THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 713 J.R.]

BETWEEN

E.G. (ALBANIA)

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 4th day of June, 2019

1. The applicant was born in Albania in 1997 and claims persecution there based on sexual orientation. He travelled to Ireland *via* Montenegro, Croatia, Slovenia, Italy and Spain with a false Romanian I.D. card obtained by his father. That ID was destroyed when he arrived in the State on 23rd October, 2014. He applied for asylum as an unaccompanied minor on 28th October, 2014 and that application was refused on 7th April, 2015.

2. On 8th April, 2015, he appealed to the Refugee Appeals Tribunal against that refusal. The notice of appeal itself is undated and the grounds of appeal are generic and unparticularised. Country reports were submitted to the tribunal on 20th April, 2015. Following the commencement of the International Protection Act 2015 on 31st December, 2016, the applicant applied for subsidiary protection on 13th April, 2017. On 7th March, 2018, he was informed that the subsidiary protection application had been refused, as had permission to remain pursuant to s. 49 of the 2015 Act. The s. 49 refusal, while not challenged in the proceedings, is strangely worded and bordering on the contradictory in the sense that at p. 11, the IPO states that there are no exceptional circumstances but on p. 12 it states that the application is rejected "*having considered the applicant's family and the exceptional circumstances of this case…".* The respondents were not really in a position to explain this satisfactorily in the absence of instructions from the specific decision-maker, which were not available during the hearing.

3. The applicant appealed to the International Protection Appeals Tribunal on 14th March, 2018 against the subsidiary protection refusal and in due course submitted country reports as well as legal submissions. An oral hearing took place on 19th June, 2018 with Ms. Lisa McKeogh B.L. appearing for the applicant. On 9th August, 2018 the applicant was informed that the tribunal had rejected the appeals by decision dated 8th August, 2018. The key finding in the tribunal member's decision was that "*I find that what the appellant fears is not persecution*". While the adverse incidents suffered by the applicant, including one incident of violence as well as harassment, bullying, intimidation, name-calling and stone throwing were noted, the tribunal member said that "*I find in this case that it does not rise to the level of persecution*". She also noted that insofar as the applicant's difficulties in school were concerned, the applicant was no longer of school-going age and thus the issue of bullying in that context does not arise in this case. She said that *"all of the indicators point to the appellant being at risk of some form of ostracization, depending upon where he chooses to settle, however I cannot conclude that there is a real risk that he will face persecution".*

4. The notice of the decision was received around 13th August, 2018 and proceedings were filed on 29th August, 2018. While a time issue was originally raised on behalf of the respondents it is accepted now that that does not arise.

5. The primary relief sought in the proceedings is an order of *certiorari* directed to the IPAT decision. I granted leave on 8th October, 2018. A statement of opposition was delivered dated 1st April, 2019 and I have now received helpful submissions from Mr. Michael Conlon S.C. (with Mr. Garry O'Halloran B.L.) for the applicant and from Ms. Grace Mulherin B.L. for the respondents.

Ground 1: unfairness error or irrationality

6. Ground 1 contends that "*the decision should be quashed because …it contains findings which were arrived at unfairly and/or were erroneous and/or irrational*" with particular reference to paras. 4.1, 5.12, 5.13 and 5.15. As far as the allegation of unfairness is concerned no particular basis was advanced, and certainly none was demonstrated, for the plea that the findings were arrived at unfairly. The claim of error or irrationality is not made out either.

7. Certainly the tribunal did not take the most favourable view from the applicant's point of view but that does not make the decision irrational or unlawful. Irrationality in this context means a finding that is simply not open to the decision-maker. The case highlights the point that the Geneva Convention does not protect against discrimination or difficulty but only against persecution. That point was made in previous caselaw relied on by Ms. Mulherin particularly *E.D. v. Refugee Appeals Tribunal* [2016] IESC 77 [2017] 1 I.R. 325, *J.E. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 372 [2011] 1 I.R. 574 *per* Cooke J., *E.M.S. v. Minister for Justice, Equality and Law Reform* [2004] IEHC 398 (Unreported, High Court, 21st December 2004) *per* Clarke J., as he then was, *B.S. v. Refugee Appeals Tribunal* [2010] IEHC 138 (Unreported, High Court, 20th January 2010) *per* Clark J., *R.A. v. Refugee Appeals Tribunal* [2015] IEHC 686, *S.Z. v. Minister for Justice and Equality* [2017] IEHC 53 (Unreported, High Court, 6th February, 2017) *per* O'Regan J.

8. The EU qualification directive provides at art. 9(1) that: "*Acts of persecution within the meaning of Article 1A of the Geneva Convention must (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms or (b)be an accumulation of various measures, including violations of human rights, which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)*." That is reflected in s. 7(1) of the 2015 Act.

