THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 923 J.R.]

BETWEEN

P.O.S. (NIGERIA) AND N.O.S. (A MINOR SUIING BY HIS MOTHER AND NEXT FRIEND P.O.S.)

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 9th day of November, 2018

1. A familiar feature of a reasonably sizeable category of claims for asylum and subsidiary protection is that such claims are made following the failure of an applicant to secure lawful status in the Common Travel Area. Such a situation may legitimately raise the inference that the protection claim is designed to further economic migration rather than to protect against persecution or serious harm. That conclusion may be reinforced if the applicant's account is lacking in candour in relation to his or her immigration history. More widely, a lack of truthfulness as to immigration history of whatever kind may be relevant to the assessment of the credibility of an applicant's account of persecution or serious harm. Occasional suggestions that lies about travel should normally be regarded as peripheral are without any jurisprudential or principled foundation whatsoever. A decision-maker can and must consider all relevant matters, and untruthfulness about something that is capable of verification or assessment is unquestionably relevant to assessment of credibility about something less easily verified. That could include matters such as mendacity, undue hesitation or opacity about matters such as travel arrangements, or undue hesitation or disingenuousness about swearing an oath that one's account is true, just to take two examples. Unless, that is, the asylum and protection world is to be some sort of special reservation outside the laws of rationality; a primary-coloured applicants' playground walled-off from the normal rules of logic, common sense and legal reasoning. In the present case the first-named applicant's credibility was rejected generally, but in addition her failure to disclose her immigration history was held to be implausible, a perfectly lawful finding that only reinforced the general rejection of her account.

2. The first-named applicant was born in Nigeria in 1982. She claims that she became pregnant in Nigeria and was threatened with human sacrifice. She gave a vague account of coming to Ireland without any reference to passing through the U.K. However, it emerged that she was granted a U.K. visa for the period 6th June, 2011 to 6th December, 2011 in Abuja. She failed to inform the Irish authorities of this. When confronted with this information she implausibly disclaimed any, or any significant, knowledge of this visa. However, the U.K. authorities have a record of the first-named applicant's fingerprints, the giving of which self-evidently required her active presentation and participation in person. Consequently, her story that the U.K. visa was organised without her involvement other than perhaps by signing a document is demonstrably false. Mr. O'Halloran's rather unconvincing reply was that "*the cultural norms of Ireland are not those of Nigeria*". Unless one is to disclaim rationality by abandoning the notion of objective fact altogether, it is clear that the applicant's relationship with the truth is somewhat hazy at best.

3. She arrived in Ireland, heavily pregnant, on 9th January, 2012 and applied for asylum. Three days after her arrival the second-named applicant was born and an asylum claim made on his behalf. The claims were identical which makes it somewhat surreal that the complaint is made in the present proceedings that the decisions reached are similar.

4. On 3rd May, 2012, she was informed that the asylum applications would be transferred to the U.K. That transfer decision was appealed but was upheld by the Refugee Appeals Tribunal. The applicants then left Balseskin Reception Centre and absconded, frustrating the transfer order.

5. They re-emerged in June, 2015 following the expiry of the time limit for transfer, with the result that the claims had to be dealt with in Ireland. The first-named applicant gave vague answers about what she was doing for the previous three years. The asylum claims were then rejected. The applicants appealed to the Refugee Appeals Tribunal but on the commencement of the International Protection Act 2015 the claims were referred to the International Protection Office. The IPO rejected the applicants' claims for protection on 26th July, 2017 and 4th August, 2017. They appealed to the International Protection Appeals Tribunal, which rejected the appeals in decisions dated 3rd November, 2017.

6. I granted leave on 27th November, 2017, the primary relief sought being *certiorari* of the IPAT decisions. A statement of opposition was filed on 9th March, 2018.

7. I have received helpful submissions from Mr. Garry O'Halloran B.L. for the applicants and Ms. Grace Mulherin B.L. for the respondents.

Grounds of challenge

8. Ground 1 alleges defects in the credibility assessment. There is simply nothing in this ground. The IPAT considered all relevant matters going to credibility, of which there were very many, in a rational and lawful manner.

