

## THE HIGH COURT

## JUDICIAL REVIEW

[2018 No. 495 J.R.]

BETWEEN

S.N. (GHANA)

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 11th day of January, 2019**

1. The applicant was born in Ghana in 1978. He claims he was reared in a pagan tradition and then converted to Christianity. He claims that his mother's uncle was a traditional chief. The uncle allegedly died in 2001 and the applicant was asked to take on this role in 2016. He gave two versions of what happened between 2001 and 2016, one being that the applicant's mother assumed chieftainship functions and another version being that there was no chief and that another uncle took the decisions. He gave multiple versions as to how the succession was meant to devolve and why it came to him. He stated that he was unwilling to participate in the pagan rituals involved and that following physical violence and threats he made a complaint to the police, in response to which the elders allegedly engaged a mob to hunt him down, using a white powdered substance to do so.

2. He left Ghana and claims that with the help of a mystery "good Samaritan" he came to Ireland, arriving on 24th May, 2016. He applied for asylum, which was rejected on 18th November, 2016. He appealed that rejection to the Refugee Appeals Tribunal. Following the commencement of the International Protection Act 2015 he applied for subsidiary protection. That was rejected on 22nd November, 2017. He appealed that refusal to the International Protection Appeals Tribunal.

3. An oral hearing took place on 7th March, 2018. Ms. Nóra Ní Loinsigh B.L. appeared for the applicant, and Ms. Irene Fisher B.L. for the International Protection Office. The applicant was notified on 23rd April, 2018 that the appeals had failed.

4. I granted leave on 25th June, 2018, the primary relief being *certiorari* of the tribunal decision. A statement of opposition was filed on 12th December, 2018. I have received helpful submissions from Mr. Michael Conlon S.C. (with Mr. Garry O'Halloran B.L.) for the applicant and from Ms. Lucy McRoberts B.L. for the respondents.

**Extension of time**

5. The delay in the initiation of proceedings is adequately explained in para. 14 of the applicant's affidavit. I also take into account as part of the overall circumstances, without in any way criticising anybody, the fact that the respondents took five-and-a-half months from the initiation of proceedings to deliver their statement of opposition, which caused more lapse of time in the progressing of the proceedings than the relatively brief delay in initiating the leave application. The latter delay should be viewed in the overall context in assessing whether to extend time.

**Ground 1 - Alleged non-compliance with s. 28(4)(b) and (c) of the 2015 Act**

6. The essential complaint made under this heading, although one would not necessarily know it from the way in which the ground is worded, is that the tribunal applied an unduly Western perspective and failed to take into account the cultural context in Ghana in assessing the applicant's claim. I can deal with that omnibus point under this heading, although I also take into account the other grounds that reformulate the same point, to no particular beneficial effect. Mr. Conlon complains that the applicant's story was, as he puts it, "thrown out" in circumstances where the applicant was relying on a translator and where he says Western perceptions of probability, reasonableness and belief were taken into account rather than Ghanaian perceptions.

7. The fact that the applicant is relying on a translator does not give rise to grounds for judicial review. The applicant has not put in any evidence that anything he said was mistranslated.