9. The UNHCR Handbook takes a broadly similar approach, although one that is possibly slightly more permissive than the qualification directive. It acknowledges in the revised edition of April, 2019 at para. 51 that: "*There is no universally accepted definition of 'persecution', and various attempts to formulate such a definition have met with little success.*" The Handbook notes that a threat to life or freedom on a Convention ground is always persecution and "*other serious violations of human rights for the same reasons would also constitute persecution*". It goes on at para. 52 to suggest that: "*Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case*", and at para. 53 that: "*In addition, an applicant may have*

been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on 'cumulative grounds'. … This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context."

10. This matter is further discussed by Judge Dörig in Hailbronner and Thym, *EU Immigration and Asylum Law* (2nd ed., C.H. Beck/Hart/Nomos, 2016) at pp. 1166 to 1174, where Dörig notes the range of academic opinion on the issue. The discussion in Hathaway and Foster, *The Law of Refugee Status* (2nd ed., Cambridge, 2014) is thus in effect to be located at one extreme of the spectrum of interpretation of what amounts to persecution (see p. 1167). Hathaway and Foster at pp. 200-206 adopt a very expansive definition of persecution, which is in effect any violation of human rights that is not *de minimis*. That approach would threaten to swallow up the whole law of human rights violations into the definition of persecution and is not representative of the international understanding of the concept. That notion cannot be accepted as being the correct approach.

11. The tribunal decision here is, as the tribunal member herself noted, in line with UK law as set out in *I.M. (Albania)* [2003] UKIAT 00067. Mr. Conlon has helpfully directed my attention to the more recent case of *B.F. (Albania)* [2019] UKUT 0093. It can reasonably be said that the decision here is certainly in line with the current position in the UK, at least as far as *I.M (Albania)* is concerned. The essential point however is not whether or not I would have made this particular decision had I been asked to do so myself (and that is not to impliedly suggest that I would not have); but whether the decision actually made was open to the decision-maker. That is a point made in many cases, most recently by Keane J. in a judgment delivered this morning, *A.O.O. v. Minister for Justice and Equality* (Unreported, High Court, 4th June, 2019). Mr. Conlon's submission then had to be that no reasonable decision-maker could have said that the adverse circumstances experienced by the applicant were not so severe as to amount to persecution. But that is not so. It was open to the decision-maker to come to that view, albeit that it was not the most favourable one from the applicant's point of view.

Ground 2: alleged confusion regarding the basis of the decision

12. Ground 2 alleges that *"the IPAT decision is vitiated by the confusion arising as to whether the applicant's claim was rejected by reason of a finding that he chooses to keep his sexual orientation private or that Albanian society ostracises but doesn't persecute homosexuals or that internal relocation is the remedy or that State protection is the remedy".* However, there is no confusion as to the rationale of the decision. The tribunal member found that what happened to the applicant does not amount to persecution and does not give rise to a well-founded fear of future persecution. She also found that state protection is available but that is a subsidiary and essentially *obiter* finding. There is no specific finding regarding internal relocation; rather the view was taken that ostracization would be less in urban areas.

Ground 3: irrational or selective use of country reports

13. Ground 3 leads that "*the use made by the IPAT of the country reports is irrational and/or selective".* Ms. Mulherin's submissions complain with some justification that this ground is insufficiently particularised. The applicant cannot succeed under this heading in the absence of alleging any particular problem with the country reports but in any event the use of the country material is not irrational or selective. It was open to the tribunal, and indeed as noted above, the approach taken was in line with the UK position.

14. Mr. Conlon points to certain parts of the country material which show certain deficits alleged in the enforcement of the law in Albania as well as aspects suggestive of a lack of state protection, but all of that is a matter for the tribunal to consider as part of the overall evidence in any individual case. In any event while the points made under this heading were possibly relevant to the *obiter* question of state protection they do not go to the critical point that the prejudicial and discriminatory behaviour directed towards the applicant was held not to amount to the sort of severe violation of human rights that comes within the concept of persecution in the qualification directive and Geneva Convention.

Order

15. This case is not about whether I have sympathy for the applicant or whether it could have been open to the IPAT or the IPO to take a more favourable approach from his point of view, and nor is it about the genuineness of the applicant's suffering in Albania. The issue relates to whether it was open to the tribunal to hold that such suffering did not amount to a well-founded fear of persecution within the meaning of the 2015 Act. For the tribunal to have taken the view that discrimination, prejudicial treatment and even isolated violence, harassment and ostracism does not amount to persecution is not of course to condone such treatment or to regard it as in any way acceptable. But it is simply not the function of the tribunal to hand out international protection on the basis of adverse treatment as such. The conferral of refugee or subsidiary protection status requires a level of severity to be reached. As indicated by Clarke J., as he then was, in *E.D.* at para. 47, the critical legal issue, as in any judicial review where *certiorari* is sought, is whether the applicant has overcome the burden of demonstrating that the decision was not open to the decision-maker or was otherwise unlawful. The only possible answer to that question in this case is in the negative and therefore the proceedings are dismissed.