THE HIGH COURT
JUDICIAL REVIEW

[2017 No. 217 J.R.]

BETWEEN

K.M. (PAKISTAN)

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 10th day of July, 2018

1. The applicant claims that he worked as a journalist in Pakistan. He says that in 2011, he wrote an article suggesting that a local *madrassa* was associated with al-Qaeda and a related group. He says he was shot at on 1st and 2nd December, 2011 and on the latter occasion fell from his motorbike and became unconscious. He was treated in hospital and fled to a different town. He moved again and was shot at once more in February, 2012.

2. He then left Pakistan and applied for asylum in the State on 27th March, 2012. This application was rejected. He appealed that decision and was again unsuccessful in a decision of June, 2013.

3. On 4th September, 2013 he applied for subsidiary protection. He was interviewed on 10th June, 2015 by the Refugee Applications Commissioner. A medical report was submitted, dated 10th June, 2015, as well as a SPIRASI report dated 21st July, 2015. The application was refused on 4th December, 2015.

4. He then appealed to the Refugee Appeals Tribunal on 16th December, 2015. An appeal hearing took place on 15th August, 2016. Ms. Lisa McKeogh B.L. appeared for the applicant.

5. Newspapers which confirm that the applicant worked as a journalist were submitted. On 19th August, 2016, the tribunal sent a somewhat sceptical letter to the applicant questioning why the same photograph was used in newspapers some years apart. I pause to comment that it is hard to see why there is anything inherently suspicious about that, so the tribunal's interest in that particular point is somewhat surprising. The tribunal also sought a copy of the envelope in which the newspapers were sent and requiring a further affidavit and copies of further newspapers. On 16th January, 2017 the tribunal sent to the applicant's solicitors translations of newspaper reports that it had obtained.

6. On 24th January, 2017 the tribunal rejected the appeal. The applicant was so notified by letter dated 6th February, 2017. Leave for the present proceedings was granted by MacEochaidh J. on 13th March, 2017. He also made an order extending time for the application and the respondents are sensibly not seeking to set that aside at the substantive stage.

7. The statement of opposition was filed on 15th November, 2017. The proceedings got a hearing date in March, 2018 but were adjourned because the applicant sought an amendment, which I granted, applying the Court of Appeal decision in *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296 [2018] 2 I.L.R.M. 56.

8. I have received helpful submissions from Mr. Garry O'Halloran B.L. (with Mr. Mark de Blacam S.C.) for the applicant and from Mr. Alexander Caffrey B.L. for the respondents.

Relief sought
9. The primary relief sought is *certiorari* of the decision of the International Protection Appeals Tribunal affirming the refusal of subsidiary protection.

Ground 1 - IPAT failed to ask whether the applicant was who he said he was
10. This is another version of the argument that the tribunal must decide on the "*core claim*". It is not necessary to do so as long as a general rejection of an applicant's credibility is arrived at lawfully. Reliance was placed on V*oga v. Refugee Appeals Tribunal* (Unreported, Ryan J., 6th October, 2010) where there was no finding that an applicant was who she said she was, but that was a case where her credibility was not specifically rejected generally. If there is such a finding, as there is in the present case, it is less crucial that there be an express finding on whether the applicant is who he or she says they are. This is not a basis for quashing the decision, assuming the credibility findings were lawful, which I will deal with under subsequent grounds.

Ground 2 - IPAT failed to afford weight to documents and country material
11. This claim as submitted on behalf of the applicant broke down under three headings: medical information, country material and specific documents submitted.

Medical information
12. As far as the medical information is concerned, the tribunal held at para. 5.24 that it was accepted that the applicant had suffered trauma but that the medical reports did not outweigh the credibility concerns regarding the applicant. That in itself was a lawful finding, assuming that the credibility assessment more generally was valid.

Country information
13. In *R.A. v. Refugee Appeals Tribunal* [2017] IECA 297 (Unreported, Court of Appeal, 15th November, 2017) Hogan J. discussed the importance of considering country material at para. 69 of his judgment, where he stated that: "*the Tribunal member was, however, obliged in this instance to consider, the COI relevant to any credibility assessment of the applicant's claims, given that these claims involved particular and specific details in relation to events which allegedly took place in April and May 2011 and which were not generally known to those who did not live in the Ivory Coast. His failure to do so in this instance amounted to a breach of the requirements of Article 5(1)(a) of the 2006 Regulations and rendered the decision invalid and the High Court fell into error in failing to quash the decision on this ground.*" Regulation 5 is now replaced by s. 28(4) of the International Protection Act 2015. Generally, therefore, the legally required approach is for the tribunal to consider but not necessarily narratively discuss, any country of origin information before going on to consider the credibility of an applicant, and indeed the tribunal would be well-advised to make clear that it has considered country material in every case.

14. In this case the tribunal member says at para. 3.24 that "*the notice of appeal, submissions and all of the documents provided have been fully considered*". That wording possibly could be improved, and it might be best if the tribunal expressly states that it has considered all up-to-date country material and has assessed credibility and the applicant's claim in the light of that. However, that is implicit in the language used in the decision, but I might be permitted to say it might be better going forward if that were to be made explicit in tribunal findings.

Documents
15. As regards specific documents, Hogan J. said in *R.A. v. Refugee Appeals Tribunal* [2017] IECA 297 (Unreported, Court of Appeal, 15th November, 2017) at para. 62 that "*given the alleged provenance of the documents and their obvious relevance to his claim, if true, it was incumbent in these circumstances on the Tribunal member to assess such documentary evidence – if necessary, by making findings as their authenticity and probative value - so that that very credibility could be assessed by reference to all the relevant available evidence.*" Referring to the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) implementing the qualification directive 2004/83/EC he goes on to say at para. 64 "*This is an instance of where the Tribunal erred in failing to have regard to 'relevant statements and documentation presented by the protection applicant' (Article 5(1)(b))*".

