

## THE HIGH COURT

## JUDICIAL REVIEW

[2017 No. 53 J.R.]

BETWEEN

E.H.G.A. (VENEZUELA)

APPLICANT

AND

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

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 5th day of June, 2018**

1. The applicant sought asylum in the State, denying in his s. 11 interview that he was ever a member of a political party. He claimed to have attended two marches in university in 2008. No repercussions followed from these. His application was refused.

2. He then applied to the Refugee Applications Commissioner for subsidiary protection, claiming he would be at risk as a result of his activism. Again he did not mention a political party. After his first interview with the Commissioner, he submitted documentation on 15th September, 2015. No covering letter was attached to this documentation. The applicant's counsel characteristically struggled to explain why the applicant has not seen fit to assist the process or explain his own documents. The documents essentially consisted of:

(i). A registration form in the context of a claim for the first time that he was a member of a Venezuelan political party.

(ii). A letter from a Mr. Duran of that party claiming ongoing involvement in that organisation. The applicant now accepts that much of the content of this letter is fraudulent. The applicant's counsel made the completely spurious point that the applicant was never making the claim set out in that letter. However, submitting a document making a particular claim is making that claim - unless the document is expressly disowned at the time it is submitted, which was not the case here.

(iii). The applicant produced an identity card which he later averred was a political party membership card, although this was not so.

3. The claim for subsidiary protection was refused and the applicant appealed to the Refugee Appeals Tribunal, an appeal which was dismissed on 30th December, 2016. That dismissal is now challenged in these proceedings. The tribunal member, Ms. Elizabeth O'Brien, said *inter alia* that it was certainly arguable that there was indiscriminate violence in Venezuela, but that one could not conclude that such was within the context of an armed conflict such as to warrant the grant of subsidiary protection. (I must emphasise that a finding of arguability is not a finding of the fact of indiscriminate violence.)

4. I have received submissions from Mr. Conor Power S.C. and Mr. Eamonn Dornan B.L., who also addressed the court, for the applicant and from Mr. Frank Callanan S.C. (with Ms. Ann Harnett O'Connor B.L.) for the respondents.

**Ground 1- contention that IPAT is the appropriate respondent**

5. Ground 1 merely relates to identifying the appropriate respondent. It is not a ground for relief as such.

**Ground 2 – claim that indiscriminate violence relates to an internal armed conflict**

6. Ground 2 claims that the tribunal erred in finding that the alleged indiscriminate violence does not relate to an internal armed conflict for the purposes of art. 15(c) of the qualification directive 2004/83/EC. However the reasoning of the tribunal is clear. The test is set out by the CJEU in Case C-285/12 *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*. An internal armed conflict involves a conflict between the state and an armed group, or between two or more armed groups confronting each other. The tribunal member therefore applied the correct test. No error in the application of that test to the facts has been demonstrated. Upper Tribunal Judge Hugo Storey in Chapter DIII of Hailbronner and Thym, *EU Immigration and Asylum Law* (2nd ed.) (C.H. Beck/Hart/Nomos, 2016) at pp. 1238 - 1239 states that "*the CJEU emphatically rejected recourse to IHL [International Humanitarian Law]*" and that "*merely establishing the existence of an armed conflict whilst a necessary condition for Article 15(c) to be engaged is not a sufficient condition*". It seems to me there is no real doubt about the EU law position, as articulated by the CJEU, so there is no basis for a reference to that court as sought.

7. Another problem with ground 2 (that also applies to grounds 3 and 4) is that even if there was a situation of indiscriminate violence based on an armed conflict, the applicant was found not to be at risk on the facts, as noted by the respondents at para. 16 of their written submissions.

**Ground 3 – alleged error in interpretation of UNHCR guidelines**

8. Ground 3 alleges that the tribunal erred in finding that the UNHCR "Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions", 2nd December, 2016, related to asylum seekers, not subsidiary protection. Unfortunately, that point is clearly nonsense. The tribunal at para. 6.12 – 6.14 explains the position. Paragraph 9 of the UNHCR guidelines refers to subsidiary protection, but that is only to point out that there may be an overlap in certain factual situations.

9. At the hearing Mr. Power accepted that the UNHCR did not have jurisdiction to deal with subsidiary protection, and that concession is fatal to the case made as pleaded. Production of the UNHCR "Guidance Note on the Outflow of Venezuelans", March, 2018 (which as it happens was as it post-dated that decision not put to the tribunal) that refers back to the earlier guidelines, does not change that conclusion in any way, and for good measure the guidance note does not refer to subsidiary protection in that context.

