

Judgment Title: P. -v- Refugee Appeals Tribunal & anor

Neutral Citation: [2013] IEHC 448

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THE HIGH COURT

JUDICIAL REVIEW

[NO. 2012/901 JR]

BETWEEN

A. P.

APPLICANT

-AND-

**THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE
AND LAW REFORM**

RESPONDENTS

**JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 20th
day of September 2013**

1. The applicant in this 'telescoped' hearing is an Iranian national who seeks, *inter alia*, certiorari of a decision of the Refugee Appeals Tribunal (the "Tribunal") dated 30th August 2012 refusing him refugee status. On 31st July 2013, I indicated to both parties that I was quashing the decision of the tribunal, remitting the matter for reconsideration and that I would give the reasons for my decision at a later date, this I now so do.

Background:

2. The applicant was born on the 14th August 1977 in Iran and is a native

Farsi speaker. He arrived in the State on 10th June 2007 and thereafter applied for asylum on the 15th June 2007. The applicant presented as a homosexual man and claimed to have a well founded fear of persecution on the basis of his membership of this social group in Iran. The applicant claims that he fled Iran following an incident which occurred at his neighbour's apartment. The applicant claims that on visiting the apartment, his neighbour invited him to watch a gay pornographic DVD and attempted to force him to have sex with him. The applicant states that he initially refused to comply because the neighbour's father was a colonel in the Iranian police. However, the neighbour blackmailed the applicant into engaging in the act by threatening to tell his father that the applicant had supplied him with the DVD. The applicant alleges that the neighbour's father appeared and attacked him in the midst of the rape. In a letter written by the applicant's mother and submitted to the Tribunal it is alleged that the neighbour's father took a picture or video of the incident on his phone. The letter also states that the neighbour's father showed these pictures to the applicant's mother. The applicant claims that he fled to his aunt's house following the incident and was thereafter smuggled out of Iran concealed in his uncle's friend's car and later a truck.

3. He received a negative recommendation at first instance from the Office of the Refugee Applications Commissioner (ORAC) on 24th October 2007. That recommendation was subsequently appealed to the Tribunal which, following a series of adjournments due to translation difficulties and the involuntary hospitalisation of the applicant for a period of two months, gave its decision and upheld the recommendation of ORAC on 17th July 2011. The applicant then launched proceedings challenging the decision of the Tribunal and leave to apply for judicial review was granted by Cross J. on 22nd February 2012. Those proceedings were thereafter compromised and updated legal submissions and medical reports were compiled and submitted by the applicant. A re-hearing of the applicant's appeal was conducted and a fresh decision upholding the recommendation of ORAC issued and was notified to the applicant on 9th October 2012. It is the substance of that Tribunal decision which the applicant impugns in these proceedings.

Submissions:

4. Mr. Dignam S.C. for the applicant levies a series of complaints against the decision of the Tribunal Member in this case- In particular, counsel takes issue with: i) the manner in which the Tribunal concluded that the applicant was not a homosexual from Iran; ii) its failure to comply with s. 16 (8) Refugee Act 1996 with regard to furnishing a report to the applicant; iii) the selective use of the report in determining a core element of the applicant's claim; iv) the failure to indicate to the applicant that a fundamental aspect of his claim (as regards his homosexuality) was being re-opened and the failure to provide him with an opportunity to comment thereon; v) the manner in which the evidence of a witness was treated and the failure to adequately take it into consideration; vi) the manner in which the applicant's credibility was assessed; and vii) the failure to take into account the applicant's fragile mental health state in the assessment of his claim.

