[2020] IEHC 450

THE HIGH COURT

JUDICIAL REVIEW

[2019 No. 854 JR]

BETWEEN

N.P.B.K. (D.R.C.)

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

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JUDGMENT of Mr. Justice Richard Humphreys delivered on Friday the 25th day of September, 2020

1. The husband-and-wife applicants in these two related cases left the Democratic Republic of Congo on 20th May, 2017. They applied for international protection on arrival in the State, applications that were rejected by the International Protection Office. They appealed to the tribunal on 31st January, 2019.

2. A hearing with an interpreter took place on 15th April, 2019. The tribunal then scheduled a resumed hearing on 22nd May, 2019. It went to some pains to ensure fair procedures and allowed a third opportunity to the applicants by way of permitting additional submissions within four weeks of the latter hearing, which were provided on 21st June, 2019.

3. The tribunal then sought further clarification by letter dated 27th June, 2019 and received further supplemental submissions on 30th July, 2019.

4. On 25th October, 2019 the tribunal issued a detailed 22-page decision in relation to the wife and a 19-page decision in relation to her husband, dismissing the appeals, mainly on credibility grounds for the reasons set out at paras. 4.1 to 4.19 of the wife's decision and paras. 4.1 to 4.15 of the husband's decision.

5. The present proceedings were filed on 27th November, 2019 the primary reliefs sought being *certiorari* of the tribunal decisions. I granted leave on 9th December, 2019 and statements of opposition were filed on 27th February, 2020.

6. On the morning of the hearing on 25th June, 2020 the applicants sought and were granted liberty to make further amendments to the statements of grounds. The purpose of the amendments seems to have been to neutralise points that were made by the respondents in their written submissions where certain shortcomings in the applicants'

papers were alluded to. That is not a particularly desirable procedure and certainly disincentivises respondents from showing their hand in written submissions. However, as the respondents have not particularly objected to these amendments I allowed them in the present case. That is not in any way to suggest that such types of amendments are appropriate or would be allowed if in fact objected to. I have now received helpful submissions from Mr. Philip Moroney B.L. for the applicants and from Ms. Emily Farrell B.L. for the respondents.

Some general considerations

7. It is worth restating some general legal propositions which are of relevance here:

(i). there is a presumption of validity for administrative decisions: *per* Finlay P., as he then was, in *In re Comhaltas Ceoltóirí Éireann* (Unreported, High Court, 5th December, 1977) and *per* Keane J., as he then was, in *Campus Oil v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88 at 102;

(ii). there is a presumption that material has been considered if the decision says so: *per* Hardiman J. in *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418, [2002] 1 I.L.R.M. 401;

(iii). judicial review is not an appeal on the merits and it is not for the court to step into the shoes of the decision-maker: *per* Finlay C.J. in *the State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 at 654; *per* Denham J., as she then was, in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701 at 743; and *per* Clarke J., as he then was (McKechnie and Dunne JJ. concurring), in *Sweeney v. Fahy* [2014] IESC 50 (Unreported, Supreme Court, 31st July, 2014), at paras. 3.8 to 3.15;

(iv). the weight to be given to the evidence is quintessentially a matter for the decision-maker: *per* Birmingham J., as he then was, in *M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192 (Unreported, High Court, 27th June, 2008) at para. 27;

(v). the onus of proof remains on the applicant at all times: *per* Denham J. as she then was in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701 at 743; and

(vi). an applicant does not have a legal entitlement to a discursive narrative decision addressing all submissions: see *per* Clarke J., as he then was (Fennelly and MacMenamin JJ. concurring) in *Rawson v. Minister for Defence* [2012] IESC 26 (Unreported, Supreme Court, 1st May, 2012) at para. 6.9, referring to the need for a "*reasoned but not discursive ruling*".

Legal issues

8. The legal grounds in the husband's statement of grounds weigh in at a slightly indigestible 1,628 words with a similar volume in the wife's case. Helpfully, the applicant's legal submissions set out two succinct questions: firstly, regarding the credibility assessment; and secondly, regarding cumulative findings.

