[2019] IEHC 699

THE HIGH COURT

JUDICIAL REVIEW

[2019 No. 21 J.R.]

BETWEEN

E.L. (ALBANIA), R.B. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND E.L.), K.B. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND E.L.), AND D.B. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND E.L.)

APPLICANTS

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of October, 2019

1. The applicants, who are an Albanian mother and her three children, challenge the validity of a decision of the International Protection Appeals Tribunal under s. 46 (3)(a) of the International Protection Act 2015 which dismissed their appeals against the refusal of protection. The challenge turns on the manner in which the tribunal dealt with country of origin information.

Facts

2. The first-named applicant's husband is Albanian, although apparently he moved to Kosovo when very young. He applied for asylum in the State around 2000, stating that he was Kosovan. That application was refused, and a deportation order was made in 2002. The husband was due to present for deportation on 5th July, 2002 but failed to do so and was classified as an evader. He returned to Albania for a period thereafter.

3. The wife says that from October, 2008 onwards she was working as a journalist in Albania and suffered various threats, particularly as a result of reporting on election corruption. While the tribunal did not fully accept every aspect of her account, it did accept that she worked as a part-time employee of a news organisation from October, 2008 to April, 2009 and that she wrote an article referred to at para. 4.3.3 of the decision, which was related specifically to electoral corruption. While she was in her late teens at that time, it does not follow from that that she could not have been doing sensitive or controversial journalistic work. The tribunal's approach here, which in effect was to classify her as a minor player because of her age, is irrational. Nor does it acknowledge that different countries may have different cultural contexts and practices and that in certain countries, persons may be given responsible positions at a younger age than would be the case in other countries.

4. The first-named applicant met her husband, the father of the second to fourth-named applicants, in Albania in January, 2009 and they married in August, 2009. The first-named applicant claimed that as a result of her journalistic activities there were continuing threats against her, culminating in threats to kill made by telephone. She said in her questionnaire at question 62 that she was threatened in the following terms: *"little whore you know we are able to kill you, make you disappear, and nobody would care about you, worthless thing".*

5. The husband and wife then applied for visas to come to Ireland. On 7th April, 2010, the Irish embassy in Athens emailed indicating that the visas were ready for collection. One of the curiosities of the case is how the husband was able to get a visa given that he was the subject of a deportation order. The visa applications were produced to me and appear to have been made on the basis that the parties were not married and had not been to the State earlier. To the husband's credit he used his correct name and date of birth, so that rather puts the ball in the Minister's court. Inferentially, no meaningful check would appear to have been made by the Irish authorities against the existence of a deportation order when deciding to issue the visas. The first-named applicant's instructions, as conveyed to the court by her legal representatives, were that the visa applications were handled by an agent and that she was a stranger to the incorrect details used in those applications. There was no formal evidence by either side on this issue so the fact that there are inaccuracies in the visa applications should not be held against the applicants. Indeed all other things being equal, the fact that the applicants used their correct personal details is corroborative of their instructions as conveyed to me that any errors were not of their engineering.

6. The purpose of the visas appears to have been to attend a conference on issues relating to caring for the elderly, as part of a delegation from the Albanian Conservative Party, which held a meeting with elected representatives of Fine Gael at the conference: see question 62 of the interview. The applicants' permissions were valid until 15th May, 2010, although as will become clear they did not in fact leave by that date.

7. On 29th April, 2010, the husband and wife arrived in the State on these visas, the first-named applicant being pregnant at that point. The first child was born in July, 2010, the second child in December, 2011 and the third child in September, 2014. On 19th September, 2014, shortly after the birth of the third child, the husband's solicitors applied for leave to remain. That was in effect a revocation application, although it was not described as such. That was refused on 16th February, 2015.

8. On 24th April, 2015, the applicants applied for asylum. The husband appears to have remained in the State without status. On 17th June, 2015, the husband reapplied for revocation by a letter sent by his present solicitors. That was acknowledged on 30th June, 2015, with the Department noting that he was an evader. No decision appears to have been taken on the revocation application to date.

9. In the meantime, the Refugee Applications Commissioner recommended that the applicants be refused asylum. That decision was appealed to the Refugee Appeals Tribunal and following the commencement of the 2015 Act, the International Protection Office considered the applicants' eligibility for subsidiary protection and refused that application. The IPO also refused permission to remain under s. 49(3) of the 2015 Act on 16th February, 2018.

10. While not specifically challenged in the present proceedings, the refusal of leave to remain by the IPO seems seriously flawed for a number of reasons, of which two are particularly striking.

11. Firstly, the decision says that "*apart from the birth certificates for two of her children which state they were born in Ireland*", there was insufficient evidence that the first-named applicant was resident in Ireland since 2010. But the expression "apart from the birth certificates" is a tendentious sleight of hand because the birth certificates are very weighty evidence of presence in Ireland. If there was any doubt about it, the various testimonials submitted at the review stage would certainly back up the applicants' claims of continuous presence in the State and presumably will be considered if the need for a review arises in due course.