5. In respect of the first complaint, the applicant contends that the Tribunal Member erred in concluding that he was not satisfied as to the credibility of the applicant's claim that he was gay and perceived to be gay in Iran. Counsel submits that the Tribunal Member erred in reaching this conclusion on the basis that he disbelieved the applicant's account of the incident which caused

his flight from Iran, the details of his travel to the State and his failure to seek asylum in other countries. It is stated that the applicant's evidence in relation to his self-identification as a gay man does not appear to have received any or any sufficient attention by the Tribunal in this regard. Further, the applicant complains that the report referred to by the Tribunal Member in reaching his decision, "Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe" (September 2011, Jansen & Spijkerboer) was not referred to at the oral hearing in breach of s. 16(8) Refugee Act 1996, nor was any indication given to the applicant that his sexual orientation was being questioned by the Tribunal. In this regard, the applicant also makes complaint that the Tribunal Member was selective in his interpretation of the report consulted and failed to apply its terms properly in determining a core issue. In particular, the applicant makes complaint that the Tribunal Member failed to give reasons or adequate reasons for disbelieving the applicant's self-identification as a gay man and his narrative in respect of that particular issue.

6. Counsel for the applicant also notes that while questions were raised in relation to the applicant's account of the incident which allegedly caused him to flee Iran, no adverse credibility findings were made by ORAC at first instance as regards his sexual orientation. As such, the applicant submits that the decision maker in ORAC accepted that the applicant was gay. In light of this, counsel for the applicant claims that as a matter of fair procedures, the applicant was entitled to be put on notice that this fundamental aspect of his claim was going to be re-opened on appeal. Further, the applicant states that the Tribunal Member failed to put these concerns to him at the oral hearing so as to give him an opportunity to respond. Issue is also raised by the applicant with the manner in which the evidence of a witness on his behalf Mr. O'Ceallaigh, formerly of Galway Gay Men's Helpline, was dealt with by the Tribunal and it is submitted that insufficient weight was given to his evidence particularly in light of its potential to support the core claim of the applicant.

7. Finally, the applicant makes complaint that the Tribunal Member erred in the manner in which he made adverse credibility findings in relation to the applicant's sexuality without an adequate basis for so doing, with evidence to the contrary and averse to the dicta of Cooke J. in *I.R. v. Minister for Justice* [2009] IEHC 353. It is also asserted that the Tribunal Member failed to take into account the applicant's fragile mental state in the manner in which his claim was assessed. In this regard, counsel for the applicant claimed that a 'lightening' of the burden of proof on an applicant was appropriate in accordance with the UNHCR Guidelines.

8. Mr. Conlan Smyth B.L. for the respondent submits, in reply, that the Tribunal Member came to a clear view in relation to the applicant's credibility in finding his narrative to be "...singularly incredible. It was inconsistent, inherently implausible and self contradictory in several key areas" and that such finding ought not to be departed from in these proceedings. In this regard, the respondent refers to the dicta of McGovern J. in *K.K. v. Refugee Appeals Tribunal* (Unreported, High Court, McGovern J., 22nd May 2007) who stated: "Provided there were facts or evidence which would entitle the first respondent to reach the conclusion he did, then his decision would appear to be immune from challenge unless there were some breaches of natural or constitutional justice or lack of vires." He further highlights that the decision specifies six reasons as to why the Tribunal deduced that the applicant had not

established that he was gay or perceived to be gay in Iran.

9. The respondent contends that the Tribunal Member has considered the applicant's self-identification as a gay man and refutes the contention of the applicant that inadequate attention was paid to this aspect of his claim. He further submits that the burden of proof is on the applicant in this regard and that where he has failed to discharge this burden it is open to the Tribunal to come to the conclusion that the applicant has not established he is gay. Counsel states that this was clearly the central issue in the case and that the matter was ventilated fully at the hearing, including the admission of evidence from a witness on behalf of the applicant who gave his opinion that he was in fact gay. The respondent believes that the witness based this opinion on "gut feeling" and that it did not occur to him that a person might fabricate a story in relation to their sexuality in order to substantiate a bogus asylum claim.