First legal question: credibility assessment

9. The first question presented is defined by the applicants as being *"[w]hether the First Named Respondent … in its decision of the 25th October, 2019, erred in law in its assessment of Applicant's credibility by way of findings that are irrational in the legal sense, and / or were arrived at in breach of fair procedures and / or natural and Constitutional justice, and / or (in one instance, at para. [4.6]), Article 3 (a) of the Qualifications Directive."* Three elements are conflated here: irrationality, unfairness and breach of the qualification directive and I will endeavour to deal with those separately.

Irrationality

10. Irrationality means that the decision was so unreasonable that it was not open to any rational decision-maker in the position of the tribunal on the materials before it. Unfortunately for the applicants, the decisions are not irrational. The vast bulk of the submissions made to me were dedicated to a broad attack on the factual conclusions of the tribunal. Judicial review is a mechanism to examine the lawfulness of the decision, not its correctness, a distinction emphasised by Clarke J., as he then was, in *Fitzgibbon v. Law Society* [2014] IESC 48, [2015] 1 I.R. 516 at para. 8.2.

11. To take one of the main examples of the factual conclusions attacked, the applicant produced a membership card for the Lucha organisation dated prior to a date on which country information indicated that the organisation was formed. While it was not impossible that the card was genuine, the tribunal held that it was not sufficiently probable to be accepted as a fact. There is nothing wrong with that finding and it is certainly not irrational or unlawful.

12. The tribunal held it against the applicant that he claimed to be a member of an organisation, but did not know its email address or website when interviewed although he had come up with the web address by the time of the tribunal hearing. Again, reliance on the uncertainties and inconsistencies in his evidence were well within the realm of lawful assessment by the tribunal. As Clarke J., as he then was, noted in *Imoh v. Refugee Appeals Tribunal* [2005] IEHC 220 (Unreported, High Court, 24th June, 2005) "*I should emphasise that the Court should not second guess a reasonable view by the decision maker as to the weight to be attached to conflicting country of origin information*." (para. 25). A similar principle applies to the assessment of other evidential contradictions or controversies or to evidence generally. As noted above, Birmingham J., as he then was, in *M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192 (at para. 27) said that the weight to be attached to various pieces of evidence was *"quintessentially a matter for the Tribunal Member*": see also *B.D.C. (Nigeria) v. IPAT* [2018] IEHC 460, [2018] 7 JIC 2006 (Unreported, High Court, 20th July, 2018) at para. 11 and *A.D.N. (South Africa) v. IPAT* [2019] IEHC 627, [2019] 7 JIC 3130 (Unreported, High Court, 31st July, 2019). In that regard it must be emphasised that the decision-maker saw and heard the witnesses. No hearing on affidavit can replicate that level of engagement with the evidence.

13. As regards the claim of a prison attack and escape, the tribunal noted that the contents of country information in relation to the prison attack were public knowledge (para. 4.18).

Unfortunately, many applicants whose evidence is wholly or partly untrue attempt to fit their stories around objectively verifiable country information in order to add a veneer of facticity to their accounts. Thus, the mere fact of consistency with known country information simply removes a negative from a claim rather than positively establishes it, a point I sought to make in *M.R. (Bangladesh) v. IPAT* [2020] IEHC 41, [2020] 1 JIC 2903 (Unreported, High Court, 29th January, 2020) at para. 25.

14. The tribunal stated that the husband's narrative as to his escape from prison was vague. An assessment of the vagueness or otherwise of that account is a perfectly lawful and legitimate way in which the truth or otherwise of an account can be assessed. I will return to that issue in more detail below.

15. Similarly, the wife's evidence was held to be contradictory. For example, in her claim for international protection she stated that she had visited the husband in prison a few times, whereas she told the doctor who prepared the SPIRASI report that she had *tried* to visit him but was not permitted to do so. The tribunal found that the explanation offered, to the effect that the SPIRASI report was just a short note, was lacking in credibility. That is a perfectly lawful finding well within the scope of what was open to the tribunal, and indeed it is the tribunal's job to assess such contradictions.

