THE HIGH COURT

[2024] IEHC 598

[Record No. 98/23 JR]

BETWEEN

H

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE

RESPONDENTS

JUDGMENT of Ms. Justice Marguerite Bolger delivered on the 21st day of October 2024

1. This is an application for *certiorari* of a decision of the International Protection Appeals Tribunal ('Tribunal') of 12 January 2023 affirming the recommendation of the International Protection Office ('IPO') that the applicant was not entitled to a refugee declaration or subsidiary protection declaration. For the reasons set out below, I grant an order of *certiorari* quashing the decision.

Background

2. The applicant is a national of Pakistan who came to Ireland in 2010 on the basis of his 2004 marriage to an EU citizen. On 5 January 2011, the applicant killed a man who was also from Pakistan and injured his now ex-wife. In 2012, he was convicted of murder but, on appeal in 2014, the murder conviction was overturned, and he pleaded guilty to manslaughter. He was sentenced to nine years imprisonment and in May 2017 whilst in prison, he applied for international protection and completed a questionnaire with the assistance of his then solicitor. Upon his release in October 2017, he completed a second questionnaire with the assistance of a friend. The applicant claimed that if he returned to Pakistan, he faced threats to his life from the family of the man he had killed. The IPO

decision in 2018 found this was credible but refused the applicant subsidiary protection because there was sufficient state protection available to him in Pakistan. The applicant appeals and his current solicitor sought his full file prior to the Tribunal appeal hearing in July 2023. The first questionnaire was not furnished and it is common case that the first the applicant's current solicitor knew of the existence of that questionnaire was when it was mentioned in the Tribunal decision of January 2023.

The Tribunal's decision

3. The Tribunal found no basis for a refugee declaration. In considering the threat the applicant claimed had been made against him, the Tribunal said it must be satisfied as to the credibility of his claim and his general credibility, which required, in particular, a consideration of *"the internal consistency of the Appellant's statements throughout his claim"* (at para. 44). The Tribunal went on to consider those matters under the following headings:-

(i) The appellant's initial claim (at paras. 45 to 47 of the decision);

(ii) The section 35 interview (at paras. 48 to 51 of the decision);

(iii) The appeal hearing (at paras. 52 to 60 of the decision) and

(iv) Police in Pakistan (at paras. 61 to 63 of the decision).

Thereafter, the Tribunal set out its conclusion.

4. The material set out by the Tribunal under the heading *"The Appellant's initial claim"* merits transcription here as its contents relate directly to the basis for the applicant's challenge to the impugned decision:-

> *"45. The Appellant was interviewed pursuant to Section 13(2) of the IP Act 2015 on 7 April 2017. At that interview, the Appellant stated that he could not return to Pakistan as* [Mr. A's] *family members will kill him. The Tribunal notes that there is no mention at this interview of any threats being made to the Appellant's family in Pakistan from members of* [Mr. A's] *family, notwithstanding that the appellant later told the IPO at his Section 35 interview that he was aware that these alleged phone threats started a year earlier in April 2016.*
>
> *46. In the Appellant's first Application for International Protection Questionnaire (AIPQ) dated 24 May 2017 the Appellant, assisted by his legal representative at the time, stated as the basis for his claim that he believed his life would*

be in danger in Pakistan from family members of [Mr. A]. *Again, the Tribunal notes that again there is no reference in this Questionnaire to any threats having been made to the appellant's family in Pakistan.*

47. Following his release from prison on 6 October 2017, the Appellant completed a second AIPQ dated 25 October 2017. In setting out the basis for his claim at Q. 62, the Appellant states that he cannot return to Pakistan as [Mr. A's] *family will kill him and that his family in Pakistan will also get hurt and he claims that* '[Mr. A's] *family have already started threatening my parent family in Pakistan.'"*

5. Under the next heading, *"Section 35 interview",* the Tribunal determined that the applicant claimed at his s. 35 interview that the threats to his life began in 2016 when his life sentence was reduced to nine years. Under the next heading, *"The Appeal Hearing",* the Tribunal set out in some detail various questions that the Presenting Officer asked the applicant and noted inconsistencies between the applicant's claim at the s. 35 interview and the account given to the Tribunal as "*markedly different*" (at para. 54). The last paragraph of that section is set out in para. 60 where the Tribunal stated:

"60. Moreover, the Tribunal must also question why members of the Appellant's family in Pakistan, whom he claims have been harassed for years with threating phone calls, have not provided any supporting evidence to corroborate this crucial element of his claim, such as sworn Affidavits, which are commonly produced before the Tribunal to support the claim being made. Indeed, the Tribunal must question why there is no evidence before it to support the alleged continued occurrence of these threatening phone calls in 2022, such as recordings, which would be easily obtainable in this day and age."

