THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 371 J.R.]

BETWEEN

A.A.L. (NIGERIA)

APPLICANT

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 21st day of December, 2018

1. The applicant claims to have been born in Nigeria in 1980. He claims that his mother was a Christian and his father a Muslim. He claims the father converted to Christianity and that as a result the family were attacked and the mother killed in 2007. He travelled with the father to London for two weeks in 2010. He claims that the church where the father worshipped was bombed in December, 2011. He went to the U.K. thereafter. He arrived in Ireland on 16th January, 2012 and applied for asylum on 19th January, 2012. That application was deemed withdrawn on 22nd October, 2013 when, contrary to statutory obligations, he left direct provision accommodation without a forwarding address. On 20th March, 2017, a deportation order was made. He then applied for subsidiary protection on 24th April, 2017. The deportation order was revoked on 29th May, 2017 in the light of the subsidiary protection application.

2. He was interviewed on 21st June, 2017, when he was unable to give dates of many of the key incidents of his account and said that he was "*not mentally ok*". The International Protection Office rejected the credibility of his account. On 20th October, 2017, a notice of appeal was submitted to the IPAT. On 10th April, 2018, an oral hearing took place, Ms. Lisa McHugh B.L. appearing for the applicant. On 24th April, 2018, the IPAT rejected the appeal. The tribunal made a series of adverse credibility findings which, as it is put in the applicant's written submissions at para. 17, were such as to be "*reaching a crescendo at para. 4.11 wherein the IPAT finds* 'this man's known and externally verified actions show that his word is not a trustworthy source'". The tribunal also noted at para. 4.6 that no medical or psychological evidence was proffered.

3. I granted leave on 10th May, 2018, the primary relief sought being *certiorari* of the IPAT decision. A statement of opposition was filed on 12th October, 2018. I have received helpful submissions from Mr. Mark de Blacam S.C. (with Mr. Garry O'Halloran B.L.) for the applicant and from Mr. Anthony McBride S.C. for the respondents. Mr. de Blacam confirms that the applicant's argument is confined to ground number 3.

The applicant's pleadings

4. Ground 3 states "*in dismissing out of hand the Applicant's explanations of suffering mental disability in response to allegations put that his credibility was undermined by contradictions…the Tribunal acted in breach of not only the UNHCR handbook and the International Protection Act 2015 but also provisions of the Charter of Fundamental Freedoms and the European Convention on Human Rights with respect to the protection of the moral integrity of the Applicant and to treat him in a manner which is non-discriminatory in light of the Applicant's repeated disclosures with regard to his mental health".* The word "*disclosures*" in this ground is inapposite. A more accurate word would be assertions. What is notable is that the applicant provided no medical evidence of mental illness or disability. Furthermore, the premise of the ground is incorrect. The applicant's explanations were not dismissed "*out of hand*", which implies flippantly or without due consideration, or as defined in the *Shorter Oxford Dictionary*, 3rd ed. (Oxford, 1973), "*straight off, ex tempore*".

5. The applicant's explanations were simply rejected. That does not amount to dismissal out of hand, albeit that they were rejected without the sort of additional investigation that the applicant now thinks in retrospect should have been afforded having received a negative decision, but that is not dismissal out of hand. The claim of "*breach*" of the UNHCR handbook is not cognisable in Irish law. Likewise the ECHR is not directly cognisable as implied by ground 3 as pleaded. It only arises through the European Convention on Human Rights Act 2003, which is not referred to in ground 3. Insofar as breach of the 2015 Act and the Charter are concerned, the claim is inadequately particularised in that no specific provision is identified. The ground does not comply with O. 84 r. 20(3), so it would be inappropriate to grant relief in any event.

6. The gist of Mr. McBride's difficulty with ground 3 was that it did not specify what the tribunal should have done. He submits that the ground "*does not plead, as the Applicant now seeks to argue, any substantive case that the Tribunal erred in not applying herein a special procedure for mentally and emotionally disturbed applicants that is drawn from the UNHCR handbook"*. The pleadings are certainly inadequate on any view. The applicant cannot succeed on the ground as drafted, but if I am wrong about that I will proceed to consider the application on the merits.

The applicant did not make this point to the tribunal

7. The second fatal obstacle to the applicant succeeding is set out at para. 22 of the respondent's written submissions - the applicant did not make any point to the tribunal about his mental incompetence. At the instance of his present solicitors, he raised ten grounds before the tribunal and none of those mentioned the UNHCR guidelines regarding mental conditions. The subject was not referred to in submissions or otherwise at the tribunal hearing by or on behalf of the applicant. It is not open to an applicant to make a point of this nature for the first time to the court not having made it to the decision-maker: see *A.J.A. (Nigeria) v. International Protection Appeals Tribunal* [2018] IEHC 671 (Unreported, High Court, 14th November, 2018). If I am wrong about all of the foregoing, I will go on to consider the point, such as it is.