12. Secondly, the leave to remain decision claims that "*the applicant has submitted an Albanian marriage certificate dated 30/08/2010… this information suggested the applicant has travelled back to Albania*". But the certificate suggests nothing of the sort. The date of the marriage is stated to be in 2009. The year 2010 was only the date of the issue of the certificate; and there is nothing to suggest that the Albanian authorities required the applicants' personal presence in that country in order to issue the certificate. The s. 49 decision thus seems to be based on a very shoddy and superficial reading of the material on behalf of the Department, resulting in a manifestly incorrect analysis.

13. The applicants then appealed the protection refusal to the tribunal. That appeal was rejected on 12th December, 2018. On 21st December, 2018, the applicants submitted an application for review under s. 49(7) of the 2015 Act, and that has yet to be decided upon.

Procedural history

14. On 15th January, 2019 the present proceedings were filed, the primary relief sought being an order of *certiorari* directed to the decision of the tribunal. I granted leave on 21st January, 2019. In doing so, I extended time having regard, among other things, to the intervention of the Christmas vacation. Sensibly, the respondents have not made an issue of that in the statement of opposition. That statement was filed on 22nd March, 2019 and I have now received helpful submissions from Mr. Michael Lynn S.C. (with Mr. David Leonard B.L.) for the applicants and from Mr. Glen Gibbons B.L. for the respondents. On 31st July, 2019, I gave an *ex tempore* ruling allowing the application and now take the opportunity to give a more detailed written judgment.

Ground 3: alleged failure to provide adequate reasons

15. It makes most sense to start consideration of the matter with ground 3, which alleges that: *"Because of the ambiguity of the words used to express a finding regarding there being no COI showing that the first applicant will be persecuted if she returns to work as a political journalist in Albania, the Tribunal has acted in breach of constitutional justice and in breach of s. 46(6) of the 2015 Act".*

16. The tribunal did not accept that the first-named applicant was a *"key political journalist*". The problem with reading from that finding to the conclusion that the first-named applicant was not at risk is that the country information does not indicate that one has to be a "*key"* political journalist in order to face a risk. The most problematic part of the tribunal's decision was at para. 4.3.10, where the tribunal member said that "*The Tribunal*

does not accept the Appellant faces any fear of persecution as alleged or at all. If the Appellant wishes to pursue a full time career as a journalist in Albania there is no country of origin information setting out the Appellant will be persecuted". That analysis is flawed for a number of reasons, but one can begin with the fact that there is an unacceptable degree of ambiguity in this rather crucial finding. Insofar as it can be said to contain reasons, the reason asserted is that there is no country information which shows that the first-named applicant will be persecuted. Literally this means there is no country information relating to the applicant specifically and personally. The most natural meaning of the phrase used is rather that the tribunal considers that there was no country information indicating a risk of persecution to political journalists in Albania. The decision is unacceptably unclear as to whether the tribunal member meant that or alternatively meant that there was country information showing that there was such a risk but that did not establish a risk in the case of this particular applicant. If the latter, then there is a complete lack of articulated or apparent reasoning as to why that is so. This is particularly fatal in a context where the constitutional requirement for reasons is reinforced by s. 46(6) of the 2015 Act which states that "*a decision of the Tribunal under subsection (2) or (3) and the reasons for it shall be communicated by the Tribunal to the applicant concerned and his or her legal representative (if known), and the Minister".*

Ground 1: alleged material error of fact and failure to consider relevant country information

17. Turning back to ground 1, this ground alleges that "*If the finding made by the Tribunal that there is no COI setting out that the first applicant will be persecuted if she were to work again as a political journalist in Albania means the Tribunal understood that there was no COI that indicated a risk of persecution to political journalists in Albania, the Tribunal materially erred in fact and failed to consider relevant COI before it that showed such a risk".*

18. As noted above, the wording of the crucial finding at para. 4.3.10 is obscure. Read literally, it suggests that the appeal is being rejected because there is no country information specific to the first-named applicant personally. It appears unlikely that the tribunal meant something as ridiculous as that as a reason for rejecting the claim, albeit that that is what the actual words used by the tribunal mean.

19. The respondents' interpretation was that the first-named applicant was not the type of journalist likely to be at risk of persecution in Albania because of the finding that she did not work as a key political journalist. The decision does not say that and it would be adding to the decision to imply that. Indeed, it would be a strange and artificial exercise to give the tribunal decision the meaning urged by the respondents, namely that the forward-looking risk must be assessed in the context of the first-named applicant working part-time as low-profile journalist. Given that it is accepted that the first-named applicant *was* a journalist, one can reasonably anticipate that she might well be working part-time if, as was the case at the material time, she had small children. But on a forward-looking test one could not assume that she would always work part-time and therefore would always be a low-profile journalist.

