THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 430 J.R.]

BETWEEN

B.K. (ALBANIA)

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 claims that he began a relationship with a woman in Albania in April, 2012 and that when he sought to end this relationship in October, 2012 he was confronted and threatened by the woman's brothers, who asked him to marry their sister or be killed. He says that he went to Greece on 20th December, 2012 and that the brothers located him in Greece, where he was beaten and tortured. He says that he fled Greece and arrived in Ireland on 20th July, 2013. In August, 2013 he says that his father was murdered by the woman's brothers.

2. On 2nd April, 2014 he was caught driving a car without a driving licence, and that intervention appears to have been rapidly followed by an asylum application on the 9th April, 2014. On 29th September, 2014 he was notified that his asylum claim had been rejected by the Refugee Applications Commissioner. An appeal to the tribunal was rejected on the 5th May, 2016. Leave to challenge that decision was granted by MacEochaidh J. on the 28th November, 2016.

3. The application was made out of time but no objection is being pressed by the respondents. I have heard helpful submissions from Mr. Michael Conlon S.C. (with Mr. Garry O'Halloran B.L.) for the applicant and Ms. Sinead McGrath B.L. for the respondents.

Is there an error in relation to the claim that the applicant is being persecuted by reason of membership of a social group?
4. Ms. McGrath has raised a pleading issue in relation to this question. Three grounds are pleaded in the statement of grounds; a lack of clarity as to the basis of the rejection, a failure to assess whether the claim fell within the ground of membership of a particular social group, and an error on the facts. I will come to the third point later but points 1 and 2 as pleaded were not pressed in the form pleaded. In any event no basis has been made out for them. Instead, a new point was raised as to an error by reason of the applicant being persecuted because he is a member of a social group. That point has not been pleaded and it seems to me that the applicant is not entitled to raise it. But in case I am wrong I will deal with that point now.

5. The error relating to the social group now being advanced seems to be made on two separate grounds (see the letter of the 6th April, 2016 sent to the tribunal after the hearing). Firstly, "*some asserted societal norm regarding courtship which did not ordinarily allow him to carry on a relationship and end it of his own violation*" and a secondary argument that because family members who were subsequently targeted could claim membership of a social group, such protection should apply to the applicant as the original target.

The courtship-as-social-group argument
6. The tribunal held there was no satisfactory evidence that persons in this situation were persecuted by reason of their membership of a social group. Hypothetically, if in a particular country there was a particular mating ritual, and if one dissented from that procedure, persecution would result, then that could involve membership of a social group. However, as noted by Judge Dörig in Hailbronner and Thym, *EU Immigration and Asylum Law* (2nd Ed.) (München, C.H. Beck, 2016), Part DIII, p. 1187 there can only be a particular social group if it exists independently of the persecution to which it is subject (see also *Fornah v. Secretary of State for the Home Department* [2006] UKHL 46). That does not seem to be the case here.

7. Firstly, the tribunal was entitled to find that a claim of persecution on the basis of membership of such a group was not made out on the evidence, or as it was put by the tribunal member at para. 6.6, "*there is not sufficient evidence before the Tribunal which would support a conclusion that those who transgress social norms in Albania are a particular social group so as to attract international protection".*

8. Secondly, it has not been made out that the persecution, such as it was, was related to any such group. This case is more about the applicant's interaction with the particular woman concerned. It seems to be an individual dispute rather than a Convention issue. It seems to me that the finding of para. 6.7 of the tribunal decision that the applicant's "*problems arose from a private dispute*" is a lawful finding.

The claim of persecution by reason of family membership
9. It was submitted that a family could be a social group (see *A.V.B. & Ors v. Refugee Appeals Tribunal & Ors*. [2015] IEHC 13; see also James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd Ed.) (Cambridge, 2014) in particular pp. 447-449). This however is a situation where a criminal threat was made against one individual and the threat was then allegedly expanded to cover one other member of his family who was attacked and killed. It may be that a family member secondarily targeted could claim to be a member of a social group but that is not the case here. The applicant has to show that *he* is a member of a social group.

10. The fundamental problem for the applicant under this heading is that he is not being persecuted because he is a member of a family. Mr. Conlon submits it would be strange if a secondary target could be held to be at risk even though a primary target would not qualify, but that situation is expressly envisaged in Hathaway at p. 447. That difficulty was to some extent acknowledged by the applicant in the written submissions made after the hearing to which I have referred, which refer also to *E.H. (blood feuds) Albania C.G.* [2012] UKUT 00348 (IAC). That unfortunately is the position here. The applicant is not being targeted because he is a member of a family. Family membership is not the Convention nexus as far as this applicant is concerned. He is being targeted because of interactions with this particular woman. While the court can, in appropriate cases, adopt a broad meaning of membership of a social group (see *S.J.L. v. Refugee Appeals Tribunal* [2016] IECA 47 [2016] 2 I.R. 559 [2016] 1 I.L.R.M. 414), that does not stretch to allow the applicant to make a claim that only someone else can make.

Alleged error regarding the father's death
11. The tribunal member also held that the applicant's view that his father's death was due to problems with his ex-girlfriend were mere assumption or speculation. Mr. Conlon says that this is not correct and relies *inter alia* on question 21 of the questionnaire, which indicates information received from the applicant's brother or the connection between the dispute and the death of the father.

12. The finding by the tribunal member is perhaps not necessarily the most favourable presentation of the facts from the applicant's point of view. However, it would be a stretch to call it an error of fact. At para. 3.12 she records that the applicant's position is one of suspicion that the ex-girlfriend's brothers are responsible. That finding is not challenged in the statement of grounds, and thus it is not inaccurate to refer to the applicant's position as being one of suspicion and therefore of assumption or speculation.

13. If the applicant had given oral evidence to the tribunal that he had objective reasons to believe that the death was related to the feud based, for example, on what the brother had allegedly told him, then the wording of the finding by the tribunal member might be inappropriate. But if the applicant's evidence was that it was a suspicion, then it is not an error, still less is it a ground for quashing the decision, to describe his position as an assumption or speculation.

14. In the s. 11 interview at question 44 he was asked *"and what makes you think that it was one of the brothers who is responsible?"* The answer was that *"this was the only problem I had in Albania, so this is why I think he did it".* There is no reference there to objective information received from the brother. It seems to me there is a degree of inconsistency in the information provided; and while it is not a matter for me, the applicant might be considered fortunate that the tribunal appears to have accepted his credibility.

15. The applicant cannot reprogramme his evidence after the event by reference to evidence he could have given, or by reference to hypothetical oral evidence which might have been more consistent with, or have given greater weight to, the documentary evidence. It is true that the questionnaire and the documentary material was before the tribunal but the applicant in his oral evidence or his s. 11 interview did not rely on it and chose to offer a more speculative account. Therefore, it does amount to *post-hoc* reconstruction of his evidence to say that his answer could have been more robust and that he could have relied on such material.

16. The completely *pro forma* nature of the grounds of appeal to the tribunal provide no support whatsoever for this point, or indeed for any of the points made by the applicant at the hearing, and reinforce my conclusion that the applicant has failed to demonstrate that the tribunal decision is invalid in law.

Order
17. Accordingly the order will be that the proceedings be dismissed.