THE HIGH COURT

[2021/64/JR]

[2022] IEHC 458

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED) and IN THE MATTER OF THE INTERNATIONAL PROTECTION ACT 2015

BETWEEN

S.

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL

THE MINISTER FOR JUSTICE AND EQUALITY

IRELAND

AND

THE ATTORNEY GENERAL

RESPONDENT

DECISION of Ms. Justice Bolger delivered on the 25th day of July 2022

Introduction

1. In these proceedings the applicant seeks an order of *certiorari* quashing the decision of the first named respondent (hereafter "the Tribunal") dated 3 December 2020, which affirmed the recommendation of the International Protection Office (the "IPO") that he is not entitled to either a declaration as to refugee status or eligible for subsidiary protection. For the reasons set out below I am granting an order of *certiorari* quashing that decision.

Background

2. The applicant is a national of Georgia, born on 2 December 1991. He submitted an International Protection Questionnaire in which he claimed that if he returned to Georgia he would be killed because he is gay. In his section 35 interview he said that he feared for his life in Georgia due to his sexual orientation, that he was bisexual, had previously had a relationship with a named man he met in bar in Georgia in 2018 and that he was spotted at a gay rally in Georgia in 2017 by unknown persons who informed his friend, who advised him that he should leave the country as his life was in danger. He also said he was in fear for his safety due to a loan he had taken out in Georgia. The applicant made no reference in his questionnaire or his interview to any negative incidents or fears connected to political opinions.

3. The IPO held that it was not credible on the balance of probabilities that the applicant was a gay or bisexual man, or that he had any loan issue in Georgia, and recommended that he should not be given a refugee or subsidiary protection declaration.

4. The applicant appealed on the grounds that the IPO's adverse credibility findings were unfair and/or unreasonable and failed to give him the benefit of the doubt. He lodged written submissions through his solicitors in which he repeated his claim that he was in fear of persecution due to his sexuality.

5. The applicant's appeal came on for hearing on 6 October 2020. Shortly before the hearing commenced and without notice to his legal representatives, the applicant confessed that his claim was false, that he was not gay and had never been in a relationship with a man. He explained that he fabricated a claim on the advice of another Georgian man who suggested he would have difficulty in securing a protection status if he did not apply in that way and would become liable for deportation. The applicant then proceeded to put forward a new claim at the hearing of his appeal. He said that he was a supporter of the UNM party, that he filmed video footage of a politician in 2014 and was targeted by men from his local area who were unhappy that he had done this. He claimed that he was beaten by men in his local area in 2014 and bullied and harassed by them frequently until he left Georgia in 2019 (I will refer to that claim as the 'new claim'). The applicant also repeated the claim he had made previously (and which had not been accepted by the IPO) that he was believed he would be targeted by the lenders of money he could not repay. When asked why he decided to give a different account on appeal, the applicant said he had decided that everything he previously said was "silly" and that he had decided it was time to tell the truth.

The Tribunal's decision

6. The Tribunal's decision dated 3 December 2020 affirmed the recommendation of the IPO that the applicant should not be given refugee or subsidiary protection declaration. At part 2 the Tribunal set out the applicant's allegations and the documents he had submitted and confirmed that the notices of appeal, submissions and all of the documentation provided had been 'fully considered'. At part 4 the Tribunal set out its assessment of the facts and circumstances. At para. 4.1 it stated that it had, pursuant to s.28 of the Act, 'considered the facts and circumstances' of the claim and in making its findings, 'had regard to the appellant's personal circumstances.' At para. 4.2 the material facts of the claim were assessed to be that:

    i. The appellant is a supporter of the UNM party.

    ii. The appellant filmed video footage of a politician, Dato Kefishvili, in 2014 and was targeted by men from his local area who were unhappy about the fact that he had filmed the footage.

    iii. The appellant was beaten by men in his local area in 2014 and bullied and harassed by them frequently until he left Georgia in 2019.

    iv. The appellant borrowed money before he left Georgia and had difficulties repaying his loan.