6. Under the final substantive heading of *"Police in Pakistan",* the Tribunal recounted matters noted by the Presenting Officer during the hearing, at paras. 61 and 62, and, at para. 63, found that the applicant's explanation did not reconcile with what is referred to as *"clear inconsistency"* in his account.

7. Under the heading *"Conclusion",* the Tribunal said they did not find the applicant to be credible. Paragraphs 64 and 69 merit quotation:

> *"64. The Tribunal has considered the Appellant's evidence in the round and concludes that the matters set out above in relation to the inconsistent timeframe of the alleged threatening phone calls to his family in Pakistan and the inconsistency regarding the reporting of those alleged phone threats to the police in Pakistan amount to a substantial inconsistencies, which render the Appellant's evidence unreliable and are damaging to his credibility and necessarily therefore the credibility of his claim.*
>
> *…*
>
> *69. While the Appellant may have a subjective belief that members of* [Mr. A's] *family may wish to harm him should he return to Pakistan, in the absence of any credible evidence of threats made by* [Mr. A's] *family towards the Appellant's life, the Tribunal, with reference to the unreliable and inconsistent evidence before it and the lack of any corroborating evidence of these alleged threatening phone calls, cannot reach such a conclusion."*

The applicant's challenge

8. The applicant asserts that the EU duty of cooperation was breached, firstly, in the Tribunal's reliance on the absence of affidavits from family members in Pakistan and, secondly in the Tribunal's failure to tell the applicant and his legal representatives that there were two completed questionnaires in advance of relying on the *"undisclosed (May) questionnaire"* (as described by the applicant) to deem that the applicant's claim lacked credibility. The applicant also relied on fair procedures and s. 46(8) of the International Protection Act 2015 ('the 2015 Act') and claimed the Tribunal made a material error of fact in making what he described as a finding at para. 61 of its decision.

(1) The duty of cooperation

9. Article 4(1) of Council Directive 2004/83/EC, the Qualification Directive, states:

> *"Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application."*

This principle is implemented in national law by s. 28(2) of the 2015 Act which states:

> *"The Tribunal shall, for the purposes of an appeal under section 41 in co-operation with the applicant, assess the relevant elements of the application."*

A similar obligation is imposed on the IPO by section 28(1). Section 28(7), in terms similar to Article 4(5) of the Directive, provides:

> *"(7) Where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation where the international protection officer or, as the case may be, the Tribunal, is satisfied that—*
>
> *(a) the applicant has made a genuine effort to substantiate his or her application,*
>
> *(b) all relevant elements at the applicant's disposal have been submitted and a satisfactory explanation regarding any lack of other relevant elements has been given,*
>
> *(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case,*
>
> *(d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so, and*
>
> *(e) the general credibility of the applicant has been established."*

The applicant contends that this duty of cooperation required the Tribunal to raise the absence of any affidavit from family members with him as it was *"clearly a material concern, of substance and significance to the decision"* (the applicant's submission at para. 29). The applicant cited the decision of Clarke J. in *Idiakheua v. Minister for Justice* [2005] IEHC 150, which was followed by Finlay Geoghegan J. in *Olatunji v. RAT and Minister for Justice, Equality and Law Reform* [2006] IEHC 113. In oral submissions, the applicant contended that, because the IPO found the applicant's claim to be credible, there was what his counsel referred to as *"a heightened requirement"* for the Tribunal to raise its concerns about the absence of corroborative evidence and, in particular, the absence of affidavits from family members.

10. The duty of cooperation has been discussed in the case law, including that of the CJEU which is particularly relevant to the correct interpretation of what this duty required the Tribunal to do. *M.M. v. Minister of Justice, Equality and Law Reform, Ireland and AG* Case C-277/11 was a reference from this Court where an applicant contended that the duty of cooperation required the Tribunal to furnish him with a draft decision for comment before the decision was finalised. The CJEU had little difficulty in rejecting that proposition and, in doing so, explained the two-stage process of an Article 4(1) assessment of facts and circumstances. At para. 64 of its decision, the court stated:

> *"The first stage concerns the establishment of factual circumstances which may constitute evidence that supports the application, while the second stage relates to the legal appraisal of that evidence, which entails deciding whether, in the light of the specific facts of a given case, the substantive conditions laid down by Articles 9 and 10 or Article 15 of Directive 2004/83 for the grant of international protection are met."*

