THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 835 J.R.]

BETWEEN

R.S. (UKRAINE)

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL,

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

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(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 3rd day of December, 2018

1. In *R.S. (Ukraine) v. International Protection Appeals Tribunal (No. 1)* [2018] IEHC 512 (Unreported, High Court, 17th September, 2018) I refused *certiorari* in respect of IPAT decisions refusing the applicants subsidiary protection. The applicants now seek leave to appeal, and I have considered the law in that regard as set out in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, MacMenamin J., 13th November, 2006) and *Arklow Holidays v. An Bord Pleanála* [2008] IEHC 2, *per* Clarke J. (as he then was). I have also discussed these criteria in a number of cases, including *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646 [2016] 11 JIC 1404 (Unreported, High Court, 14th November, 2016) (para. 2), and *Y.Y. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 185 [2017] 3 JIC 2405 (Unreported, High Court, 24th March, 2017) (para. 72).

2. I have received helpful submissions from Mr. Eamonn Dornan B.L. for the applicants, from Mr. Peter Leonard B.L. for the respondents in the husband's case and from Mr. Alexander Caffrey B.L. for the respondents in the wife's case.

Question 1

3. The first proposed question of exceptional public importance is "*Is an international protection decision-maker obliged to determine the probative value to be afforded to a medico-legal report in relation to the material fact for which it is proffered, or can the decision-maker dispose of it as "insufficient" in the context of a general credibility assessment?".*

4. First of all, the submission made under this heading suffers from a certain terminological mangling. It confuses disregard with discounting. The medical report was not disregarded. Regard was had to it but it was held to be insufficient.

5. Secondly, documentary evidence can perfectly lawfully be held to be insufficient. The applicants' submission is overdetermined. A report can only tell so much unless it is diagnostic of a particular account. Merely being consistent, or even highly consistent, with an account does not of itself prove the account to be correct. That it not a difficult or problematic concept or one on which reasonable or any doubt arises or could arise.

6. Thirdly, it is well-established that a decision-maker should not compartmentalise the various components of the interlocking aspects of a decision. There is a fundamental difficulty with the notion that you can divorce an assessment of the reliability of a document, including a medical report, from an assessment of the reliability of the person providing the information contained in the document or producing that document, for example by postulating that these two processes can be put in watertight compartments and the latter only assessed after the former. We would not do this in real life. Issues with one naturally and legitimately 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 oral evidence, that may cast doubt on a document that he or she has earlier produced that might otherwise look valid on its face. If such a holistic approach is legitimate, which it is, it is not possible to credibly suggest that documents or reports can be assessed separately from and in advance of an assessment of an applicant's credibility: see also *K.M. (Pakistan) v. Minister for Justice and Equality* [2018] IEHC 510 [2018] 7 JIC 1005 (Unreported, High Court, 10th July, 2018).

7. Mr. Dornan's submission is that the tribunal has to make what he calls a "*proper determination of the material facts*", which in practice would mean disregarding anything adverse to an applicant, such as the major question marks over his account. That would be a blinkered determination. The fact that evidence against an applicant outweighs, in the opinion of the tribunal, the evidence in his or her favour, does not mean that a methodological error has been committed. The applicants' submission that the tribunal did not make proper findings of material fact comes down to an assertion that the tribunal did not make prematurely favourable findings on limited evidence. The tribunal is certainly neither obligated nor entitled to make any determination of material fact separately from a holistic assessment of the evidence, and indeed it would be an error of law to do so.

8. It is true that Hogan J. said by way of *obiter* comment in *R.A. v. Refugee Appeals Tribunal* [2017] IECA 297 (Unreported, Court of Appeal 15th November, 2017) (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, implementing directive 2004/83/EC. That comment, I would very respectfully venture to suggest, was not only *obiter* but also somewhat in tension with the *ratio* of the decision under this heading which was "*The Tribunal member's obligation was to make an overall assessment of credibility based upon an evaluation of all potentially relevant information and not just some of that material"* (para. 70). It is just as much a breach of the requirement to evaluate all of the evidence to purport to "*mak[e] findings*" as to the authenticity of documents separate from and in advance of an assessment of "*that very credibility*" of the applicant as it would be to determine the credibility of the applicant without reference to the documents.