8. Neuberger L.J., as he then was, in *H.K. v. Secretary of State for the Home Department* [2006] EWCA Civ. 1037, commented at para. 28 that: "In many asylum cases, some, even most, of the appellant's story may seem inherently unlikely but that does not mean that it is untrue." He went on to say that "The ingredients of the story, and the story as a whole, have to be considered against the available country evidence and reliable expert evidence, and other familiar factors, such as consistency ... and with other factual evidence ...". So far, so unremarkable. It is clear, for example, in the EU qualification directive 2004/83/EC that a decision-maker must normally consider all relevant country information. Neuberger L.J. went on to say at para. 29 that: "Inherent probability ... can be a dangerous, even a wholly inappropriate, factor to rely on in some asylum cases. ... customs and circumstances [may be] very different from those of which the members of the fact-finding tribunal have any (even second-hand) experience." The reference to inherent probability being dangerous and wholly inappropriate is possibly slightly over-dramatic. The word "some" is crucial here - certainly not most. Neuberger L.J. relies on James C. Hathaway, *The Law of Refugee Status*, 1st ed. (1991) at p. 81 but that passage is rather more measured. Professor Hathaway says at pp. 81 to 82 that: "Simply because a particular state of affairs may be difficult to understand from the vantage point of the country of adjudication does not give license to disregard relevant information." That is certainly true. Interestingly, that sentence is not replicated in the body of the text in the second edition by Hathaway and Foster (Cambridge, 2014) which at n. 236 p. 126 simply cites the passage in *H.K.* The body of the text of the second edition states that "country data may be credible even if it does not align with a decision maker's intuitive understandings of reasonableness" and refers to the "risk of cultural assumptions about plausibility", citing *Ye v. Canada (Minister of Employment and Immigration)* [1992] FCJ 584 per MacGuigan J. That was a case on somewhat more extreme and compelling facts, where the decision-maker considered that the Chinese authorities would have arranged to "wait to apprehend the applicant when he returned home" in the context of a position that "in none of the hundreds of relevant cases which have come before this court in recent years did the Chinese authorities ever lie in wait to make an arrest after having delivered a summons". The point made by Neuberger L.J. is balanced by the recognition at para. 30 that there is an entitlement on the fact-finder to rely "on his common sense and his inability as a practical and informed person to identify which is or is not plausible", citing Pill L.J. in *Gheisari v. Secretary of State for the Home Department* [2004] EWCA Civ. 1854, at paras. 20 and 21. Essentially Neuberger L.J.'s judgment must stand for

the uncontroversial proposition that an assessment of plausibility must have due regard to the country material, which was what was done here.

9. One overall point here is that judges who, in our system, are by definition generalists and whose exposure to asylum law may in any event be intermittent, are in a weaker position to take a view on what is or is not probable in a given country than members of the IPAT. The role of the court is a limited one, as set out by Clarke J., as he then was, in *E.D. v. Refugee Appeals Tribunal* [2016] IESC 77 [2017] 1 I.R. 325 at 339: "So far as the facts are concerned a court's function is to determine whether the facts, as found by the administrative body, can be sustained on judicial review principles." The reference made by Neuberger L.J. to individual members of the fact-finding tribunal is not necessarily apposite in a system such as that in Ireland, where, while the members of the IPAT are individually independent in relation to any particular case, the tribunal is organised on a corporate basis and its members are institutional actors. The tribunal is organised on a basis that ensures that any personal know-how, or lack of know-how, of an individual member is addressed by co-ordinated measures to ensure consistency in the tribunal overall. Section 63(2) of the 2015 Act provides that "the chairperson may issue to the members of the Tribunal guidelines on the practical application and operation of the provisions or any particular provisions of [that part of the Act] and on developments in the law relating to international protection". Sub-section (6) provides that the chairperson may convene meetings with a member or members of the tribunal for the purposes of discussing matters relating to the transaction of the business assigned to the tribunal or such members, "including, in particular, such matters as the avoidance of undue divergences in the transaction of business by the members". Sub-section (7) provides for an annual meeting with members of the tribunal "and, where necessary, to make provision for training programmes for members". Section 65(2) sets out the obligation of individual members, including at para. (d) having regard to any guidelines issued by the chairperson and at para. (f) attending any meetings convened by the chairperson under s. 63(6) or (7). Standards of international protection are now highly developed, with practical guidance from the European Asylum Support Office (established by Regulation (EU) 439/2010) and the International Association of Refugee and Migration Judges, and a body of caselaw across the EU and from the Court of Justice of the European Union. It is not the case that Irish protection decision-makers arrive at conclusions by the seat of their pants or on the basis of individual member's hunches or cultural perceptions. There is no reason to consider that the tribunal members in general, or the member in this particular case, are unduly influenced by inappropriately Western notions of what is probable.