There was not and still is no evidence that the applicant has a medical condition

8. The tribunal member at para. 4.17 says that "*there is not a shred of evidence for such 'mental weakness'*". That was a finding open to him. The applicant failed to put medical information before the tribunal to show that he had a genuine medical condition. The tribunal is entitled to reject the applicant's credibility. Mr. de Blacam predictably majors on the "*shared duty*" of the tribunal, but this misunderstands the meaning and scope of the shared duty. In the absence of evidence as to a mental condition, it does not seem to

me that the shared duty argument can get off the ground.

9. Section 23(1) of the 2015 Act provides that where, in the performance by the Minister or an international protection officer of his or her functions in relation to an applicant, "*a question arises regarding the physical or psychological health of the applicant"* the Minister or the officer may require an applicant to be examined. Mr. de Blacam submits that, at absolute minimum, the tribunal should have raised the issue of the applicant's mental health with the applicant's lawyers. That submission falls flat because the applicant's claims of confusion were there from day one, certainly well before the notice of appeal was lodged to the tribunal, and they were not news of any kind to the applicant or his legal representatives. Mr. de Blacam submits that "*if you accept that there was a mistake by the applicant's lawyers and this was an issue that should have been raised by the applicant's lawyers, the Tribunal, because it has an inquisitorial function, must investigate an issue of it calls for investigation*". The premise of this argument has not been established. If a party does not raise an issue, the normal inference is that there were no sufficient grounds to raise that issue. A party cannot come to court and suggest that there was a mistake without some sort of evidential foundation. The applicant has not pleaded in the present judicial review that his lawyers erred. The notion of a mistake was introduced for the first time in submissions. Had the applicant succeeded at the tribunal, he would not have regarded the approach taken as a mistake and I do not think I can regard it as one. He has not put in any evidence, even at this stage, that he has any medical condition. There is no formal acknowledgment or evidential foundation for the position now being adopted by counsel that the applicant, his solicitors who acted at all times and his current legal team regard the acts of the same solicitors and different counsel at a previous time as a mistake. As Mr. McBride submits at para. 17 of his written submissions, "*the applicant relies on his own hearsay and self corroboration to supply the place of actual evidence that he is mentally disordered*". Even if there had been a medical report corroborating the applicant's medical condition, that would have to reach a significant threshold before the procedures in the UNHCR handbook should be operated: see *R.A.E. (Cameroon) v. Refugee Appeals Tribunal* [2013] IEHC 538 (Unreported, Clark J., 30th September, 2013). Reliance was also placed on A.*D. v. Refugee Appeals Tribunal* [2015] IEHC 779 (Unreported, Faherty J., 24th November, 2015), but that may have arisen on different facts (see para. 53). The applicant is thus at two removes from being able to make this argument. If I am wrong about the foregoing in holding that the applicant cannot in principle succeed due to the lack of evidence, I will consider the shared duty argument.

The tribunal is not a fully inquisitorial body but operates a well-established shared duty, which does not displace the applicant's primary responsibility for personal factors

10. Even with a shared duty, the primary duty to verify factors personal to an applicant rests on the applicant. The State through the tribunal may have a heightened duty to verify factors relating to general country situations. Reliance was placed on the decision of Peart J. in *A.O. v. Refugee Appeals Tribunal* [2004] IEHC 107 (Unreported, High Court, 26th May, 2004) which cited with approval a portion of the judgment of the Federal Court of Australia in *Kuthyar v. Minister for Immigration and Multicultural Affairs* [2000] FCA 110. Bearing in mind that *A.O.* was only a leave decision, I am free to form my own view on *Kuthyar*, which I would be inclined to think was not an entirely satisfactory decision. However, the unsatisfactory features are not ones particularly relied on by Peart J., so *A.O.* cannot be even tentative authority for those features. *A.O.* was dealing with a situation where part of the claim actually made by the applicant was not dealt with.