16. A range of other shortcomings or inconsistencies in the evidence in relation to other matters were also challenged, such as in relation to a newspaper article, a particular politician and other issues. All of the findings of the tribunal on those matters were also well within the scope of what was lawfully open to the tribunal.

17. As regards the SPIRASI medical report, a report can only specify the applicant's medical condition and history and record the applicant's instructions, but cannot testify as to how any injuries were in fact inflicted. A decision on the latter aspect depends on a number of factors including factors going to the overall credibility of an applicant, particularly their consistency and clarity. The mere fact that an applicant comes forward with a medical report does not entitle them to succeed. The point was made by Ouseley J. in *H.E. (DRC)* [2004] UKIAT 00321 that, "*[r]ather than offering significant separate support for the claim, a conclusion as to mere consistency generally only has the effect of not negating the claim.*" The same is true for other conclusions in the sense that even highly consistent or diagnostic findings do not establish the circumstances in which the injuries were inflicted. The medical report here notes that the examining doctor found some symptoms of scarring that the doctor "*would not expect",* but it was opined that those could be explained by being infection-related. The wife's symptoms were viewed as "*highly consistent*" with knife wounds and trauma. That is not in dispute, but does not of itself establish how such injuries were inflicted. That is a matter for the tribunal to assess and it is not for the court to step into the shoes of the decision-maker.

18. Coming back to the tribunal's view that the evidence given was vague, Mr. Moroney submitted that vagueness had not been put to the applicant. First of all, that point was not pleaded so cannot succeed. More fundamentally, a decision-maker is not obliged to stop a witness and say "*you are being vague*". Vagueness is an impression in the light of

all the circumstances, an assessment, a conclusion and a finding. The tribunal is not obliged to come to some sort of draft decision mid-hearing and put it to the applicant. It is the decision-maker's job to assess the evidence and he or she is not obliged to share that assessment with the applicant, either at the hearing, or in some ongoing way, or in draft form, or otherwise, prior to the decision. To say that answer X is vague is an evaluation. Moreover, it is an evaluation that the decision-maker is entitled and obliged to make. It is not some form of surprising new fact that has to be put to an applicant in order to give him or her a chance to refute it. The attempt to inject fair procedures into the actual assessment by the decision-maker of the primary evidence is utterly misconceived.

19. Anyway, even if I am totally wrong about that and additionally even if the point had been pleaded, the onus of proof is on the applicant at all times and there is no evidence that the applicant was not challenged on his evidence. An applicant cannot boot-strappingly launch this sort of point in judicial review, and it is not even arguable in *G. v. DPP* [1994] 1 I.R. 374 terms, because there is no evidence sufficient to ground the point.

20. Separately, it is submitted that the tribunal had not specified exactly how the applicants were vague and what could have been specifically fleshed out. Reliance is placed by the applicants on the judgment of Barrett J. in *V.H. v. IPAT* [2020] IEHC 134 (Unreported, High Court, 12th March, 2020). The written submissions of the respondent suggest that that decision should not be followed and, with great respect to the learned judge, I don't propose to follow it for a number of reasons which I can summarise as follows.

21. *V.H*., for whatever reason, makes no reference whatsoever to Irish caselaw apart from one case on extension of time. In his recent paean to *stare decisis* in *June Medical Services LLC v. Russo,* 591 U.S. ___ (2020) (US Supreme Court, 29th June, 2020), Roberts C.J. made the point (at slip op. p. 4) that "[s]tare decisis *principles also determine how we handle a decision that itself departed from the cases that came before it. In those instances, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of stare decisis than would following" the recent departure.* Adarand Constructors, Inc. v. Peña, 515 U. S. 200, 231 (1995) (plurality opinion). Stare decisis is *pragmatic and contextual, not "a mechanical formula of adherence to the latest decision."* Helvering v. Hallock, *309 U. S. 106, 119 (1940)*." In Ronald Dworkin's metaphor, the law is a chain novel (R. Dworkin, *Law's Empire* (Cambridge, Massachusetts, Harvard University Press, 1986), p. 229); it is not a series of disconnected haiku. Thus, a judgment that itself does not engage with the relevant contrary authority does not automatically outweigh such authority. (*Re Worldport Ltd*. [2005] IEHC 189 (Unreported, High Court, Clarke J., 16th June, 2005) doesn't preclude my not following *V.H*. in that that decision notes (at para. 17) that *"[a]mongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority").*

