THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 928 J.R.]

BETWEEN

B.C. (ZIMBABWE)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 2nd day of July, 2019

1. The applicant is a Zimbabwean national who left her own country on 19th January, 2001 and travelled through Germany and the UK, arriving in the State on 22nd June, 2001. She did not claim asylum in the State until 27th January, 2016. That application was refused in October, 2016. She appealed to the Refugee Appeals Tribunal and following the commencement of the International Protection Act 2015 she was deemed to have made a subsidiary protection application. That was refused by the International Protection Office in October, 2017 and that decision was appealed to International Protection Appeals Tribunal.

2. An oral hearing of the appeal took place on 4th April, 2018, when Ms. Eve Bourached B.L. appeared for the applicant. Commendably, the applicant's solicitor, Ms. Bartels, has briefed the same counsel for the consequent judicial review, a practice which can only assist the court. Following the conclusion of the hearing the tribunal permitted the applicant to submit further evidence relating to her claim of persecution and serious harm in Zimbabwe, particularly as regards the fate of a colleague in the Movement for Democratic Change, Mr. Takundwa Chipunza. This material was duly submitted and was transmitted by the tribunal secretariat for the tribunal member the following day, 5th April, 2018.

3. On 28th September, 2018, the applicant was notified that the tribunal had rejected the appeals. On 3rd October, 2018, the applicant's solicitor put the tribunal on notice of the intention to seek judicial review. The present judicial review was filed on 9th November, 2018, slightly out of time. The circumstances of the delay are set out in paras. 21 and 22 of Ms. Bartels' affidavit and I should perhaps note that one of the factors involved was her very proper and helpful desire to have the same counsel give advices on judicial review, that counsel being unavailable for a short period around that time. I certainly would not wish to disincentivise solicitors from taking that approach and accordingly an understanding view needs to be taken of time issues arising in that kind of situation, certainly more so than when solicitors seek to brief alternative counsel.

4. The primary relief sought in the present proceedings is *certiorari* of the tribunal decision notified on 28th December, 2018 and I have now received helpful written and oral submissions from Ms. Bourached for the applicant and from Ms. Grace Mulherin B.L. for the respondents.

Time

5. As noted above, the proceedings were issued slightly out of time. While issue was taken with that in the statement of opposition, and to some extent in the written legal submissions, it was not pressed very far. The respondents' legal submissions at para. 8.1 says that it is a matter for the court. Furthermore, for what it's worth, the time issue was not particularly pressed in oral submissions and finally, I should say that leave was granted on 12th November, 2018 but the statement of opposition was not filed until 13th March, 2019, so the time lag, for want of a better word, between the leave order and opposition was significantly more than the modest delay in issuing the proceedings in the first place, which is another factor that can legitimately be taken into account under this heading. When I granted leave in the present case, I did extend time; and I am of the view that that order should stand in all the circumstances.

Alleged failure to consider documents sent on 4th April, 2018

6. In the impugned decision, the tribunal lists at para. 2.2 the documents that were submitted. Despite otherwise comprehensively setting out what was before the tribunal, that list omits the documents submitted on 4th April, 2018. It is true that at para. 2.3 the tribunal member says that the documents submitted were considered; but in context that more naturally reads as referable to the documents specifically referred to at para. 2.2. Certainly the fact that particular documents were omitted from para. 2.2 does not inspire confidence that they were in fact considered. This issue also needs to be seen in the context of the legal obligation that the decision-maker must keep a record of what materials were considered. Such a record, whether set out in the decision expressly or not, is essential for judicial review: see *P&F Sharpe Ltd. v. Dublin City and County Manager* [1989] I.R. 701, *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 [1992] I.L.R.M. 237. Independently of the question of legal obligation, certainly the best practice is to list the material submitted in the decision itself. There has in certain circumstances been an onus on an applicant to take steps to clarify what materials were in fact considered but I do not think that such an onus applies here where neither the list of the materials considered nor the substantive discussion discloses any consideration of the material of 4th April, 2018.