16. Nonetheless, I see a certain theoretical difficulty with divorcing an assessment of the reliability of documents from an assessment of the reliability of the person producing them. We would not do this in real life. Issues with one inform the other. High Court judges, for example, do not do that when assessing evidence. If a person is caught out in a lie in evidence, does that not cast doubt on a document that he or she produces that might otherwise look valid on its face? If so, one wonders how documents can be assessed separately from, and in advance of, an assessment of an applicant's credibility, or if it realistic and practical for a decision-maker to therefore decide on the validity of documents in the abstract and then go on to decide on an applicant's credibility in the light of its views on the documents. Such an exercise is at best problematic and at worst entirely unreal. The safest course is probably for the tribunal to endeavour to identify how reliable the document is on a *prima facie* basis or alternatively, which amounts to the same thing, to ask how much weight should *prima facie* be placed on the document before going on to consider an applicant's evidence more generally, following which the documents can be revisited if necessary. A decision-maker can lawfully find a document to be *prima facie* reliable or not to be reliable, or by way of an intermediate position to be not particularly reliable, where for example it cannot be verified and could easily be forged. A decision-maker can also lawfully avoid having to decide that issue by stating that even if the document is reliable it does not significantly advance the applicant's claim. Any such decision is perfectly permissible as long as it is rational and lawful.

17. In the present case the tribunal simply said it was not in a position to verify the authenticity of the documents but they were not in themselves capable of establishing the truth of the claim, para. 5.23. The tribunal went on to say that the documents were "*of little value in terms of establishing the credibility of the material facts of the applicant's claim*" at the end of the same paragraph. Therefore, in this case, the tribunal member, particularly in the latter finding, took the view that even if the documents were valid and reliable they were of little value. That is not a finding that stands up to much scrutiny on the very fact-specific circumstances of this case. It might (without so deciding) have been open to the tribunal to reject the documents, or some of them; but by contending and finding that the documents do not materially assist the applicant, the tribunal erred in law, in terms of irrationality, on the very specific facts of this particular case.

Ground 3 - IPAT erred in rejecting the applicant's explanation as the reason for inconsistencies.
18. The medical report indicated that the applicant suffered from PTSD, depression, anxiety and insomnia and indicated that he had been prescribed an anti-depressant. The tribunal member said that nothing emerged that satisfactorily resolved the inconsistencies in the applicant's explanation. That is a somewhat ambiguous finding which must be either (a) a failure to address the tribunal's mind to the question of whether the medical condition could have explained the inconsistencies in the applicant's evidence or (b) an implicit finding that the medical report was not a satisfactory explanation. Option (a) would be fatal on conventional judicial review jurisprudence but even assuming option (b) applies, the level of reasons required can be fact-specific and on the facts of this particular case the applicant's medical evidence called for a more explicit articulation or rationale as to why his explanation did not account for his difficulties in giving evidence, and particularly inconsistencies in that evidence. It might have been sufficient for the tribunal member simply to have stated that he had formed the view from seeing and hearing the applicant that his memory difficulties were selective and his evidence was evasive rather than the product of a medical condition, but the phrase in the decision referred to above is simply too opaque to provide adequate guidance as to the tribunal's reasoning, even in the most general terms.

Ground 4 - IPAT failed to consider future risk of serious harm.
19. This ground prior to the amendment sought was phrased as a complaint of foreclosure of speculation. That is not necessarily the most helpful language. Insofar as an applicant complains that the tribunal did not "*speculate*", if a tribunal had "*speculated*" no doubt that would amount to a complaint on judicial review in and of itself. The essence of the complaint was simply that the tribunal failed to consider the risk of future harm and the applicant has amended the application accordingly.

20. The conclusion on this issue, particularly at para. 6.3, was extremely laconic. The tribunal found that the commissioner had found that substantial grounds had not been shown regarding a real risk of serious harm because the applicant was not credible and "*the Tribunal finds that there is no basis for disturbing the relevant determination in the ORAC decision*".

21. O'Regan J. in *S.W.A. v. Refugee Appeals Tribunal* [2017] IEHC 40 (Unreported, High Court, 30th January, 2017) emphasised that the forward-looking test remains even if elements of an applicant's credibility are rejected. It does not seem to me that the appropriate test was applied here. The test was for the tribunal to form its own view of whether any forward looking risk remained by reason of factors independent of an applicant's credibility, if any, notwithstanding the rejection of such credibility.

Ground 6 - IPAT erroneously took on the role of review of the reasonableness of the commissioner's decision rather than arriving at a *de novo* decision based on its own assessment.
22. In *H.I.D. (a minor) v. Refugee Applications Commissioner* [2011] IEHC 33 at paras. 49 – 50, Cooke J. said that the appeal to the tribunal is "*a full appeal on both matters of fact and law*". Charleton J. said in *M.A.R.A. (Nigeria) v. Minister for Justice and Equality* [2014] IESC 71 [2015] 1 I.R. 561 at para. 12 that "*on appeal therefore the issue is not simply whether an error was made at first instance*". Unfortunately, here the tribunal decision repeatedly says that it was open to the commissioner to make various findings. That is not an appropriate approach. IPAT has the opportunity to review the evidence itself. It is not engaged in a judicial review-type exercise in relation to the commissioner. The particular decision here is anomalous and out of line with the normal tribunal decision format, but more fundamentally fails to adopt the correct legal approach.

Order
23. For the multiple reasons set out in this judgment there will be:

(i.) an order of *certiorari* removing the tribunal decision for the purposes of being quashed; and

(ii.) an order remitting the applicant's appeal back to the tribunal to be heard by a different tribunal member.