#### **Ground 4 – alleged failure to depart from CJEU jurisprudence**

10. Ground 4 contains the unlikely contention that the tribunal erred in holding that it was not open to it to depart from the CJEU judgment in *Diakité*. That point is misconceived, as the earlier discussion makes clear.

#### **Ground 5 – failure to make a finding of enhanced risk of serious harm to the applicant**

11. Ground 5 alleges that the tribunal erred in finding that the applicant was not at an enhanced risk of serious harm, as defined by reg. 2 of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) and/or art. 15(b) of the qualification directive. However, the tribunal's conclusion lawfully follows from the view legitimately taken by the tribunal of the applicant's situation.

#### **Ground 6 – failure to find that a returnee is at enhanced risk of harm**

12. Ground 6 contends that the tribunal erred in finding that the applicant was at no greater risk than that faced by other Venezuelans merely on account of his perceived status as a wealthy returnee from a western country. The tribunal member said she had been provided with no country material that could support such a claim: see para. 5.2. She found that the applicant was a person "*who does not have any political profile and who is not engaged in any meaningful political activity and who admits that he is not politically active*". It seems to me that that is a clearly reasonable finding on the material before the tribunal.

#### **Ground 7 – alleged rejection of political party material**

13. Ground 7 alleges that the tribunal erred in rejecting the applicant's alleged political party documentation. In replying submissions, Mr. Doman clarifies that the error was in rejecting the "*certificate of registration*", which he says was inaccurately referred to as the membership card. To an extent this submission mischaracterises what was decided. The tribunal member held at para. 5.1 that she was not in a position to "*denounce*" the documentation but said "*I find it unreliable for the same reasons I find the letter from the secretary general of the party unreliable. It is issued by someone who has not just gilded the lily but issued downright lies*". While this statement is slightly ambiguous, its natural meaning is either that (a) the secretary general, Mr. Duran, issued the registration certificate or (b) the same source or political party issued the certificate.

14. As to interpretation (a) it is in principle quite possible that there was evidence at the hearing to the effect that Mr. Duran signed the registration certificate. The signature is different but not so radically different as to put that outside the realm of possibility. It would be entirely natural for it to be discussed at the hearing as to who signed what documents. The applicant carries the onus of proof in the present proceedings and has to positively aver that there was no such evidence. Instead, the applicant has not enlightened the court as to what evidence was put before the tribunal on this issue. It seems to me, that in such an evidential vacuum, it is not open to me to find for an applicant under those circumstances.

15. Interpretation (b) leads to a conclusion that is in any event totally within the discretion and jurisdiction of the tribunal. The previous document issued by the political party was found to be fraudulent. That would be a basis to dismiss a further document issued by the same party and that is the interpretation I prefer given that that is the general sense of the comment made by the tribunal member. If I am wrong in applying interpretation (b), the applicant for the reasons stated fails on evidential grounds to obtain relief under interpretation (a).

16. However, if I am wrong about both of these matters and if there was an error, the error is not material: a point made in *I.R. v. Minister for Justice and Equality* [2015] 4 I.R. 144 [2009] IEHC 510 *per* Cooke J. at p. 152, para. 10(7). This is so because the applicant was, on his evidence at its height, a low, level ordinary member of the party and thus not materially distinguishable from a person who was a student activist in his youth. Even taking the applicant's case at its high water mark, the only document going towards the claim shows that he was at one stage an applicant for ordinary membership. He was asked to submit country information regarding threats to inactive or former members: see para. 3.8 of the tribunal decision. He did not do so. The absence of any risk having actually being demonstrated gives rise to the position that the situation of a former ordinary member of a political party has not been shown to be materially different from a low-level person such as a student demonstrator, in terms of the risk going forward. Thus, it seems to me that an adverse conclusion was open to the tribunal member on the evidence and indeed is perfectly reasonable.

#### **Motion to dismiss the proceedings**

17. Even if I am wrong about all of the foregoing, I would have granted the respondents' motion to dismiss the proceedings. Clearly there was very significant non-disclosure on an objective basis by the applicant, given the constantly mutating accounts, the failure to engage with material, the failure to take the initiative to explain documents, waiting until the applicant was essentially caught red-handed with inaccurate statements before they were adjusted, and drip-feeding of information to the decision-making bodies.

#### **Order**

18. The application is dismissed.