20. But the more natural meaning of the expression used is that there is no country information that political journalists will be persecuted. That is clearly not the case and there was a wealth of material before the tribunal to the contrary that included reference to the US Department of State Report on Human Rights Practices 2017 – Albania, published on 20th April, 2018, which referred *to "intimidation of journalists driven by financial and political interests; and pervasive corruption in all branches of government"*. Accordingly, the decision is to be set aside on this ground also.

Ground 2: alleged error of law by applying erroneously high standard of proof

21. Ground 2 alleges that "*If the finding that there is no COI setting out that the applicant will be persecuted if she returns to work as a political journalist in Albania means that the Tribunal considered the relevant COI showing risk but considered that it does not prove that the first applicant will be persecuted, IPAT erred in law by applying an erroneously high standard of proof".*

22. As noted above, the tribunal finding was that there was no country information setting out that the first-named applicant "*will be persecuted*". The standard of proof regarding past persecution is the balance of probabilities, and that regarding future persecution or risk of serious harm is whether there is a reasonable chance of persecution or sufficient reasons for believing that the person concerned would face a real risk of serious harm: see *M.E.O. (Nigeria) v. International Protection Appeals Tribunal* [2018] IEHC 782 [2018] 12 JIC 0714 (Unreported, High Court, 7th December, 2018). While the respondents' written legal submissions on this issue conclude with the rather blustering assertion that *"it is clear that the correct legal standard was applied by IPAT*", that defensive display of confidence is misplaced. There is a time and a place for the phrase *"it is clear that*", but this is not it. Again, the applicants are entitled to succeed under this heading because the standard of proof as phrased and conceptualised by the tribunal member pitches the test at an unduly high level. In that regard, the judgment in *V.K. v. Minister for Justice and Equality* [2019] IECA 232 (Unreported, Court of Appeal, 31st July, 2019) is apposite, where Baker J. speaking for the Court of Appeal said at para. 109 that *"words do matter, and if the language of the Minister departed in its emphasis, tone, and possible import from that in the case law, it seems to me that [the learned trial judge] was correct to grant* certiorari". Such an observation is equally applicable to the present case.

Ground 4: alleged failure to assess credibility in the context of relevant and accurate COI

23. Ground 4 alleges that "*The finding that the first applicant's evidence of past persecution for having published political articles as a journalist is not credible was made unlawfully because the Tribunal made this finding in the context whereby it was of the erroneous view that there was no COI to support the claim that political journalists face a risk of persecution in Albania; the Tribunal failed to make this finding in the context of relevant and accurate information about Albania and breached s. 28(4)(a) and (b) of the 2015 Act".*

24. It follows from the problem discussed above that the finding in relation to past persecution was contaminated by the erroneous approach of the tribunal to country

information. Section 28(4)(a) of the 2015 Act requires that the assessment of a protection claim must include taking 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*". The rejection of the first-named applicant's claim of past persecution was not wholly dependent on the credibility of her account because important parts of that account were accepted. Nor, for what it's worth, was there anything particularly problematic about the parts of her account that this particular tribunal member did not see fit to accept. Thus there is no analogy to cases such as those where an applicant's credibility is in tatters: see e.g. *M.S. (Albania) v. Refugee Appeals Tribunal* [2018] IEHC 395 [2018] 5 JIC 3005 (Unreported, High Court, 30th May, 2018). Here, the erroneous attitude of the tribunal to country information cannot be insulated from the finding in relation to past persecution; and indeed the tribunal member made clear that its findings in this regard were interlinked: see para. 4.3.11. Consequently the whole decision must fall.

Order

25. All four of the grounds advanced by the applicants have been made out, so whether taken individually or cumulatively the appropriate order is one of *certiorari* removing for the purposes of being quashed the IPAT decision in relation to the applicants and remitting their appeals to the tribunal to be reconsidered by a different tribunal member.

26. I hope I can be forgiven for mentioning in conclusion that the factual context here is that the eldest child has been in Ireland for nine years, the wife has been here for over nine years and the husband has been here on and off for nineteen years. Admittedly the latter has been an evader for much of that time, so would not qualify for much in the way of favourable consideration in his own right, but he is part of a nuclear family and it would neither be very humane nor in accordance with the desirability of a holistic treatment of the family to break up a nuclear family by deporting him on his own. Furthermore, deportation of the husband while the wife's protection claim is pending would be problematic as he would anticipate having a legal right to be granted permission if the wife's protection claim was ultimately successful. It may also be of relevance that the authorities let him back into the country without bothering to check whether there was a deportation order. For whatever reason, the Department has made it very clear that it will be insisting on its entitlement to seek to deport the applicants if they are not granted protection. That is of course entirely a matter for it (subject, needless to say, to constitutional and legal considerations and to searching judicial review). But given that the wife has produced evidence of involvement in political journalism in Albania, which was accepted by the tribunal, and given that the tribunal accepted that she published on the subject of electoral corruption in particular, and given the documented risks to political journalists there, which are set out in authoritative country material, the phrase that somehow comes unbidden and unwanted to mind is "good luck with that".