and 5.6 of the decision were condemned.

17. Given the reliance by both parties on this singular paragraph it is convenient to set same out:-

> "29. However, a person entitled to the positive presumption may be in a better position to persuade the planning authority to decide in his favour, depending, of course, on the strength of the countervailing planning considerations. In other words, I do not think that those considerations are necessarily in a watertight compartment, uninfluenced by the status, vis-à-vis the issue of positive presumption, of the applicant for permission. I merely say that it would be open to a planning authority or the Board to modify their position. I would not wish to say any more and I certainly do not state that they would or should modify their position. There is no doubt that the planning history constitutes very strong evidence that the appellants face an uphill battle in seeking to obtain planning permission. However, I am satisfied that a judge is not entitled to presume in advance what the outcome of an application will be. That is exclusively a matter for the statutory bodies charged with those functions."

18. The respondent also points to the judgment of Mac Eochaidh J. in *E.S. v. Refugee Appeals Tribunal & Ors.* [2014] IEHC 534 where the Court held that severability of lawful reasons from unlawful reasons in an administrative decision is established practice.

19. The applicant accepts this contention save that it is argued that severing the lawful finding from a decision would depend upon how material that particular finding is to the claim of the particular applicant.

20. In addition the respondent counters that in accordance with the decision of Finlay C.J. in *O'Keffe v. An Bord Pleanála* [1993] 1 I.R. 39, at page 71, the Court cannot interfere with the decision of an administrative decision making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.

21. The applicant refers to the assessment made by Cooke J. in *I.R. v. the Minister for Justice, Equality and Law Reform & Ors.* [2009] IEHC 353 where following an assessment of the jurisprudence to that date he enumerated the principles which might be said to emerge from the case law as a guide as to the manner in which evidence going credibility ought to be treated. The applicant suggests that items 4 and 5, of the list of ten, within the judgment of Cooke J. have not been adhered to. They provide:-

> "4) The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed. It must not be based on a perceived, correct instinct or gut feeling as to whether the truth is or is not being told.
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> 5) A finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation and the reasons drawn from such facts must be cogent and bear a legitimate connection to the adverse finding."

Decision

22. Of the three different statements tendered by the applicant in relation to the kidnapping incident on two occasions she mentioned that following the taking of the 10 lira note she does not know what happened. In her affidavit in the within application of the 4th February 2016 she states at paragraph 2 that when she was selling water she was pushed into the back of a van. This mirrors the statement given by her in her s. 8 interview.

23. From these statements the decision maker stated at paragraph 5.3 "by implication she was rendered unconscious by touching this currency note."

24. Although certainly one of a possible number of reasons as to why she does not remember anything after receiving the 10 lira note might be that she had been rendered unconscious by touching the note nevertheless it does not appear to me by any stretch of the imagination that the history given by her resulted in an implication that she was rendered unconscious by touching the currency note. For example it is equally possible that she received a blow to the head or that the incident was so traumatic that she cannot recall

same. In these circumstances the implication imputed by the decision maker is in my view at variance with reason and common sense, or, in the alternative the content of paragraphs 5.3 and 5.4 (the latter paragraph suggesting that the applicant had given an account of being rendered unconscious) amount to a finding of lack of credibility tainted by conjecture or speculation (see paragraph 5 of the principles identified in *I.R.* aforesaid).

25. It is argued on behalf of the respondent that even if the finding of the implication at paragraph 5.3 cannot survive nevertheless same can be considered to be in a watertight compartment so that this error does not contaminate the balance of the decision.

26. Given that it is clear from the content of paragraph 5.6 that in fact the implication at paragraph 5.3 did contaminate the applicant's account of her captivity it is not possible to state that the implication at paragraph 5.3 did not cause further contamination. Furthermore it appears to me given that, relying on the implication mentioned at paragraph 5.3, the applicant's account of her captivity was found to be incredible this indicates that the adverse credibility finding based upon the imputed explanation at paragraph 5.3 was a substantial issue in the mind of the decision maker.

27. I am satisfied therefore that the decision is unsafe and it is not for this Court to presume in advance the outcome of the decision had the implication aforesaid not been arrived at.

28. Therefore I am satisfied that the decision should be quashed.