22. In para. 7 of *V.H.*, the learned judge sets out the tribunal's findings that *"[t]he Appellant was vague in his account of a … 2016 attack on his life, at both his oral hearing and at his section 35 interview."*. The tribunal then went on to provide very specific examples of what was vague, which was that when asked "*to provide further details of the attack*" all the applicant could say was, "*during the communist regime in the '90s the* … [Name Stated] *family was powerful*." Self-evidently that is declining to answer the question. The tribunal goes on, *"[t]he Appellant was asked a further three times for the details of the attack and he simply responded, 'we fought all the time', 'as I said they put a gun to my head' and 'I was threatened by them'*." Again, these small content-free snippets from the applicant self-evidently do not constitute details of the attack. However, despite such a background, at para. 8 the learned judge said, *"[r]egrettably, the court must conclude again that this text seems to it to possess a legal deficiency in that there is no indication why the IPAT found the account of the attack to be so vague as to require further details or even some indication as to what further details it might have expected to be forthcoming. In this regard, the court recalls and respectfully adopts the following reasoning of the United Kingdom: Immigration Appeal Tribunal in* J.B. (Torture and III treatment - Article 3) DR Congo *[2003] UKIAT 12, at para. 7* ... " (then referring to that decision).

23. Unfortunately, this approach raises a number of difficulties. First of all, as mentioned above, there is no reference to any Irish jurisprudence. There certainly are cases in which a finding that an applicant's evidence was vague has been upheld on judicial review: see *e.g. per* O'Regan J. in *O.O. (A Minor) v. Refugee Appeals Tribunal* [2017] IEHC 57 (Unreported, High Court, 9th February, 2017). More fundamentally, there is rich caselaw to the effect that a decision must be viewed in the round and that in particular, decisions on credibility should not be parsed and overanalysed: see *J.B.R. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 288 (Unreported, High Court, Peart J., 31st July, 2007); *O.A.A. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 169 (Unreported, High Court, Feeney J., 9th February, 2007). Cooke J. held in *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 353 (Unreported, High Court, 24th July, 2009) (at para. 11.8), that credibility decisions should "*be read as a whole and the Court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in disregard of the cumulative impression made upon the decision-maker*". That, on one view, could be a description of the exercise attempted in *V.H.*, particularly as in the passage from the tribunal decision quoted at para. 3 of his judgment, the learned judge has broken down the various points made by the tribunal into separately numbered snippets (with numbers for each snippet in square brackets having been added by the learned judge) and examined each in isolation.

24. Secondly, it is neither safe nor legally appropriate for a judge in judicial review proceedings to start second guessing the decision-maker's assessment of the evidence save where a clear illegality is demonstrated. The person who sees and hears the witnesses is in the best position to assess the evidence: see the principles laid down by Clarke J. and Birmingham J., as they then were, referred to above.

25. Thirdly, as the decision clearly states, the decision-maker in the decision challenged in *V.H*. did provide quite some detail and clarity as to what the problem with the applicants' evidence was. Given the clear signposting of those problems, there is no realistic basis to say that anything was lacking in the specification of why the decision was vague. More generally though, there is simply no legal requirement that if a decision-maker concludes that evidence provided *is* vague, that they have to go on to list all the matters that could have been specified by the witness, or indeed any of them.