9. Where Hogan J. refers in the *obiter* passage quoted to assessing credibility "*by reference to all of the relevant available evidence"* that is of course not problematic if by "*evidence*" what is meant is material before the tribunal prior to any findings. Such a concept becomes problematic – indeed erroneous – if the apparently innocuous *obiter* phrase "*if necessary, by making findings as to their authenticity and probative value*" is interpreted as meaning that (save in exceptional circumstances where the document's status was unquestionable) credibility can be determined in the light of, and thus by definition after, such "*findings*". If such a distorted process were to take place, the credibility assessment would not be one carried out by reference to all of the evidence – it would be carried out by reference to a blinkered and truncated process involving improperly premature and artificially compartmentalised findings in relation to documents, divorced from a holistic assessment of the evidence overall. That is not assessment by reference to all of the available evidence in any meaningful sense.

10. The notion that one could make findings on documents in advance of an assessment of the applicant's account overall could only apply in exceptional circumstances where the authenticity of the document can be indubitably established independently of the applicant's credibility. That is what Hogan J. can only have meant by "*if necessary*". Outside such exceptional circumstances where such findings are undisputed and undisputable, compartmentalisation by making findings on documents before considering overall credibility is neither necessary nor lawful. The judgment in *R.A.* cannot be read as meaning that documents or reports should be assessed and subjected to firm findings *in vacuo* without a consideration of all the circumstances of the case, including factoring in any issues with the applicant's general credibility. Such an approach would certainly misunderstand, and contradict, European standards.

11. The guidelines prepared by the European Asylum Support Office (established by Regulation (EU) 439/2010) and drafted by the International Association of Refugee Law Judges-Europe, *Judicial Analysis, "Evidence and Credibility Assessment in the Context of the Common European Asylum System",* 2018 state that "*a decision-maker will err in law if he/she approaches the evidence in a compartmentalised way and reaches a conclusion before considering all the relevant evidence in the round"* (p. 72).

12. The judicial analysis refers under this heading to *Mibanga v. Secretary of State for the Home Department* [2005] EWCA Civ. 367. In that case Buxton L.J. at para. 30 illustrated the problem by saying that in that case "*the adjudicator's failing was that she artificially separated the medical evidence from the rest of the evidence and reached conclusions as to credibility without reference to that medical evidence; and then, no doubt inevitably on that premise, found that the medical evidence was of no assistance to her*". But the opposite also applies. A decision-maker cannot uphold a document or medical report as establishing the applicant's case "*on the balance of probabilities*", as put by Mr. Dornan, without having full regard to all the other evidence, including questions over an applicant's credibility, and then use the finding in relation to the document or medical report to overcome all possible doubts about such credibility. That is equally impermissible compartmentalisation. The decision-maker must consider the case as a whole before making any "*findings*" about any aspect of it.

13. Finally under this heading, I should say that the applicants claim that there is a conflict in caselaw at para. 37 of the leave to appeal submissions, but I dealt with this at para. 10 of the No. 1 judgment. There is no such divergence because reasons were given for discounting the medical report as being insufficient. The applicant also seeks to resuscitate a stale argument about the fact that the comments in *R.O. v. Minister for Justice and Equality* [2015] 4 I.R. 200 were somewhat finessed in *I.E. v. Minister for Justice and Equality* [2016] IEHC 85 (Unreported, High Court, 15th February, 2016). The position in *I.E.* has been explained in a number of subsequent cases. Respondents do not have to prove that reasons are cogent and substantial. The onus of proof in judicial review is on the applicant. That is not a controversial proposition.

Question 2

14. The second proposed question of exceptional public importance is "*Does an applicant meet his/her burden of establishing a lack of state protection for the purposes of Regulation 16 of S.I. 426 of 2013 and Article 7(2) of Council Directive 2004/83/EC where the applicant can demonstrate that the change in regime has not resulted in any* "effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm" *in relation to actors of persecution and/or serious harm under a former regime?".*

15. The premise of the question is incorrect. The applicants did not demonstrate that, insofar as they were concerned, there was a risk of serious harm after the régime change. Thus a question premised on a position that the applicants have demonstrated such a risk does not apply. There is possibly some country information that not all past perpetrators of harm have been fully held to account, but one could say that about many situations of régime change or political change. By way of a possible example, one could take Northern Ireland. Country information, insofar as it was relevant to these particular applicants, fell well short of suggesting, let alone demonstrating, a material forward-looking risk of serious harm specific to them.