9. Mr. O'Halloran relies in written submissions on the decision in *Carciu v. Minister for Justice, Equality and Law Reform* [2003] IEHC 41 (Unreported, High Court, Finlay Geoghegan J., 4th July, 2003). However, that is only a leave decision not a substantive decision and more fundamentally relates to a quite different situation of disregard of allegedly material undisputed facts. Mr. O'Halloran in submissions also complains that the tribunal wrongly failed to consider the applicants' explanations in the light of a UNHCR report entitled *Beyond Proof: Credibility Assessment in EU Asylum Systems* (United Nations High Commissioner for Refugees, Brussels, May 2013). He relies on decisions in *V.Z. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 135, *O.N. v. Refugee Appeals Tribunal* [2017] IEHC 13 (Unreported, High Court, 17th January, 2017) and *A.N. v. Minister for Justice, Equality and Law Reform* [2007] IESC 44 [2008] 2 I.R 48. *A.N.* was a case where the court took guidance from the UNHCR handbook rather than decided that the tribunal was legally obliged to do so. As regards Mr. O'Halloran's other authorities on the point made under this heading, I dealt with these, and the overall point thereby asserted, in an earlier case, *S.A. (Ghana and South Africa) v. International Protection Appeals Tribunal* [2018] IEHC 97 [2018] 2 JIC 0104 (Unreported, High Court, 1st February, 2018). There I pointed out at para. 12

that, in that case, the guidelines were not referred to but there was no evidence that they were ignored and that *O.N.* and *V.Z.* were not cases that held that the tribunal was required to follow, still less refer to, the UNHCR handbook, but rather were ones where the court found that handbook helpful. I also pointed out that *V.Z.* was a case relating to the UNHCR handbook as such, which was a somewhat more definitive document than individual guidelines that may be presented from time to time (para. 13). I also drew attention to Cooke J.'s judgment in *N.N. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 234 (Unreported, High Court, 20th May, 2009) at para. 15 as regards the lack of a basis for a legal obligation to comply with such guidelines. Furthermore, at paras. 14 to 18 of the judgment, I referred to the unrealistic nature of contending that failure to refer expressly to any individual passage in a lengthy guideline produced by a body such as the UNHCR that might be subsequently quoted by an applicant would set the tribunal an impossible task. The document *Beyond Proof* is 283 pages long and the notion that failure to refer to any fragment of such a document would be the basis for *certiorari* would simply set IPAT members up to fail. It is not the role of the judicial branch of government to frustrate the work of any other branch, still that of independent quasi-judicial office holders, but rather ultimately to help such systems to work by applying the appropriate legal principles and thereby clarifying the legal parameters where called upon to do so in an individual case.

10. Unhelpfully, the decision in S.A. is not cited in the applicants' submissions. The case appears in the respondent's submissions and book of authorities but it was not addressed on behalf of the applicants in oral argument either. Posner J.'s judgment in *Gonzalez-Servin v. Ford Motor Company* (No. 11-1665 (US Court of Appeals 7th Cir. 2011) is worth looking at in this regard, including its helpful pictorial representation regarding the need to engage with relevant adverse precedents. Making points that have already been rejected and citing cases that have already been distinguished without an attempt to engage with the adverse authority is not hugely helpful. In the present case I would apply *S.A.* and reject the point made under this heading. The point in any event is somewhat undermined by the fact that the tribunal did make express reference to the UNHCR guidelines on child asylum.

11. Ground 2 alleges a lack of clarity in the decision regarding the U.K. visa. There is absolutely no lack of clarity in that decision. It reinforces a conclusion independently arrived at by the tribunal. Reliance is placed on behalf of the applicant on the decision of MacEochaidh J. in *R.O. v. Minister for Justice and Equality* [2012] IEHC 573 [2015] 4 I.R. 200, although no reference to the reported version of the case is made the applicants' submissions. More significantly however, no reference is made to my attempt to finesse the conclusions of that case in my judgment in *I.E. v. Minister for Justice and Equality* [2016] IEHC 85 [2016] 2 JIC 1505 (Unreported, High Court, 15th February, 2016) (paras. 34-37). Fundamentally, however, the point simply does not arise on the facts because as I say, the decision under this heading is in fact quite clear.

12. Ground number 3 complains of a failure to have regard to all material before the IPAT. That complaint has not been made out: see *G.K. v. Minister for Justice and Equality* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401 *per* Hardiman J.

13. Ground 4 complains that the decision contains unfair or irrational findings that cannot be severed. This formulation of this ground is contrary to O. 84 r. 20(3) of the Rules of the Superior Courts, in the sense that it fails to particularise which findings are unfair, but in any event there are no such findings so the point does not arise.

14. Ground 5 complains that the tribunal erred in "*foreclosing on speculation*" in relation to future harm. Leaving aside the fact that I had previously taken the view that the language of foreclosing on speculation is unhelpful, the obligation to consider future harm only arises in respect of facts as found or accepted by the tribunal. No such facts in the present case give rise to an inference of possible future harm.