    Para. 4.3 set out questions asked of the applicant during the appeal, all of which centred on the false claim originally made by him and why he had done that. None of the questions related to the new claim or to his repeated claim about a loan. The applicant's responses to the questions are recorded at para. 4.3, namely that he had been advised by a Georgian man he met shortly after he arrived in Ireland to tell the Irish authorities that he was gay, that he thought he would have difficulties if he told the truth to the Irish

authorities, that at the appeal hearing he decided everything he had said was silly and that it was time to tell the truth, and that he realised it was not right to lie and that he was now telling the truth. The Tribunal found that "the appellant has not provided anything remotely approaching a reasonable explanation for the huge inconsistency in the nature of his claim at different points in the protection process and find this inconsistency to be significantly undermining of his credibility".

7. The Tribunal went on at para. 4.4 to conclude that "the massive inconsistency in the nature of the claim presented by the appellant utterly deprives his claim of credibility to the extent that the Tribunal rejects the material facts of the appellant's claim as not having been established on the balance of probabilities".

8. There is no reference in the Tribunal's decision to an assessment of the new claim or of the claim he repeated about a loan. The Tribunal does say at para. 2.9 that the 'submissions' were fully considered and I take the reference to 'submissions' to include the oral submissions made by or on behalf of the applicant at the appeal hearing.

Legal issues

9. The applicant and respondent set out the following legal questions:

   i. Whether the Tribunal erred in law by not carrying out an assessment of the applicant's claim in accordance with its function and duty under s. 28 of the International Protection Act, 2015, and/or Article 4 (1) of Directive 2011/95/EU, by finding that the failure of the applicant to offer any reasonable explanation for the inconsistency in the nature of his claim at different points in the protection process – in particular having previously put forward an entirely different claim prior to oral hearing - significantly undermined his credibility.

   ii. Alternatively, whether the Tribunal erred in law in its application of s. 28 of the 2015 Act by reaching its conclusion at para. 4.4 that it is open to it to reject the material facts of the applicant's claim on the sole basis of the prior fabrication (which was voluntarily disclosed to it by the applicant) and the explanation provided for this by the applicant.

   iii. Whether the Tribunal erred in law in finding that the inconsistency in the nature of the claim presented by the applicant or his lack of a reasonable explanation for that inconsistency, deprived the applicant's claim of credibility to the extent that Tribunal was entitled to reject the material facts of the applicant's claim as not being established on the balance of probabilities.

In summary, the applicant identifies the central issue as whether the Tribunal properly did what was required of it by s. 28 whereas the respondent focuses on what it says was the Tribunal's entitlement to make its findings on the basis of the applicant's lack of credibility.

The applicant's case

10. The applicant cites the applicable principles set out by Cooke J. in the *locus classicus* case of *I.R. v. Minister for Justice Equality & Law Reform & anor* [2009] IEHC 510, [2015] 4 IR 144 and submits that this case falls within the second of the applicable principles:

> "On judicial review the function and jurisdiction of the High Court is confined to ensuring that the process by which the determination is made is legally sound and is not vitiated by any material error of law, infringement of any applicable statutory provision or of any principle of natural or constitutional justice".

11. The applicant submits that it is not open to the Tribunal to refuse a claim solely on the basis of a belated, voluntary disclosure at the commencement of the oral appeal hearing that the evidence previously advanced had been a fabrication (irrespective of the explanation for same). The appellate decision-maker must still assess the merits, if there be any, of the belated claim advanced - as mandated by s. 28 of the 2015 Act, and/or Article 4(1) of the Qualification Directive.

12. The applicant submits that s. 28(2) of the 2015 Act requires the Tribunal to assess the relevant elements of the application, which are broken down in ss. (3). The requirements of what an assessment "shall include" are identified in ss. (4) including, *inter alia*, the personal circumstances of the applicant so as to assess whether the applicant has been or may be subject to persecution or serious harm and the general credibility of the applicant. The applicant's counsel distinguishes the decision of Humphreys J. in *Y v IPAT and the Minister for Justice and Equality* [2021] IEHC 524 as one in which the new claim made by the applicant was considered by the Tribunal. In contrast here, the applicant argues that his new case made belatedly at the appeal hearing was never assessed by the Tribunal but that, had it been assessed then, it would have been open to the Tribunal to rely on the prior fabrication and to decide what weight it attached to the applicant's new evidence in reaching its conclusion. He contends that the process of assessment required by s. 28 was never applied by the Tribunal as his claim was rejected on the sole basis that he had previously put forward a false claim, and the Tribunal determined his new claim was belatedly advanced without a reasonable explanation for its late disclosure.