10. Counsel for the respondent dismisses the applicant's claim that s. 16(8) Refugee Act 1996 was breached in relation to the use of the Jansen & Spijkerboer report and notes that it was not alleged that if the applicant had use of the document that his case would have been presented in a different fashion, nor was it alleged that the applicant suffered any prejudice and crucially it was not alleged that the principles referred to were in error. The respondent also submits that the report used does not contradict the account given by the applicant to the Tribunal nor does it undermine the case made by the applicant. Further, counsel for the respondent dismisses any assertion by the applicant that there was selective use and interpretation of the Jansen & Spijkerboer report. The respondent believes that the recommendations of the report were complied with by the Tribunal Member and that he did not base his decision on medical reports, he had reference to the evidence adduced by the applicant's witness and he did not put inappropriate questions to the applicant. Rather, the respondent submits that the Tribunal Member gave the applicant the opportunity to express himself fully in describing his sexual orientation at his oral hearing. As such, counsel submits that there is no lack of clarity in respect of the basis of the Tribunal Member's finding that the applicant is not credible as to his claim to be gay and to be perceived as such in Iran.

11. As to the remaining claims made by the applicant, the respondent dismisses the contention that the applicant should have been put on notice that the issue of his sexual orientation would be re-opened on appeal and refers to the fact that the appeal is a *de novo* hearing and that the burden of proof rests on an applicant to satisfy the Tribunal Member as to the veracity of his claim. Further, the respondent submits that it is clear that the sexual orientation of the applicant was to the forefront of the hearing and that his core claim was therefore clearly considered. It is also submitted that the evidence of the witness adduced on behalf of the applicant was taken into account and carefully considered by the Tribunal Member contrary to the applicant's claim. Finally, the respondent states that the applicant's reference to a 'lightening' of the burden of proof in relation to a person who is mentally disturbed is not applicable in this case and that the Tribunal Member fully accepted that the applicant had mental health issues and reference was made in his decision to the medical reports submitted in this regard.

Findings:

12. In the court's view, the Tribunal rejected the claim of the applicant principally on the basis of adverse credibility findings. It is clear that the

Tribunal Member found the applicant's claims to be "inconsistent, inherently implausible and self-contradictory in several key areas." As a result, the Tribunal Member held that the applicant's lack of credibility fatally undermined his narrative that he was both a homosexual and perceived to be such in Iran. While the applicant has levied a series of complaints at this decision, in the view of the court it is the manner in which the Tribunal assessed the credibility of the applicant which renders it unlawful. The assessment was contrary to the oft quoted dicta of Cooke J. in *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 353. It is my view that the Tribunal Member has erred in the manner in which he has reached the following adverse credibility findings and it is this failure which fatally undermines his conclusion in this case.

13. The Tribunal Member believes that the applicant was inconsistent in his evidence and that an answer to a question in his s. 11 interview undermined certain other responses given. The Tribunal Member states that: "the appellant's contention to the Tribunal that he was an unwilling participant [in the alleged rape incident] and resisted advances made by his neighbour was undermined by his admission later to the Tribunal that he found the same man attractive and had, as a result, made suggestive overtures to him in the past, which he had given as the reason as to why that neighbour may have known that the appellant was allegedly gay. This was in response to the presenting officer putting his response to question 63 of the s. 11 interview to him". It is noted that at question 63 in his s. 11 interview the applicant was asked: "Did other people know you were gay?" To this the applicant replied: "I kept myself to myself, I didn't let other people know, I didn't know what gay meant." The court finds it difficult to comprehend how the applicant's claim to be an unwilling participant in the incident could be undermined by his admission that he had found his neighbour attractive. Further, it does not follow that the applicant's behaviour towards his neighbour prior to the incident contradicted a statement by the applicant in his s. 11 interview that he did not make it known publicly that he was a homosexual. In my view, the Tribunal Member's contention in this regard flies in the face of commonsense contrary to the standard set by Henchy J. in *State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642 and is illegal.

14. An issue surrounding the content of the video or pictures which were taken on the colonel's phone was also raised by the Tribunal Member. In this regard, the Tribunal Member found that "in light of the colonel's lack of hesitation in showing the video he allegedly took of the act to, amongst others, the appellant's parents, the appellant's continued insistence that it was he who had been raped, rather than the other way around becomes highly implausible." It is, at best, unclear as to what may or may not have been shown by the colonel to the applicant's mother and while viewing the images may have clarified who the perpetrator of the act was, it is difficult to understand how this could in some way be determinative or even cast doubt on the applicant's claim to be a gay man and to be perceived as such in Iran. To seek to impugn the credibility of the applicant on the basis of conjecture and speculation in this regard is unsafe and I find the Tribunal Member's finding irrational and illegal in this regard.

