[2018] IEHC 671

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 403 J.R.]

BETWEEN

A.J.A. AND A.M.A-A. (NIGERIA)

APPLICANTS

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 14th day of November, 2018

1. The applicants are a husband and wife from Nigeria, the husband having been born in 1970. In February, 2011 he was charged with forgery of two certificates by AIICO Insurance Company, where he was the manager. He claims this was a strategic prosecution to deter him from whistleblowing. Whatever about his difficulties with his employer during his 42 years living in Nigeria, there is no evidence that he was ever subjected to indiscriminate violence in his country of origin.

2. The applicants arrived in Ireland on 14th May, 2012 *via* the U.K. They did not claim asylum in the U.K.; nor indeed did they claim asylum in Ireland until two years later in May and June, 2014. That was refused by the Refugee Applications Commissioner. An appeal to the Refugee Appeals Tribunal was rejected, the tribunal holding that the hardship to the husband was primarily financial and not related to threatened harm.

3. The wife then sought subsidiary protection and the husband followed suit on 11th November, 2016. On 9th October, 2017 and 3rd November, 2017, the IPO notified the applicants that the applications were refused. Adverse credibility findings were made regarding the husband's account and were also relied on in the wife's application. The wife's evidence was also rejected.

4. An appeal was lodged to the International Protection Appeals Tribunal and an oral hearing took place, at which Ms. Lisa McHugh B.L. appeared for the applicants.

5. On 27th March, 2018 their appeal was rejected. Leave in the present proceedings were granted on 17th May, 2018 in which the primary relief is *certiorari* of the IPAT decisions. I should record that ground 5 of the statement of grounds was not pursued at the hearing. A statement of opposition was filed on 19th July, 2018.

6. I have received helpful submissions from Mr. Michael Conlon S.C. (with Mr. Garry O'Halloran B.L.) for the applicants and from Ms. Eva Humphreys B.L. for the respondents.

Criticism of credibility assessment

7. The applicants claim that the tribunal failed to ask itself whether the court case against the husband was strategic and involved serious harm to a whistle blower in accordance with the country of origin material. They make other complaints regarding the credibility assessment. It is clear that assessment of the evidence is a matter for the decision-maker: see *S.A. (Ghana and South Africa) v. International Protection Appeals Tribunal* [2018] IEHC 97 (Unreported, High Court, 1st February, 2018), *R.A. v. Refugee Appeals Tribunal* [2015] IEHC 686 [2015] 11 JIC 0403 (Unreported, High Court, 4th November, 2015), *I.E. v. Minister for Justice and Equality* [2016] IEHC 85 (Unreported, High Court, 15th February, 2016), *K. v. Refugee Appeals Tribunal* [2007] IEHC 148 (Unreported, McGovern J., 22nd May, 2007), *S.B. v. Refugee Appeals Tribunal* [2010] IEHC 133 (Unreported, Cooke J., 25th February, 2010), *E.Y. (Pakistan) v. Refugee Appeals Tribunal* [2016] IEHC 340 (Unreported, Stewart J., 17th June, 2016) and *per* Birmingham J. in *M.A. v. Refugee Appeals Tribunal* [2008] IEHC 192 (Unreported, High Court, 27th June, 2008) (para. 27): "*the assessment of whether a particular piece of evidence is of probative value, or the extent to which it is of probative value, is quintessentially a matter for the Tribunal Member*".

8. Mr. Conlon accepts this basic proposition, subject to a thorough review by the court. On such review, I consider that the tribunal member's findings on credibility, particularly as summarised at para. 4.9 of the decision, are perfectly reasonable and lawful and withstand such review.

The claim of a quest to disbelieve

9. Reliance is placed on *B.A. (Nigeria) v. Refugee Appeals Tribunal* [2015] IEHC 76 (Unreported, High Court, 11th February, 2015), where Eagar J. refers to the "*quest to disbelieve*" (para. 17), quoting from Hathaway and Foster, *The Law of Refugee Status*, 2nd ed. (Cambridge, 2014). No page reference is given in *B.A.* (nor is reference made to Ms. Foster's co-authorship) but the matter quoted seems to be at p. 138 of the textbook. Hathaway and Foster say that "*despite the clear salience of an Applicant's own evidence, there is little doubt that a quest to disbelieve negatively affects many assessments of the value of a refugee claimant's evidence*", citing two academic studies, one from the US and one from the EU. This passage is somewhat argumentative in the sense it goes on to describe a judgment in the U.K. Supreme Court as "*tragi[c]*". The phrase "*quest to disbelieve*" is itself an argumentative and polemical one, not a legal test, and does not particularly assist in legal adjudication by way of judicial review. It is not a hugely helpful notion to introduce into the discussion because it runs the risk of perpetuating a very out-of-date notion that the tribunal's methodology is questionable or is in need of regular correction by the court. There is no basis to suggest any generalised problems in the IPAT as it currently functions, leaving aside of course the possibility that individual decisions may not withstand judicial review. To suggest that the tribunal or its members are involved in a "*quest to disbelieve*" is not much more than a smear and unfairly imputes a lack of integrity to their processes and a degree of bad faith that cannot honourably be made the subject of a casual allegation.