13. The applicant submits that there is no basis in Irish or EU law for a decision-maker bound by the Qualification Directive to disregard its mandatory provisions on the basis of a falsified prior disclosure, which is effectively how the Tribunal disposed of the present case.

14. The applicant cites UK case law in submitting that the fabrication of evidence alone may not be a basis for a decision-maker to set aside the accepted international obligation towards persons who fall within the protection of the Refugee Convention. The applicant cites Laws L.J. and Buxton J.J. in *GM (Eritrea) & Ors v. Secretary of State for the Home Department* [2008] EWCA Civ 833 and Carnwath L.J. in *RT (Zimbabwe) & Ors v. Secretary of State for the Home Department* [2010] EWCA Civ 1285 which were appealed on a discrete issue of law, but with no criticism raised by the UK Supreme Court on this aspect of the lower court's judgment.

15. The applicant furthermore submits that it was irrational and manifestly unreasonable, having regard to the mandatory nature of s. 28 of the 2015 Act and/or Article 4 of the Qualification Directive, for a decision-maker to reject the material facts of the applicant's claim on the sole basis of a voluntarily disclosed prior fabrication.

The respondents' case

16. The respondents submit:

(1) The Tribunal did not err in law in its assessment of the applicant's claim;

(2) The Tribunal did not err in law in its application of s. 28;

(3) The Tribunal was entitled to look at the case in the round and find (i) that the failure of the applicant to offer a reasonable explanation for the huge inconsistency in the nature of his claim at different points in the protection process significantly undermined his credibility; and (ii) that the massive inconsistency in the nature of the claim presented by the applicant utterly deprived his claim of credibility to the extent that Tribunal was entitled to reject the material facts of the applicant's claim as not being established on the balance of probabilities.

(4) The Tribunal's assessment of credibility was made by reference to the full picture that emerged from the available evidence and information taken as a whole, when rationally analysed and fairly weighed, and its decision on credibility must be read as a whole having regard to the cumulative impression made upon the decision-maker.

17. The respondents contend that the decision of Barrett J. in *Y v IPAT and the Minister for Justice and Equality* [2021] IEHC 524 is on all fours with the instant case, save for the fact that the applicant in the Y case admitted at an earlier stage (during his section 35 interview) that his initial claim, that he was at risk due to being gay, was a complete fabrication.

18. The respondents contend that the Tribunal did not take issue with the lateness of the disclosure on the part of the applicant but rather with the applicant's failure to give a reasonable explanation for the inconsistency between his two versions of events. They rely on para. 2.9 of the Decision where it states that the notices of appeal, submissions and all of the documentation provided were fully considered.

19. The respondents highlight s. 28(7) and submit that those requirements could not have been met in the circumstances of the present case, including firstly, where the Tribunal found that the general credibility of the applicant was not established and secondly where the applicant relied solely on his personal testimony, having failed to provide any documentary evidence in support of his new claim. The respondents submit that the applicant has failed to provide any, or any credible, other evidence which proves his asylum claim, and they cite Cooke J. in *IR*:

> "If, as in other cases, the applicant's claim turned entirely on his personal testimony, it would be difficult to persuade the Court to interfere with that assessment [of a negative credibility finding]. The applicant has been interviewed by the Commissioner and had an oral hearing before the Tribunal member. Both decision-makers have seen and heard him and concluded that he lacks credibility."

20. The respondent submits that the decision was not an irrational or manifestly unreasonable one, nor a "pass or fail test". The Tribunal was entitled to find in the round that the applicant lacked all credibility.

Decision

21. As has been frequently stated, the function of this court in considering a judicial review of a decision of the Tribunal is not to re-assess the case that the applicant made to it but to ensure "that the process by which the determination is made is legally sound and is not vitiated by any material error of law, infringement of any applicable statutory provision or of any principle of natural or constitutional justice" (as per the second *I.R.* principle). In assessing the process applied by the Tribunal here it is necessary to examine what s.28 requires of the Tribunal and how the Tribunal assessed the account given by the applicant.