15. The Tribunal Member also casts doubt on the applicant's credibility in relation to a perceived conflict of evidence whereby the applicant, in his s. 11 interview, claimed that he did not know what kind of evidence the colonel had to use against him and yet the applicant's parents in their letter allege that

the colonel showed them the images of the incident on the day it occurred. It is of note that the applicant's s. 11 interview was conducted on the 21st September 2007 while the letter from the applicant's parents setting out their side of the story is dated 9th August 2008, almost one year later. The Tribunal Member is of the view that: "Either the appellant's parents failed to tell the appellant about this, a scenario which is inherently implausible...or the letter and the whole scenario is a fiction of the appellant's imagination." While the applicant confirmed at his s. 11 interview that he had been in contact with his family since he had arrived in Ireland it is not clear what the extent, duration or content of that contact was. It would appear therefore that the Tribunal Member is engaging in some measure of speculation in suggesting that it is 'inherently implausible' that they failed to tell the applicant what evidence the colonel had against him. It does not follow that the failure of the applicant to mention that the colonel had video evidence (about which he may or may not have been aware at the time of his s. 11 interview) results in the whole scenario being a "fiction of the appellant's imagination." In any event, despite my misgivings, it does not appear that the Tribunal Member makes an express finding on this issue.

16. The Tribunal decision goes on to cast doubt on evidence given by the applicant that he never told his father about his sexuality and that the other members of his family were also unaware of it and states that this "flies in the face of the other evidence presented by the appellant". In this regard, it should be noted that it appears on the face of the letter written by the applicant's parents that the applicant had spoken to his father and had told him that he was wrongly accused. It does not appear that the issue discussed was the applicant's sexuality, but rather the focus was on the incident that occurred between the neighbour and the applicant. The Tribunal Member has erred by speculating that the applicant had in fact discussed his sexuality with his parents and family in this regard.

17. A significant criticism was made by counsel for the applicant in respect of the manner in which the Tribunal Member dealt with the evidence of the witness called on the applicant's behalf and that insufficient weight was given to same. While it is true to say that the evidence of a witness is not necessarily determinative of an applicant's claim, it must be properly assessed and taken into consideration. In this regard the Tribunal Member notes: "When the Tribunal asked the witness directly if he thought it was at all possible that the appellant may have been pretending to be gay, he stated that he was at a loss as to why anyone would pretend to be gay. It was pointed out to him that such a stratagem would not be at all unusual for the purposes of fabricating or bolstering a bogus asylum claim. This seemed to never have occurred to him previously. One must approach this witness's opinion on the appellant's sexuality with a degree of caution therefore." However, on viewing the solicitor's attendance note of the Tribunal hearing it appears that the above statement by the Tribunal Member is a mischaracterisation of the evidence of the witness. The attendance note records that when the witness was asked whether he thought the applicant was genuinely homosexual or trying to convince him, he stated: "[I] Have asked myself [the] same question a number of times. Yes I would know. I cannot think of [a] single instance I felt he was in any way trying to convince me he was gay. I have known a lot of people from Asia, School of Oriental and Africa Studies, known gay men from Central Asia. I am not unfamiliar with people from this culture. I'm absolutely convinced A. is not a straight man...This is clearly an obvious context where this could happen. I've been in

hour after hour where he's in severe emotional distress. I've put a lot of my time over [the] last five years supporting this guy. I wouldn't be doing this if I thought he was a straight guy." It would appear that by mischaracterising the evidence of the witness the Tribunal Member has erred in failing to fairly weigh the evidence and give it sufficient weight in the assessment of the applicant's claim.