7. The statement of opposition contends that the applicant is not entitled to a further hearing in respect of documents which were submitted late. There are two somewhat discordant features of that plea. Firstly, the word "*late*" is to some extent inappropriate in the sense that there was permission to submit documents, which was given at the hearing, and indeed Ms. Mulherin does not take issue with the claim that such permission was given. Under those circumstances it is questionable whether that should be described as a "*late*" submission. Secondly, the plea of a lack of entitlement to a further hearing is an attempt to meet a point which is not actually made by the applicant, and indeed the terms of that plea smack of an implication that not much consideration need be demonstrated for the documents in question.

8. The respondents' written submissions phrase the matter slightly differently, saying that *"there is no basis for the suggestion that these documents were not duly considered".* That is a somewhat negative formulation. Ms. Bourached makes a possibly legitimate complaint at para. 22 of her written submissions that the respondents' position *"strongly indicates acceptance that it was not considered and seek to rely on an argument that the tribunal was not required to consider it because it post-dated the hearing".* Certainly the statement of opposition gives that impression, although Ms. Mulherin says that wasn't intended.

9. It is true the statement of opposition asserts that all documents and submissions were duly considered. In some cases such an assertion, duly verified, carries some weight, but not so here. Firstly, that contention is very generic and does not really meet the very fact-specific allegation here. One might ask to what documents and submissions does the plea in the statement of opposition refer? All documents and submissions submitted by the applicant, including those of the 4th April, 2018? If so, why not say so.

10. More fundamentally, a statement as to a question of fact set out within a statement of opposition is not worth very much, or anything really, unless properly verified. While the statement of opposition purports to be verified in the affidavit filed on behalf of the respondents, we need to look at that in a little further detail.

11. An official of the Department of Justice and Equality has exhibited various pieces of correspondence, including a letter from the IPAT secretariat of 5th April, 2018 forwarding the relevant documents to the tribunal member. All that really shows is that the documents were sent; and indeed that only reinforces the need for clarity as to what was actually considered. I accept that the situation is difficult for the State in the sense that it would be an inappropriate procedure for a quasi-judicial officer to swear an affidavit and thus be liable to cross- examination to the defend his or her decision. Indeed in the U.K., the counterparts of the IPAT are considered to be judges and a similar position prevails in many other developed countries. While not technically judicial brethren and sisters in Irish law, tribunal members are certainly close cousins; and just as it would be an infringement of the independence of the judiciary for a judge to be cross-examined on his or her judicial work, a similar position pertains in relation to quasi-judicial work. Nonetheless, an affidavit verifying the statement of opposition must then be sworn by somebody. In this case, as is the normal practice, it was sworn by an official of the Department of Justice and Equality, that being what might be referred to as the Department proper rather than the International Protection Office. Ms. Mulherin says that her deponent based the affidavit on the tribunal member's copy file although he doesn't actually say so in his affidavit, nor does he say that he has read that file. Rather he says that the affidavit is made from his own knowledge save where otherwise appears. There isn't anything particularly otherwise appearing except insofar as it is inherent in the nature of the issue that an official of the Department can't assert as a fact what was or was not considered by someone else without making inquiries of that someone. (Even that would be hearsay but maybe permissibly so in the special case of an independent office-holder.) I am informed that on account of the independence of the tribunal, the Department does not ask the tribunal member whether he or she did or did not consider particular documents. I do not need to decide whether that reticence is right or wrong but assuming that to be the case, then while the Department can legitimately *negatively deny* a plea that a document was not considered it is not really in a position to meaningfully *positively assert* that a specific document was considered. At most it can say that a document was on the member's copy file that was before the decision-maker at the time of the decision and indeed as noted above, the respondents' deponent does not even say that.