10. More fundamentally, the whole argument made under this heading does not arise on the facts. Even on the high-water mark of Neuberger L.J.'s judgment, that judgment accepts the legitimacy of having regard to the contradictions in an applicant's account, and that was the basis on which the story regarding succession was rejected at para. 4.4.2, not simply on the basis that the member did not think it was likely. The applicant gave three different versions of how the succession came about and two different versions of who was ruling between the death of the uncle in 2001 and the approach to him in February, 2016. While the decision made reference to Ghanaian country of origin information at para. 4.4.3 (the Immigration and Refugee Board of Canada, *Ghana: Consequences of refusing a fetish priest of chieftaincy provision, whether there is state protection available* (16th August, 2012) at p. 3), the member nonetheless accepted that there could be a risk in refusing such a chieftaincy offer. The discussion of risk seems to have been *obiter* since the tribunal rejected the case that the applicant was offered the chieftaincy anyway, so a risk arising from rejecting an offer that was not made does not logically arise. Insofar as that risk was concerned, the tribunal had regard to the applicant's claim that he was placed on medication or eye damage due to allegedly having white powder thrown at him, but that he then failed to produce any evidence of medication or eye damage, and instead produced a spectacle prescription, which (especially for a 39-year old) is not exactly evidence of eye damage. The tribunal noted that the applicant referred to four separate attacks, but that each story was "identical in each and every single detail". This simply was not a case that the tribunal member failed to consider the cultural context. Thus the applicant's point under this heading just does not arise. Insofar as reliance was placed on *X. v. Refugee Appeals Tribunal* [2007] IEHC 422 (Unreported, High Court, 11th December, 2007) *per* Herbert J., that case has nothing to do with the current situation, or indeed current decision-making methodology generally by the IPAT. *X.* was a case where there was a failure to identify and decide on the material elements of the claim. That was done here.

#### **Ground 2 - Alleged error or irrationality in relation to succession to the chieftaincy**

11. As noted above, the decision at para. 4.4.2 considered that the IPAT took the view that the applicant had put forward alternative scenarios which were inconsistent with a claim of predetermined hereditary succession. It is alleged that this was irrational or erroneous. I cannot accept that submission. The tribunal member was entitled to consider that the tension between the multiple versions of the story given by the applicant regarding devolution of the role and the requirement for nomination amounted to contradiction undermining the credibility of the account. Mr. Conlon conceded that the applicant's account "appears to be somewhat contradictory" but was not necessarily so. However, this is not a situation where only one conclusion (being one favourable to the applicant) is possible, so the conclusion actually drawn was a matter for the tribunal member who, having seen and heard the applicant, was in a much better position than the court to determine whether his account is credible.

#### **Ground 3 - Alleged error or irrationality in relation to the persecution claim**

12. The applicant made the case that he was traced by a mob *via* the white powder that was thrown in his eyes. He also claimed that his eyes were damaged. Mr. Conlon says that the tribunal should have asked whether the elements of the story that were independent of the claim regarding tracking by white powder should have been a basis for protection. The problem with this submission is that the tribunal did consider all relevant issues and did not reject the applicant's entire story simply because he gave evidence of (what Mr. Conlon accepts can be termed his "magical belief" of) being tracked by a white powder.

#### **Ground 4 - Alleged unfairness, error and irrationality**

13. Unfairness as alleged in this ground is, Mr. Conlon explained, a shorthand for the Western bias complaint which I have already dealt with above. He also submits that the finding of myriad inconsistencies and unresolved contradictions was irrational; but it was not irrational, as explained above.

#### **Ground 5 - Irrational or selective reading of the material regarding chieftaincy**

14. Again this adds nothing to the Western bias argument that I have already dealt with.

#### **Ground 6 - Failure to assess the actual subsidiary protection claim made**

15. As pleaded, this ground involves a misunderstanding of the role of the tribunal. Subsidiary protection is to be determined against the background of the facts accepted, not those rejected. There is no obligation on the tribunal to "assess the actual subsidiary protection application made" in the sense pleaded. The claim is assessed only by reference to the elements accepted by the tribunal. The applicant's real complaint is the rejection of the claim, which I have dealt with above. No independent ground arises by reference to how the subsidiary protection claim was dealt with, as Mr. Conlon appeared to concede.

#### **Order**

16. As set out at para. 26 of Ms. McRoberts' helpful written submissions, there are at least eleven reasoned and entirely legitimate factors that were taken into account by the tribunal in rejecting the credibility of the applicant's account. This is not a case where

that account was rejected on any unsustainable or culturally unreasonable basis. Accordingly, the order will be:

- (i). that time be extended for the making of the application up to the date on which it was made; and
- (ii). that the proceedings be dismissed.