<u>The mandatory requirements of section 28</u>

22. Section 28 of the Act sets out mandatory requirements, which is confirmed by the strong language of Article 4(1) of the Directive in referring to the "duty of the Member State to assess the relevant elements of the application". I find support for this view of the mandatory nature of the s.28 requirements in the decision of Humphreys J. in *LH (Algeria) v IPAT & Anor* [2020] IEHC 157:

> "It is the role of the tribunal to assess all of the facts and circumstances: that is clear from both art. 4(1) and (3) of the qualification directive 2004/83/EC and s. 28(2) and (4) of the International Protection Act 2015. Whether or not the applicant contacts the person from whom he says he fears harm, or whether or not he entertains that person's attempts to make contact, is a part of the facts and circumstances of the case and cannot be arbitrarily disregarded. Having regard to such a matter is not an error of law, fatal or otherwise".

23. Section 28(2) requires that the Tribunal "shall … assess the relevant elements of the application". What the "elements" consists of is confirmed in ss. (3) as the applicant's statements and documents submitted regarding their age, background, identify, nationality, country or place of residence, previous asylum applications, travel route, identity and travel documents and at (i) "reasons for applying for international protection". Subsection (4) identifies what the assessment "shall include taking into account" as:

(a) 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;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities will expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship;

(f) *the general credibility of the applicant*. (my emphasis)

The subsection does not indicate any hierarchy by which one matter is to be considered ahead of the others and does not treat any of them as conditional on establishing another. Subsection 7 goes on to separately identify the applicant's general credibility as part of the process to be applied to the absence of documentary or other evidence supporting the applicant's statements where the Tribunal must be satisfied of certain specified matters in order to not require confirmation of such statements. There is an important difference in how ss. (7) is drafted in that the applicant's general credibility at ss. 7(e) is required to have been satisfied <u>in addition</u> to the matters previously set out at ss. 7(a) through to (d). Thus in assessing an appeal where aspects of the applicant's statements are not supported by documentary or other evidence, the statements do not need to be confirmed where the Tribunal is satisfied that the applicant's general credibility has been established and thereafter whether the remaining requirements of ss. (8) are satisfied.

24. That chronology of establishing the applicant's credibility before consideration of the other four factors of s. 28(7) is confirmed by Ferriter J. in *AH and ors v IPAT* [2022] IEHC 84 at para. 17:

> "In short, it is clear that before the benefit of the doubt can be given in relation to undocumented aspects of an applicant's claims, the applicant's general credibility must be established (see s.28(7)(e)). Once the applicant's general credibility has been established, undocumented aspects of the applicant's

case do not need to be confirmed i.e. can get the benefit of the doubt where, but only where, the four other factors in s. 28 (7)(a) to (d) are satisfied".

25. Thus in determining an applicant's entitlement to the benefit of the doubt where their statements are not supported by documents or other evidence, the Tribunal must first assess the applicant's general credibility. Section 28 (2) to (4) require a different approach by the Tribunal in assessing the applicant's appeal where their credibility is to be considered alongside the other matters identified in ss. (4). General credibility is not a pre-condition to the assessment of the relevant elements of the applicant's application that the Tribunal is required to carry out but rather is one of a number of matters to be taken into account. The other matters include the applicant's statements and their personal circumstances. The purpose of the assessment of their personal circumstances is identified in ss. (4)(c) as being "to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm".

26. A proper application of s. 28 required the Tribunal to assess the elements of both the new claim about political activity and the repeated claim about a loan. There were no documents submitted but there were statements made by the applicant at the appeal hearing which covered a number of the issues set out at ss. (2). The applicant's account of abuse he claimed to have suffered as a result of filming a local politician and his fear of being targeted by the persons to whom he owed money were the reasons he applied for international protection. In accordance with ss. (3)(i) the Tribunal was required to assess those reasons. In accordance with ss. (4)(b) that assessment should have taken account of the applicant's statements on whether he was or might be subject to persecution or serious harm and, in accordance with ss(4)(c), it should have taken account of his personal circumstances. Subsection (3)(f) also required the Tribunal to take account of his general credibility. The Tribunal could not ignore the obligations that s. 28 clearly imposes on it and/or focus on just one of the many matters that s. 28 requires the Tribunal to assess and take account of in its decision.