11. Einfeld J. in *Kuthyar* said at para. 39 that: "*With all the benefits for the ascertainment of truth available in adversarial proceedings, and this society's experience with them, rejection of cases as fabricated and fraudulent is not common. It should not be resorted to by tribunals which are both interrogator and judge without ample grounds*." Applied in the immigration context, these naïve remarks seem almost other-worldly. For a much more realistic view of the problems of fraud and fabrication in the world of immigration and international protection claims, one should turn to the judgment of the U.S. Court of Appeals for the 9th Circuit in *Angov v. Holder* (Case No. 0774963, 9th Circuit, December 4, 2013), which I have referred to, *inter alia*, in *T.T. (Zimbabwe) v. International Protection Appeals Tribunal* [2017] IEHC 750 [2017] 10 JIC 3105 (Unreported, High Court, 31st October, 2017). Any recent survey of UK (see *Sathivel v. Secretary of State for the Home Department) [2018] EWHC 913 (Admin))* or Irish (see *J.A. (Pakistan) v. Minister for Justice and Equality* [2018] IEHC 343, *Martins v. Minister for Justice and Equality* [2018] IEHC 268, *Bebenek v. Minister for Justice and Equality* [2018] IEHC 323) law would confirm that problems of lack of candour in the immigration area are not at all isolated, and may require specific measures to ensure that the court is not misled.

12. Einfeld J. went on to say at para. 81 that: "*The Tribunal reached its conclusion that the applicant's account was "not true" based on a finding of doubts, implausibilities and improbabilities, without entertaining other major possibilities thrown up by the evidence provided. The conclusion was reached, not on the basis of evidence, but on the Tribunal member's feelings about what was plausible*." That has some of the appearances of a tendentious characterisation of the decision being challenged in that case. It is hard to immediately see how such an analysis is distinguishable from the conclusion that Einfeld J. simply did not agree with the statutory decision-maker who saw and heard the applicant.

13. In any event Mr. de Blacam relies on the *Kuthyar* decision as authority for the proposition that the tribunal is inquisitorial. It is certainly not inordinately in question that the tribunal's methodology has some inquisitorial features. The fact that it is inquisitorial to some extent does not make it responsible for everything that occurs.

14. Reliance is also placed on *X v. Refugee Appeals Tribunal* [2007] IEHC 422 (Unreported, Herbert J., 11th December, 2007) to the effect that the tribunal erred in not dealing with a particular point originally made by an applicant even though it did not seem to be contained in his notice of appeal. The grounds of appeal in that case were extremely laconic and unclear; nor is it clear from the judgment as to whether Herbert J. considered that the point which was not dealt with did properly come within the grounds of appeal. If not, the decision cannot be correct having regard to the Supreme Court decision in *M.A.R.A. (Nigeria) v. Minister for Justice and Equality* [2014] IESC 71 [2015] 1 I.R. 561, but if so, the decision therefore only stands from the proposition that the tribunal has to consider a point actually made by an applicant.

15. In *Idiakheua v. Minister for Justice, Equality and Law Reform* [2005] IEHC 150 (Unreported, High Court, 10th May, 2005) (another leave decision), Clarke J., as he then was, said at p. 8: "*It should be recalled that the process before the RAT is an inquisitorial one in which a joint obligation is placed on the applicant and the decision maker to discover the true facts*." However, that was in the context of the obligation of the tribunal to bring potentially adverse matters to the attention of a party, which Clarke J. thought could be higher than that of a purely adversarial body. Mr. de Blacam seeks to generalise from the mere use of the word "*inquisitorial*" to suggest the tribunal has a free-ranging duty to investigate matters personal to the applicant. *Idiakheua* does not purport to be an exhaustive examination of the shared duty. The word "*inquisitorial*" is used simply as a shorthand.

16. There is a developed set of approaches at EU level to the shared duty. In Case C-277/11 *M.M. v. Minister for Justice and Equality* (22nd November, 2012), the Luxembourg court said at para. 65 that: "*Under Article 4(1) of Directive 2004/83, although it is generally for the applicant to submit all elements needed to substantiate the application, the fact remains that it is the duty of the Member State to cooperate with the applicant at the stage of determining the relevant elements of that application*." The court went on to say at para. 66 that: "*This requirement that the Member State cooperate therefore means, in practical terms, that if, for any*

reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled. A Member State may also be better placed than an applicant to gain access to certain types of documents." While phrased in general terms, the note sounded by the CJEU here is to ask who is "*better placed*" to substantiate certain elements.