15. The applicants' reliance on the decision of Cooke J. in *M.A.M.A. v. Refugee Appeals Tribunal* [2011] IEHC 147 [2011] 2 I.R. 729 is misplaced for the same reason that I rejected this point in a recent decision of *D.U. (Nigeria) v. International Protection Appeals Tribunal* (Unreported, High Court, 6th November, 2018). In that case I held that where a fact alleged by an applicant is not accepted by the tribunal, a need to consider future risk based on that alleged fact simply does not arise, also citing the judgment of MacEochaidh J. in *M.M..A. v. Refugee Appeals Tribunal* (Unreported, High Court, 13th February, 2013) and *S.W.A. v. Refugee Appeals Tribunal* [2017] IEHC 40 (Unreported, O'Regan J., 30th January, 2017). Again, unhelpfully, no reference to *D.U.* was made, albeit that in fairness to the applicants, while their lawyers are familiar with the *ex tempore* version of that ruling, the written version of that judgment has not yet been circulated.

16. Ground 6 alleges that the decision regarding the minor is *pro forma* and primarily a cut and paste of the mother's decision. It is alleged that the tribunal has applied the principle of family unity against the minor rather than in his favour. The opaque nature of this ground illustrates its lack of coherence. Of course the child's case is similar to the mother's and the decision is naturally similar. No unlawfulness has been demonstrated in this regard. The principle of family unity is not infringed and is in essence misunderstood in the applicants' pleadings. That principle benefits a child where a parent is granted protection but has limited or no relevance if the parent's application is rejected, especially where the child makes his or her own protection application which is also considered. Mr. O'Halloran relies on Article 42A of the Constitution but that does not compel a favourable protection decision. The applicants' submission seems to anticipate the deportation stage, a matter that does not arise here, but, with that caveat, it is certainly not the case that children cannot be deported. Any state that declines to deport children illegally present, or born on its territory without a legal right to remain, is undermining its borders, its sovereignty and potentially its future stability, as well as its consequent capacity to assist persons in genuine need of international protection.

Discretion

17. It is well-established that judicial review is discretional remedy (see the judgment of Lord Carnwath in *Youssef v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 and my judgment in *Li v. Minister for Justice and Equality* [2015] IEHC 638 [2015] 10 JIC 2102 (Unreported, High Court, 21st October, 2015)). In the present case the applicants, by evasion, frustrated the operation of the State's protection legislation under which the decision now impugned was made (see by analogy *per* Clark J. in *O.S.D. v. Minister for Justice and Equality* [2010] IEHC 390 (Unreported, High Court, 30th July, 2010)).

18. Secondly, the first-named applicant demonstrably misled the protection decision-making bodies as regards her account of travel by denying that she had actively facilitated the UK visa (see *O.S.D. v. Minister for Justice and Equality* and *R.C. v. Refugee Appeals Commissioner* [2010] IEHC 490 (Unreported, Clark J., 15th July, 2010)).

19. As regards the child applicant, by analogy with *Butt v. Norway* (Application no. 47017/09, European Court of Human Rights, 4th December, 2012), a child must be generally associated with the conduct of the parent for general immigration purposes (see also *P.O. v. Minister for Justice and Equality* [2015] 3 I.R. 164 [2015] IESC 64, *C.M. v Minister for Justice and Equality* [2018] IEHC 217 (Unreported, High Court, 25th April, 2018) (para. 20) and *K.R.A. v. Minister for Justice and Equality* [2017] IECA 284 (Unreported, Court of Appeal, 27th October, 2017)). There may be limited exceptions to this for the purposes of interlocutory injunctions (see *K.R.A.*), but for substantive immigration decisions, to hold otherwise would be to allow a parent to hide behind the child and to facilitate the evasion and obstruction of the State's immigration and protection legislation.

20. The applicants evasion and absconding (albeit that the second-named applicant is not personally to blame, but his position is derivative) completely frustrated the proper functioning of the Dublin system. Their protection claims should have been dealt with in the U.K. Having entirely frustrated the operation of the Dublin system, I would refuse relief on discretionary grounds even if the IPAT had erred, which it did not. The first-named applicant's excuses for the evasion, such as that she was afraid, are paper-thin and legally meaningless. If the court were to accede to such a plea, which could be maintained in one shape or form by every applicant, it would undermine the system prescribed by the Oireachtas, contrary to the separation of powers and the rule of law. The applicants should never have been assessed in the Irish system and have only wound up here through their unlawful conduct. Such conduct precludes relief by way of judicial review against the outcome of a system they should never have been entitled to avail of in the first place but for their disregard of the law of the State and the integrity of its borders.

Order

21. The first-named applicant has told a vague and implausible story at all stages and has been rejected at every stage of the process. She unlawfully obstructed the proper functioning of the State's immigration and protection legislation. The second-named applicant's position is entirely derivative. The applicants were only here in the first place on the precarious basis of the first-named applicant having arrived without permission and both applicants having made claims for international protection that were held to be unfounded and incredible. No basis to quash the latest of the many negative decisions directed at the applicants has been made out and the proceedings are accordingly dismissed.