The Tribunal's assessment of the Applicant's account

27. The Tribunal said at para 4.1 of its decision that it had, pursuant to s.28 "considered the facts and circumstances of the appellant's claim. In making its findings, the Tribunal has had regard to the appellant's personal circumstances". Thereafter paragraphs 4.3 and 4.4 focus almost exclusively on the fabricated claim (apart from briefly confirming that "a small aspect of his claim concerning a loan" was not different to the claim he had made at first instance) and on the applicant's explanation for giving a different account on appeal. There is nothing there, or elsewhere in the decision, that shows any assessment by the Tribunal of the applicant's new claim of persecution based on his political activity and his repeated claim about possible persecution for having borrowed money.

28. The Tribunal's obligation pursuant to s. 28(2) was to "assess the relevant elements of the application". This requires more than the consideration or regard the Tribunal said at para. 4.1 it had to the applicant's claim and personal circumstances. 'Assess' is defined in the Oxford English Dictionary as "evaluate or estimate the nature, value, or quality of".

Consider is defined as "think carefully about", "believe to be", "take into account when making a judgment", or to "look attentively at". An assessment involves a systematic approach whereas a consideration is passive and requires a lesser level of analysis.

29. The Tribunal did not conduct an assessment of the facts of the new claim or the repeated claim about the loan such as could ground a conclusion that either or both claims were deprived of credibility. This contrasts with the decision of the Tribunal in *Y*, which was upheld by Barrett J., and included an assessment of the new claim made by the applicant after he admitted that his initial claim was falsified. The assessment of the new claim can be seen in the extracts from the Tribunal's decision contained in the Statement of Grounds quoted by Barrett J. at para. 4 of his decision which expressly refers to elements of the new claim, which the Tribunal condemned as having an unreasonable degree of uncertainty and inaccuracy to a degree that it found undermined the applicant's credibility. It is clear from Barrett J.'s findings that the Tribunal had assessed that new claim properly in accordance with s.28.

30. In the within case, no such assessment of the applicant's new claim about his political activity or of his repeated claim about a loan took place. Therefore the Tribunal failed to conduct the appeal in accordance with s.28. A mere stated consideration by the Tribunal of the facts and circumstances of the applicant's claim and its regard to his personal circumstances (as set out at para. 4.1 of the decision) does not constitute an assessment of the elements of the claim that s. 28(2) requires, or reflect adherence to the duty imposed on Ireland by Article 4(1) of the Directive. The Tribunal used its finding at para. 4.3 of its decision, that the applicant did not offer a reasonable explanation for the inconsistency in his claim at different points of the protection process which undermined his credibility, to ground a conclusion at para. 4.4 rejecting the material facts of his new claim as not having been established. That was not in accordance with the Tribunal's obligation to assess the applicant's claim in the manner as set out in s. 28.

31. For the avoidance of doubt I wish to make it clear that had the Tribunal properly assessed the applicant's new claim in accordance with s. 28, it would have been open to it to have determined what weight it would attach to the applicant's evidence about his claimed political activity and resulting abuse, and his concern about being targeted by persons to whom he owed money, including by taking account of the applicant's general credibility in the light of having made an initial false claim. The difficulty with the approach that was adopted by the Tribunal is the absence of any or any adequate assessment by it of the new claim and the Tribunal's almost exclusive focus on the applicant's decision to make an initial false claim and the absence of a reasonable explanation for having done so.

32. I am therefore of the view that the decision of the Tribunal was not reached in accordance with the requirements of s. 28 and should be quashed by way of an order for certiorari. I will remit the matter for a fresh determination in accordance with the law.

Indicative view on costs

33. As the applicant has succeeded in his application, my indicative view is that costs should, in accordance with s.169 of the Legal Services Regulation Act, follow the cause and the applicant is entitled to his costs against the respondents.

34. I will list the matter for mention before me at 10 a.m. on 29 July to allow the parties to make such further submissions on costs as they wish to make and to hear whatever submissions the parties wish to make on the final orders to be made. I am not requiring written submissions but if the parties do wish to make them they should be lodged with the court at least 24 hours before the matter is back before me.