17. The shared duty is thrashed out further in the judicial analysis published by the European Asylum Support Office (established by Regulation (EU) 439/2010) and prepared by the International Association of Refugee Law Judges – Europe, *Judicial Analysis*, "E*vidence and Credibility Assessment in the Context of the Common European Asylum System"*, 2018. That document notes that "*taking into account art. 4(1) (of the qualification directive) as well as the subsequent case law of the CJEU and UNHCR documents, the European Court of Human Rights has noted that* 'it is the shared duty of an asylum-seeker and the immigration authorities to ascertain and evaluate all relevant facts of the case in the asylum proceedings'" citing the Strasbourg court's decision in *J.K. v. Sweden* (Application no. 59166/12, European Court of Human Rights, 4th June, 2015) para. 96. At para. 4.2.5, the judicial analysis states "*Member States have an investigative burden with regard to the information listed in Article 4(3) QD (recast) which is separate from the applicant's duty to substantiate the application. Article 4(3)(a) requires the assessment of applications for international protection to take into account* 'all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied'". *This norm applies, inter alia, to obtaining information about the country of origin. Obtaining such information is part of the Member State's investigative burden*".

18. In *B.B. (India) v. International Protection Appeals Tribunal* [2018] IEHC 741 (Unreported, High Court, 14th December, 2018) I considered this issue insofar as it related to the shared duty in the context of the internal protection alternative. I referred to the discussion in Hailbronner and Thym in *EU Immigration and Asylum Law,* 2nd ed. (C.H. Beck/Hart/ Nomos, 2016) at pp. 1164 to 1165 by Judge Harald Dörig, regarding art. 8 of the qualification directive (recast) (although the same point arises in relation to the original directive), in which he referred to a judgment of the German Bundesverwaltungsgericht (Federal Administrative Court) of 10th May, 2004 No. 9 C 434.93, *Neue Zeitschrift für Verwaltungsrecht* 1994, p. 1123, to the effect that "*it is the general duty of an applicant to explain that his fear of persecution extends to the territory of his home country as a whole. But in the case of an IPA [internal protection alternative], this only means that he has to describe facts and events which fall in his personal sphere*." That illustrates, albeit in the international protection context, the distinction between personal matters and general country matters.

19. Mr. de Blacam submits that *Whitehorn v. R.* [1983] HCA 42 encapsulates the difference between inquisitorial and adversarial systems on the basis that the role of a judge in an adversarial trial "*is not an inquisitorial role in which he seeks himself to remedy the deficiencies of the case on the applicant's side*." He seeks to extrapolate from that a free-roving duty on the tribunal or any inquisitorial body to remedy the deficiencies of the case on the applicant's side. That of course is reading far too much into a comment made in a different context. Mr. de Blacam's characterisation of the tribunal as simply an inquisitor is not accurate. There is a spectrum of types of inquisitorial process. International protection decision-making is not to be structured purely on the basis of *ad hoc* judgments of the Superior Courts of Ireland. It is a *sui generis* procedure, which rests on the bedrock of EU asylum and subsidiary protection law set out in European directives and supplemented by recognised EU guidelines. It is not up for reinvention in every new case. The mere use of the word "*inquisitorial*" as shorthand in some of the caselaw does not either sweep away or affect in any way the well-established meaning of the shared duty.

Summary of shared duty

20. The shared duty in the light of the foregoing discussion can be summarised as follows:

(i). Under art. 4(1) of the directive 2004/83/EC it is generally for the applicant to submit all elements needed to substantiate the application: see *M.M.*

(ii). It is the duty of a Member State to cooperate with the applicant at the stage of determining the relevant elements of the application: see *M.M*. This involves cooperation with the applicant as opposed to a fully inquisitorial procedure. It also involves identifying the elements of the application actually made, not an application that the applicant could have made but did not.

(iii). The elements of the application fall broadly into two categories: the country situation and factors personal to the applicant.

(iv). Insofar as information regarding the country situation is concerned, Member States have an investigative burden with regard to the information listed in art. 4(3) of the qualification directive: see EASO judicial analysis. This is closer to the traditional understanding of the inquisitorial function.

(v). A Member State may also be better placed than an applicant to gain access to certain types of documents: see *M.M*. This is more likely to arise in relation to country documentation. State protection bodies are not in a position to obtain documents personal to an applicant because attempting to do so identifies the applicant to third parties as a protection seeker, contrary to the International Protection Act 2015, s. 26.

(vi). Insofar as factors personal to the applicant are concerned, the primary responsibility to describe the facts and events which fall into his or her personal sphere is that of the applicant: see authority cited in *B.B.A. (India).*

(vii). If the applicant fails to assemble the elements of his or her claim that are personal to him or her, the State therefore has only a limited role in supplying the deficit, as it is unlikely to be in a "*better position*" to do so than the applicant (see *M.M.*).

Order

21. The application is dismissed.