10. In any event, *B.A.* is not a hugely convincing authority and not one that could be followed. At the core of the decision at paras. 21 to 24, Eagar J. refers to various pieces of country information in the applicant's account and gives his own opinion that "*there seems nothing incredible about the general account of the Applicant in this case*" (para. 21). One must not lose sight of the fact that the tribunal member has seen and heard the witnesses and it is not necessarily appropriate for the court to sift through the papers and quash a decision made by an independent quasi-judicial statutory office-holder who did see the witnesses simply because the

court takes a different view of the evidence or of what it thinks is credible or incredible. Many tales may look credible on paper – but less so when one sees and hears the teller, particularly when tested by cross-examination (see the comments of Hardiman J. in *Maguire v. Ardagh* [2002] 1 I.R. 385 at 704 to 707 as to the power of cross-examination to expose falsehoods). Granted, judicial review is a "*thorough review*" of the decision (see *N.M. (DRC) v. Minister for Justice and Equality* [2016] IECA 217 [2016] 2 I.L.R.M. 369); but that is not to be conflated with the court making the decision itself. In the present case there is certainly no basis to suggest that the tribunal member engaged inappropriately in any "quest to disbelieve", even if I accepted that as an appropriate yardstick by which to judge tribunal decisions, which it is not.

The claim that the IPAT failed to apply its own mind to the matter but instead reviewed the IPO decision.
11. Under this heading, the applicants rely on *K.M. (Pakistan) v. International Protection Appeals Tribunal* [2018] IEHC 510 (Unreported, High Court, 10th July, 2018). Paragraph 5.6 of the decision impugned here deals with harm due to indiscriminate violence. It reads in full that "*nothing arose at the hearing which would cause the tribunal to disturb the findings of the IPO in this respect. In the circumstances, the Tribunal upholds the findings in the s. 39 report in this respect*". It is fair to say that this is phrased in terms suggestive of the question as to whether the IPO decision should be disturbed rather than what the IPAT member, bringing her own view to the situation, thinks. Following *K.M.*, one might conclude that the tribunal member did not necessarily take the appropriate course in this particular paragraph. Paragraph 5.4 adopts a better wording, which references the IPO decision perfectly legitimately but then sets out the tribunal's own decision. It would have been more appropriate had para. 5.6 followed the format in para. 5.4. However, the problem for the applicants under this heading is that they did not make any submission regarding a risk to them arising from indiscriminate violence. That is fatal to the application now made. This is not a question of the court's discretion. Here there is an even simpler difficulty - the applicants just did not make this point.

12. They thus merely join the queue of applicants whose current barristers think of interesting points that were never made to the decision-maker and who launch those points for the first time before the court. Such gaslighting of decision-makers cannot be endorsed.

13. Even if the applicants were not precluded from making this point, the evidential basis to support any case under this heading is absent. Article 15(c) of the asylum qualification directive, directive 2004/83/EC of 29th April, 2004, was considered by the CJEU in Case C-465/07 *Elgafaji v. Staatssecretaris van Justitie*, in which the Luxembourg court interpreted that provision as meaning that "*the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances*" but separately that "*the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat*" (see also p. 1237 of Hailbronner and Thym, *EU Asylum and Immigration Law* (C.H. Beck/Hart/Nomos, 2016), in Part DIII by Judge Storey (discussing the recast directive but the same point applies to the original)). *Elgafaji* implies that art. 15(c) comes into play if either:

(i). an applicant adduces evidence of individualised threat, or

(ii). the degree of indiscriminate violence is exceptionally assessed at such a high level as to apply to a civilian solely on the grounds of their presence in the country.

14. As regards the first point, the applicant simply did not adduce such evidence, and even applying *M.M. v. Minister for Justice and Equality* [2018] IESC 10 [2018] 1 I.L.R.M. 361, there is simply no evidence in the case, or evidence that there were any elements that could have been introduced by the decision-maker, to support a finding of individualised risk from indiscriminate violence.

15. As regards the second point, there is no evidence that the exceptionally high threshold of risk to civilians overall is reached as regards Nigeria. Tribunal members are not novices and it is just not realistic to suggest that no civilian can be returned to Nigeria by reason of an alleged state of indiscriminate violence there threatening all civilians: see by analogy *G.O.B. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 229 (Unreported, Birmingham J., 3rd June, 2008). Indeed not only is there no basis in evidence for an indiscriminate threat to all civilians in Nigeria due to indiscriminate violence, but an inferentially the evidence before the IPAT contradicts such a risk. The husband was present in Nigeria for 42 years without any evidence of being subject to such indiscriminate violence or a risk of it.

16. So while the phraseology of para. 5.6 falls short of the ideal legal standard, it is not appropriate to quash the decision in whole or in part or to direct a further supplementary decision in a situation where the applicants never made the relevant point and, independently, where there is no evidence supportive of the applicant having any substantive point whatsoever under this heading.

Order
17. Accordingly, the application is dismissed.