18. The Tribunal Member also makes adverse findings in respect of the applicant's narrative in respect of his travel details. The Tribunal is of the view that the applicant was not forthcoming about his travel details and that by fleeing the truck in which he was travelling without communicating with the driver or asking him where he was, constituted "precipitous behaviour" which "suggests that the appellant knew where he was and his alleged ignorance of his travel details is not accepted as plausible." Further, the Tribunal Member states that the applicant's contention that he: had never communicated with any of the drivers contradicted what he said at his s. 11 interview. On viewing the text of the s. 11 interview, it appears that the: Tribunal Member has erred in mischaracterising the evidence of applicant. When asked "Did you ask [the driver where you were]?" the applicant is recorded as answering "No, there was no chance he told me to get into the other lorry & gave me a plastic bag with items to help me live for the next few days in both lorries." When asked: "Why didn't you ask him when you were in the process of changing vehicles?" the applicant replied: "It happened so quickly there was no chance for me to speak." It also appears that in reaching his conclusions in relation to the applicant's narrative in respect of his travel details, the Tribunal Member failed to take adequate account of the letter from Mr. McGrath and his family which was highly corroborative in nature and came from a 'good Samaritan' who had aided the applicant whom he had come across in a distressed state near the Nil in Wicklow. Such pertinent and corroborative documentary evidence, so often absent in an asylum applicant's narrative of their travel to the State, required an assessment more than a mere recording that it had been "considered". I find that the Tribunal Member has erred in failing to rationally analyse and fairly weigh this evidence.

Conclusion:

19. In the view of the court, the error in the manner in which the Tribunal Member assessed the credibility of the applicant and thereafter concluded that the applicant was not a homosexual from Iran is sufficient to warrant the order of *certiorari* in its own right. With regard to the other complaints raised by the applicant, I agree with the submission of the respondent that as the Tribunal process is a consideration of the asylum claim *de novo*, the applicant cannot succeed with the claim that he received no indication that the question of his homosexuality would be re-opened by the Tribunal. On the contrary, it was clear to all that the issue of the applicant's homosexuality was the core issue at the Tribunal. The selective use of the Jansen & Spijkerboer report by the Tribunal and the failure of the respondent to comply with the terms of s. 16(8) Refugee Act 1996 are also issues raised on behalf of the applicant. I am of the view that while there appears to have been a breach of the terms of s. 16(8) Refugee Act 1996 owing to the failure to indicate to the applicant the report later relied upon by the respondent, the applicant has not suffered or pointed to any particular prejudice as a result. In this instance and on the terms of this particular case, the breach is not sufficient to result in the Tribunal decision being quashed on that basis alone.

20. As regards the selective use of the report, it would appear that the

Tribunal Member has focused on certain passages over others in seeking to establish at the outset a framework within which to adjudicate the applicant's claim. It would appear that the Tribunal Member in endeavouring to do so may have slipped into error as it appears that he failed to mention to do so the key part of any applicant's claim in such cases, as highlighted in the report, is his or her self identification as an LGBTI. As Hogan J. in *SA (Algeria) v. Minister for Justice, Equality and Law Reform* [2012] IEHC 78 remarked: "Sexual orientation is moreover an intrinsic and essentially immutable feature of human identity: see, e.g., the comments of Ryan J. in *MA v. Refugee Appeals Tribunal*, High Court, 12th November, 2010, and those of Smyth J. in *E v. Refugee Appeal Tribunal* [2011] IEHC 149. It is not simply a question of performing physical sexual acts with a member of the same sex as distinct from a member of the opposite sex: it is rather a defining feature of that very identity. We know from the work of Freud, Jung, Kinsey and others that sexual orientation defines key aspects of the individual's more general orientation to the world around them." It was incumbent on the Tribunal Member to highlight that both an applicant's credibility and the narrative of self-identification as a gay man are relevant considerations which should be taken into account in assessing such a claim. Finally, I am of the view that the Tribunal Member did consider the applicant's fragile mental health state in the assessment of his claim and I agree with the respondent's submission that no 'lightening' in the burden of proof placed upon the applicant is applicable in this particular case.

21. Having reached these conclusions and this being a 'telescoped' hearing, I hereby formally grant leave to seek judicial review and I grant an order quashing the decision and remitting the matter to be re-heard by the Tribunal. I also direct that a copy of this judgment be placed on the file, at the election of the applicant.

Source:

<http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/e12dba7d944c396580257c1300372141>