16. The applicants also misread reg. 16 of the European Union (Subsidiary Protection) Regulations 2013, which provides that protection against serious harm includes a situation where there is an "*effective legal system for the detection, prosecution and punishment of acts constituting serious harm*". That does not mean that in the context of system change, failure to fully punish all perpetrators of past harm under an old system constitutes a lack of forward-looking protection for any and all applicants who may present themselves.

17. For what it is worth, this impunity point was framed in a different form in the pleadings to what is now submitted. An applicant is not entitled to appeal on the basis of second thoughts about how the case should have been run originally, as seen through the prism of an adverse substantive judgment. What is pleaded at ground 1 of the wife's case and ground 2 of the husband's case was firstly that there was a misreading of the so-called *B.O.* case (as I pointed out at para. 13 the No. 1 judgment, the correct title is *O.O. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 165 (Unreported, Cooke J., 16th March, 2011)). I held that the case was not necessarily misread because it was prefaced by "*C.f.",* which suggests that the tribunal member was contrasting that case. In any event, this first point is not the subject of an application for leave to appeal.

18. The second matter that had been pleaded in the statement of grounds under this heading is that the decision is "*unreasonable*

and does not flow rationally from the Country of Origin Information considered" (the distinction implied by the word "*and*" seems elusive, perhaps to the point of non-existence). What I said about that at para. 12 of the No. 1 judgment was that the fundamental point made by the tribunal in this regard was that even if there was a failure to punish members of the *ancien régime*, which the tribunal did not accept, that did not on the facts of the particular case constitute a basis for holding that there was a risk to the applicants. To that extent, while naturally enough the proposed question is phrased in the widest possible terms, its application comes down to being quite fact-specific.

19. While Mr. Dornan places some reliance on the written submissions before the tribunal, that was superseded to a considerable extent by the oral evidence of the applicants, both of whom accepted that the new régime opposes the policies of the previous government: see para. 16.10 and 16.11 of the decision in the wife's case.

Question 3
20. The third proposed question is "*Where a decision-maker has made adverse credibility findings arising from an Applicant's failure to seek medical or psychological assistance following an allegation of rape, has the decision-maker acted unreasonably in the assessment of past harm, and serious risk of future harm, under Regulation 13(2) of S.I. 426 of 2013?".*

21. Again, that is a totally fact-specific issue and does not raise a question of law, let alone one of exceptional (or indeed any) public importance. Furthermore, it completely misrepresents the nature of the decision. If the tribunal decision had been solely or primarily based on the wife's failure to seek counselling, then it would indeed have been problematic. However, as I said at para. 18 of the No. 1 judgment, the unsatisfactory nature of the tribunal's comment in relation to that point is diluted by the fact that there were a host of other legitimate findings against the wife on the credibility issue. I also noted that the second problem with this submission was that the IPAT had a separate ground for refusal that was not related to its handling of the counselling issue.

22. The applicants rely in submissions on *Da Silveira v. Refugee Appeals Tribunal* [2004] IEHC 436 (Unreported, Peart J., 9th July, 2004). That was a leave decision, not a substantive one (not that that was adverted to in the applicants' submissions); but in any event there is no question about the need to consider a future risk of harm if some elements of an account are accepted, even if some elements of an applicant's credibility are rejected. But any such consideration of a future risk has to be carried out in terms of the facts as found by the tribunal, not by reference to those rejected. In some instances, the nature of the rejection of an applicant's account is such that no independent risk can arise from the sometimes quite minimal material facts that are accepted. In the present case this principle does not assist the applicants.

Overall problems with the application
23. A couple of overall problems with the application should be re-emphasised. For reasons that should be apparent from the foregoing, one can legitimately summarise by saying that the proposed grounds of appeal and submissions made in support of them are quite tendentious and mischaracterise a number of key aspects of the case. More fundamentally, there were two separate and independent grounds for the tribunal decision. The applicant would have to show grounds of appeal and points of exceptional importance on both grounds in order to succeed. Here the applicants have done neither, but even if they had shown such grounds in relation to one such point, any appeal would be futile as it would be bound to fail having regard to the other independent ground of refusal.

Order
24. Accordingly, the applications for leave to appeal are dismissed.