26. Further, with great respect, the learned judge's reliance in the asylum context on *J.B. (Torture and ill treatment, Article 3) (DR Congo)* [2003] UKIAT 12 at para. 7, is in my view misplaced. That was not an asylum case - it was a decision under art. 3 of the ECHR - what is referred to in the English parlance as "*human rights grounds".* In the torture context there is a particular well-established and rigorous threshold and methodology which has nothing to do with an asylum case such as *V.H*. or the present proceedings. The very paragraph of the UKIAT's decision which is quoted by the learned judge makes that distinction explicit. In para. 7 of *J.B*., the tribunal says, "*we bear in mind that the appeal before us is not about asylum but solely on human rights grounds*." The tribunal goes on to say,*"[t]he Tribunal decision in the case of* Madjidi [v. Secretary of State for the Home Department [2002] UKIAT 02245] *upon which* [counsel] *placed reliance is of no assistance. Besides being fact specific, it was a decision under the Refugee Convention and the dismissal of the appeal did not give the respondent the power to remove the appellant from the United Kingdom"*, again drawing the distinction between refugee cases and art. 3 cases. The tribunal went on, again still remaining within the same para. 7 cited by the learned judge, to expressly refer to the threshold that applies under art. 3 alone and not to asylum, "*whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion*."

27. More generally, the High Court does not feel obliged to specify in detail what exactly a witness could have been more specific about when assessing that evidence has been vague, and it would be contradictory if not maybe hypocritical to require a decision-maker to do so.

28. It is also unclear what the doctrinal source of such an obligation is meant to be. If it relates to an entitlement to reasons, that entitlement is not to every finely granular sub-reason, but only to reasons in the context of the "*broad issues" per* Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 at 76; or the "*broad gist*" of the reasons *per* O'Flaherty J. (Hamilton C.J. and Barrington J. concurring) in *Faulkner v. Minister for Industry and Commerce* (Unreported, Supreme Court, 10th December, 1996), followed by Birmingham J., as he then was, in *P.N. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 215 (Unreported, High Court, 3rd July, 2008).

29. The problem with the kind of exercise suggested by *V.H*. and urged by the applicant here ("you've said the evidence was vague but not precisely how – gotcha") is that *any* reason

is capable of further elaboration, and it is *always* possible to say that a decision could have given further reasons. That is just as true of a High Court decision as of the tribunal or anyone else. The game of "gotcha" is one rigged in favour of the applicant from the off. Costello J. (Haughton and Ní Raifeartaigh JJ. concurring) recently emphasised the "*basic proposition*" that "*[t]he essential duty"* of a judge is to give reasons for decisions *(Protégé International (Cyprus) Ltd. v. Avalon International Management Inc.* [2020] IECA 80 (Unreported, Court of Appeal, 2nd April, 2020) at para. 75), but in that context (and there's no basis to suggest that the standard of reasons in the judicial context should be more lax than that of reasons in administrative decisions), Munby L.J. in *In re A. and L. (Children)* [2011] EWCA Civ. 1611, at para. 35, stated "*I should add that there is no obligation for a judge to go on and give, as it were, reasons for his reasons*." As Kirby J. has said, "*the findings of fact need not be lengthy. They can be confined to the barest outline", (Ex Tempore Judgments – Reasons on the Run* (1995) 25 Western Australian Law Review 213 at p. 226). Once the decision-maker says the evidence was vague, that is the reason for declining to accept it, and that satisfies constitutional and administrative law requirements. To demand details of precisely why is to impermissibly demand reasons for the reasons.

30. There is simply no legal principle that when an account is rejected as vague, the decision-maker has to fill in as to in what precise respect and what exactly could have been said. In any event, in the present case the particular findings are sufficiently clear and reasoned in all the circumstances.

31. A separate point arising from V.H. is relied on by Mr. Moroney to the effect that he complains that the tribunal rejected the applicant's evidence as "*self-serving".* In *V.H*., the learned judge also quashed the decision on the grounds that the tribunal had noted that a document "*is understood to have been obtained for the purposes of the appellant's international protection application*". The learned judge said at para. 5 that "*just because evidence is self-serving is not of itself a basis for rejecting that evidence*", thereby implying that that is how the tribunal decision in that case was be characterised.

