[2019] IEHC 627

THE HIGH COURT
JUDICIAL REVIEW

[2018 No. 1097 J.R.]

BETWEEN

A.D.N. (SOUTH AFRICA)

APPLICANT

AND

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

RESPONDENTS

AND

[2018 No. 1096 J.R.]

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F.N.N. (SOUTH AFRICA)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 31st day of July, 2019

1. The applicants are South African nationals and are a married couple. They went to the U.K. between December, 2015 and February, 2016 but did not claim asylum there. They returned to South Africa and then came to the State on 9th May, 2016. They claimed international protection on the same day, were both refused by the International Protection Office, and both appealed to the International Protection Appeals Tribunal. At para. 1.11 of its decision rejecting those appeals, the tribunal noted that because the applicants' claims were similar, it had formed the view that each applicant might wish to give evidence in support of the other or alternatively that they might wish to have a joint hearing. The applicants were notified of the hearing date six weeks in advance: see para. 1.12.

2. Regulation 8 of the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017 allows for joint hearings in certain circumstances, including where members of the same family are involved. In the case of a joint hearing, however, the issue of exclusion of one applicant during the evidence of the other applicant may fall for consideration because, as the tribunal member put it at para. 1.18, "*the second witness's evidence could be affected or tainted by hearing the first witness, either deliberately or inadvertently".* The tribunal member gave the applicants the option of two separate back-to-back hearings or a joint hearing where each would be excluded from the other's oral evidence.

3. At para. 1.21 she records the applicants' counsel as stating that the applicants were willing to consent to leaving the hearing room for each other's evidence in the context of a joint hearing. At para. 2.1 she noted that the applicants' accounts were not entirely consistent. At para. 4.6 she stated that she was making an individualised assessment of the applicants' claims.

4. At para. 4.7 onwards she noted that in relation to the wife's evidence "*numerous credibility issues arise. An exhaustive exposition of these is beyond the scope of this decision which seeks to set out some illustrative examples of the issues which arose".* Those illustrative examples are then set out in technicolour; and she concludes after a further 20 paragraphs outlining inconsistency, vagueness or other difficulty that the wife's evidence "*has numerous negative credibility indicators*".

5. The husband fared no better. At para. 4.29 the tribunal member said that his *"account at the hearing was overall vague and non-specific. He tended to give long answers which deviated from the question asked. He supplied little concrete information. When asked for further details, something that occurred repeatedly due to his overall vagueness, he appeared unable to flesh out his account with concrete facts or specifics".* After a further eighteen paragraphs of detail in relation to that, his account was rejected at para. 4.47.

6. The two sets of proceedings now before the court were filed on 21st December, 2018, the primary relief sought being *certiorari* of the IPAT decision. I granted leave on 21st January, 2019 and have received helpful submissions from Mr. Paul O'Shea B.L. (with Mr. Philip Moroney B.L. and Mr. Alex Layden B.L., who appeared at the tribunal) for the applicants, and from Ms. Sarah K.M. Cooney B.L. for the respondents.

The conduct of the joint hearing

7. The applicants' submissions helpfully set out a series of questions presented by the proceedings. The first set of questions is as follows: "*1. Did the First Respondent err in law in its interpretation and/or application of Regulation 7 and 8 of Statutory Instrument 116 of 2017, in allowing a joint hearing to be conducted whereby the Applicant was excluded from a portion of [his or her] own hearing? 2. Did the First Respondent err in law by conducting a hearing where the Applicant was excluded from a portion of [his or her] own hearing, having regard to natural and Constitutional justice, including the principles of fair procedures and audi alterem partem, and/or having regard to Article 6 of the European Convention of Human Rights and/or Article 47 of the EU Charter of Fundamental Rights?".*

8. It is an overstatement to say that the applicants were excluded. They were personally present for a part of the joint hearing but they were represented by a legal adviser throughout. That is not exclusion in any improper sense. Even if it could be regarded as exclusion, it was not unlawful. Indeed, in some legal systems it is the default position that witnesses in any proceedings are called in the absence of each other. The fact-finder must have a discretion as to how to conduct the hearing and is perfectly entitled to consider that the evidence of one spouse would be more reliable if not influenced by having heard the evidence of the other spouse. It is true that s. 42(6) of the 2015 Act sets out the right of an applicant to "*be present at the hearing*" but that is a statement of general principle, subject to lawful directions of the tribunal. It is not intended to be an absolute right with no exceptions. Suppose for example that when an applicant's lawyer is making closing submissions an applicant behaves in a disorderly manner and is asked to leave. The consequence of the literal interpretation advanced by Mr. O'Shea is that the tribunal must then suspend the hearing and cannot hear the conclusion of the