12. But to go beyond that and to verify a statement of opposition with the positive plea that the document was considered goes beyond what such a deponent knows from his or her own knowledge or otherwise appears and that is clearly the position in the present case. That may seem a technical drafting point but is an important point. There is only so much the Department can aver to and they must be seen not to over-egg the pudding. I emphasise that I totally exonerate the departmental official in the present case because it is obvious and accepted that the affidavit was sworn on legal advice, but the legal approach adopted did not really come to grips with the distinction between a legitimate traverse and a positive statement that something was considered, which is a statement that the respondents' deponent is not in a position to back up. It is fair to note perhaps that the fact that there may be a limit to what the Department can say in reply as to the carrying out of functions by a quasi-judicial office holder may to some extent qualify the general requirement for respondents to make clear the factual position to the court or lay their cards on the table, as put in *McEvoy v. Garda Síochána Ombudsman Commission* [2015] IEHC 203 (Unreported, High Court, McDermott J.) at para. 33 (a similar point having been made by Keane C.J. in *O'Neill v. Governor of Castlerea Prison* [2004] IESC 7 [2004] 1 I.R. 298).

13. I do not need to decide in the present case how to square that circle definitively. I can offer only as a suggestion that the Department and the tribunal need to work out some clear understanding how questions as to what was or was not considered by a tribunal member can be received by the court in a proper evidential manner. The best possible way of course is for the material to be listed in the decision itself. In that regard I certainly do not want to disincentivise the tribunal from listing the material that was before it. I emphasise that that is at a minimum best practice and ultimately must be seen in the context of the legal obligation that such material should be ascertainable. It is also highly important from a practical point of view that tribunal decisions are coordinated, a point referenced in the 2015 Act, including as to format, and that any guidance from the tribunal chairperson is followed in this respect.

14. On the very fact-specific circumstances of the present case the normal presumption that all documents were properly considered has been found to be adequately rebutted. *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401 *per* Hardiman J. permits of either direct or inferential evidence to displace that presumption, and such an inference arises from the combination of elements arising here. It may be helpful to recapitulate the more salient features:

> (i). The tribunal lists at para. 2.2 the documents that were submitted. Despite otherwise comprehensively setting out what was before the tribunal, that list omits the documents submitted on 4th April, 2018.
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> (ii). Where at para. 2.3 the tribunal member says that the documents submitted were considered, that more naturally reads as referable to the documents specifically referred to at para. 2.2.
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> (iii). Neither the list of the materials considered nor the substantive discussion discloses any consideration of the material of 4th April, 2018.
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> (iv). The statement of opposition contends that the applicant is not entitled to a further hearing in respect of documents which were submitted late. But these documents were not submitted "*late*" in the normal forensic sense of that term.
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> (v). Further, the plea of a lack of entitlement to a further hearing smacks of an implication that not much consideration need be demonstrated for the documents in question.
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> (vi). The assertion in the statement of opposition that the documents were considered is very generic and does not really meet the very fact-specific allegation here.
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> (vii). Nor does it define what documents and submissions are being referred to, still less does it specifically include those in question.
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> (viii). The State's deponent doesn't in fact say that he based the affidavit on the tribunal member's copy file, or otherwise identify what his means of knowledge are.

(ix). Nor does he say that he has read that file.

(x). Insofar as he says that the affidavit is made from his own knowledge save where otherwise appears, that doesn't stand up insofar as the point at issue is concerned, which is neither within his knowledge nor the subject of a source that otherwise appears.

(xi). The Department does not ask the tribunal member whether the documents were in fact considered.

(xii). While the Department can legitimately *negatively deny* a plea that a document was not considered it is not without making specific inquiries in a position to meaningfully *positively assert* that a specific document was considered. At most it can say that a document was on the member's copy file that was before the decision-maker at the time of the decision, but the respondents' deponent does not even say that.

15. In those circumstances it is not necessary to deal with the applicant's remaining points.

Discretion
16. The respondents make a point regarding discretion, but a combination of the nature of the error here and the particular features of the case make this an inappropriate case to exercise discretion against the applicant. That point was not particularly pressed in oral submissions in any event.

Order
17. Accordingly, the order will be one of *certiorari* against the decision of the tribunal together with an order remitting the matter to the tribunal for reconsideration by a different tribunal member.