32. With great respect, such representation of the finding by the tribunal does not seem to reflect anything that can recognisably be extracted from the tribunal member's comment which is merely a statement of fact. As noted above, decisions must be read in a manner that renders them lawful rather than unlawful, in the context of the presumption of legality noted by Finlay P. as he then was in *Comhaltas Ceoltóirí Éireann*. And even if something being self-serving is not "*in and of itself"* a reason to reject it, it is most definitely part of the overall context. It is perfectly lawful to take the self-serving nature of any evidence or document into account as part of an overall assessment together with other factors, which is all the tribunal member in the decision challenged in *V.H*. seems to have done (see the extract from the tribunal decision in para. 3 of *V.H*., where this was only one of a number of points made by the tribunal member, points which on the jurisprudence need to be viewed in the round, not deconstructed and addressed individually in isolation from the other points). This seems to be an example of the fallacy that just because a decision-maker says something, that amounts to an assertion that the

something is a legal test (the reasoning in *V.H*. in effect being that the tribunal said the evidence was generated for the appeal, the tribunal rejected the appeal, therefore the appeal was rejected in and of itself because the evidence was generated for the appeal). That is unfortunately a misconception. Decision-makers (and judges) must have some latitude in how they structure their decisions, including how they outline the features of the case. Merely because a particular feature is adverted to is not equivalent to a finding that everything (or anything) turns on that feature. Not even all points of law adverted to in a decision are automatically seen by the judge or decision-maker as crucial to the outcome. Consequently, it is unfortunately not possible or appropriate for me to follow *V.H*. under this heading either.

33. There is no basis to say the tribunal here has committed any error.

Unfairness

34. No unfairness has been demonstrated. As noted above, the tribunal's evolving impression and assessment during the course of oral testimony as to whether the evidence being given is vague is not something that has to be put to a witness or in particular an applicant, either midstream at the hearing or at all.

Breach of qualification directive

35. It is pleaded that the tribunal was in breach of art. 3(a) of the qualification directive in that it did not consider relevant country material. That point has not been made out and nor did that objection particularly feature in the oral submissions. The tribunal considered whatever material was submitted to it, and it has not been shown in evidence that there was any other crucial piece of country information that was ignored.

Second legal question: cumulative assessment of credibility

36. The second question presented by the case on behalf of the applicant is *"[w]hether, in the case of a decision that is supported by a number of reasons, one or more of which are unsustainable, the overall conclusion can be upheld, if it cannot be discerned from the decision how much weight should be attributed to each finding".*

37. As none of the reasons are unsustainable, this point simply does not arise.

38. Even if it did arise, there is ample material on which the decision can be upheld. To frame the question of a cumulative assessment as being one where it cannot be discerned from the decision how much weight should be attributed to each finding, is in effect a reversal of the presumption of legality and is an irrelevancy. Decision-makers are not computers that assign 5% of a decision to factor X, 20% to factor Y and 75% to factor Z, and so on. Frequently a bundle of matters come together to reinforce a conclusion, but that conclusion may be "*tenably sustained*" (*B.W. v. Refugee Appeals Tribunal* [2017] IECA 296, [2018] 2 I.L.R.M. 56, para. 69) on some sub-set of those reasons, either because any flawed reasons are insufficiently material, or because *"the flawed fact is simply overwhelmed by the other correct facts"*. No decision-maker is obliged to identify *"how much weight should be attributed to each finding*" and nor is a decision invalid because he or she does not do so. Even if one or more findings are legally infirm, the overall decision may still stand notwithstanding a lack of a statement as to the weight of

each sub-component, if the decision comports with the conclusions in *B.W*. (of which an alleged requirement to specify the weight of sub-components formed no part).

Order

39. The applications are dismissed.