submissions and must wait until the applicant comes back, if he ever does. That is to read s. 42(6) in a blindly literal manner, an interpretative methodology that is not to be encouraged. As soon as people start reaching for dictionaries as a starting point, you know the law is heading down a dead-end. Text, purpose and context all must be viewed collectively and holistically to produce an interpretative outcome, and not in isolation from each other. But even if I am wrong about whether s. 42(6) should be read literally, the fact that this was a joint hearing meant that the tribunal was within its jurisdiction to consider that one spouse could be excluded from the other's evidence given that the right to be present only applies to one's own case rather than the entirety of the joint hearing.

Waiver

9. The third question presented is "*did the applicant acquiesce to the conduct of the joint hearing or waive [his or her] right to subsequently review the conduct of the joint hearing?".*

10. Because the point fails anyway, that does not arise; but if it had arisen, on the facts here the applicants rejected the option of back-to-back hearings and agreed to the procedure adopted, as noted in the tribunal member's decision, so they cannot challenge it now: see *R.S. and S.S. (exclusion of appellant from hearings) Pakistan* [2008] U.K. AIT 00012. It is overkill to call what happened "*duress*". On the contrary, as Ms. Cooney puts it eloquently at para. 29 of her written submissions, "*the applicants themselves have orchestrated this legal merry-go-round".*

The issuing of a joint decision

11. The next question presented is *"did the first respondent err in law by acting ultra vires and/or in breach of s. 28 of the International Protection Act 2015 by issuing a joint decision to the applicant".* Given that joint hearings are allowed for in reg. 8 of the 2017 regulations it is to be implied that a joint decision in the form of a single document is also a permissible procedure. The terms of that decision make clear that the applicants' cases were individually considered, as I have noted above. In any event, no injustice was done to either applicant by the procedure adopted.

Credibility as to past events

12. The next series of questions raise a sequence of micro-criticisms of the tribunal's credibility findings. But as appears from the narrative I have referred to above, there was a litany of material on which the tribunal member was entitled to act in drawing the adverse credibility findings. As Ms. Cooney quite legitimately puts it at para. 43 of her written submissions, "*it is quite apparent that the applicants' claim for international protection does not inspire much confidence. The claims made lack coherence, clarity and detail".* The adverse credibility findings were well within the jurisdiction of the tribunal. It is well established that the weight to be attached to various pieces of evidence is "*quintessentially a matter for the Tribunal member*" (*per* Birmingham J., as he then was, in *M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192 (Unreported, High Court, 27th June, 2008) at para. 27: see also *B.D.C. (Nigeria) v. International Protection Appeals Tribunal* [2018] IEHC 460 [2018] 7 JIC 2006 (Unreported, High Court, 20th July, 2018) para. 11).

Future assessment of risk

13. The final set of questions presented on behalf of the applicant are "*Did the First Respondent err in law and fact in assessing the Applicant's future risk of harm if returned to his country of origin?"* and "*Did the First Respondent err in law and fact in failing to consider the risk of the Applicant being subjected to non-violent forms of xenophobia, amounting to persecution, if returned to his country of origin?".*

14. The tribunal expressly considered the question of future risk and did so in a lawful manner. The fact that in the course of that discussion it referred to a consideration of violent acts against the applicants must be read as meaning consideration of acts which would amount to persecution or serious harm. The fact that the tribunal mentioned violence and did not go on to mention a possibly completely academic category of non-violent risks which nonetheless qualify a person for international protection. It is not even clear whether such a category exists in law in any event. The use of a reference to violence as a shorthand for risks warranting international protection does not make the decision unlawful. The tribunal member went on to consider the general position of serious harm or persecution (see para. 5.12) and came to a clear conclusion about a lack of further risk in the terms of the statutory language at para. 5.13. Merely plucking out of context the reference to the word "*violence*" does not nullify these conclusions either as a matter of common sense or as a matter of law.

Time

15. The proceedings were filed a month out of time and insufficient particulars were deposed to to enable me to conclude that there is good and sufficient reason to extend the time. However, as the applications fail on their merits anyway, it is not necessary to deal with this point.

Order

16. Both proceedings are dismissed.