The court concluded, at para. 68:

> *"It is thus clear that Article 4(1) of Directive 2004/83 relates only to the first stage mentioned in paragraph 64 of this judgment, concerning the determination of the facts and circumstances qua evidence which may substantiate the asylum application."*

11. By contrast, the second stage,

> *"…relates to the appraisal of the conclusions to be drawn from the evidence provided in support of the application, when it is determined whether that evidence does in fact meet the conditions required for the international protection requested to be granted."* (at para. 69)

The CJEU confirmed that that second stage is *"solely the responsibility of the competent national authority"* for which the duty of cooperation *"is of no relevance"* (at para. 70). The court concluded, emphatically, that there is no obligation on the national authority,

> *"…to inform the applicant that it proposes to reject his application and notify him of the arguments on which it intends to base its rejection, so as to enable him to make known his views in that regard."*

12. Exactly what is involved in the stage 1 process, where the duty of cooperation does apply, was teased out a little more in another later reference to the CJEU from this Court in *X v. IPAT* Case C-756/21. The CJEU found that the duty requires a national authority to carry out "*…an appropriate examination of applications, at the end of which it will take a decision regarding them"* (at para. 49). The Court said this,

> *"…must include an individual assessment of that application, taking into account, inter alia, all relevant facts as they relate to the country of origin of the applicant at the time of taking a decision on the application, the relevant statements and documentation presented by him or her as well as his or her individual position and personal circumstances. Where necessary, the competent authority must also take*

> *account of the explanation provided regarding a lack of evidence, and of the applicant's general credibility"* (at para. 51).

On the facts of that case, the CJEU found that the Tribunal,

> *"…may therefore be required to obtain and examine such precise and up-to-date information, including a medico-legal report deemed relevant or necessary."*

The CJEU expressly recognised (at para. 48 of its decision) that the national authority will often be better placed than an applicant to gain access to certain types of documents.

13. The within applicant referred to a number of national authorities where matters of concern to the Tribunal were not put to the appellant, as a result of which leave was granted to judicially review the Tribunal's decision (*Idiakheua*) or the decision of the Tribunal was quashed (*Olatunji* and *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296). In each of those decisions, there was a tangible issue that was not put to the applicant. For example, in *Idiakheua*, the Tribunal found that the applicant's explanation for not having sought protection was not tenable. Clarke J. found this was arguably a matter of substance and significance in relation to the Tribunal's decision and should have been put to her. His decision was expressly followed by Finlay Geoghegan J. in *Olatunji* where the question whether the applicant was or was not forced to leave her home, was also found to have been a matter of substance and significance in relation to the Tribunal's decision and therefore,

> *"…the Tribunal Member was under an obligation to put to the applicant the relevant matters which appeared to the Tribunal Member to support such a conclusion and give the applicant an opportunity of commenting or dealing with same."*

B.W., a decision of the Court of Appeal, concerned an issue in relation to a date of death and the existence of a marriage certificate that was raised for the first time in the Tribunal decision. The Tribunal's failure to put that to the applicant formed the basis for *certiorari* of the Tribunal's decision.

14. A similarly specific matter was identified in the CJEU decision of *X v. IPAT* at para. 51 where the court confirmed the competent authority's obligation to take account, where necessary, *"of the explanation provided regarding a lack of evidence, and of the applicant's general credibility".*

15. The applicant also relies on the decision of Phelan J. in *T.B. v. IPAT* [2022] IEHC 275, albeit this related to a somewhat different point about the right to an oral hearing where the applicant's credibility was at issue, i.e., her version of events was simply not believed.

Phelan J. found that *"identified inconsistencies"* had not been put to the applicant (at para. 80) including that she had *"never availed of the help of any support organisation"* (at para. 81).

16. The Tribunal's fatal failures to put something to an applicant in the decisions on which this applicant relies, all involved far more specific matters than what was at issue here, namely the lack of <u>any</u> evidence corroborating the applicant's claim that threats against his life had been made to members of his family in Pakistan. His own account of the threats were second hand versions of what he says he was told by members of his family. He chose not to seek or secure any corroborating evidence, which was a matter for him and his legal advisors. The national authority was not better placed that the applicant to obtain evidence corroborating the applicant's account of threats made to his family members. This contrasts with the situation in *X. v. IPAT* where the national authority was clearly better placed than the applicant to gain access to up-to-date country of origin information and a medico-legal report on the applicant. The applicant's lack of corroborative evidence is not comparable to a failure by the Tribunal to put it to an applicant that her explanation was not tenable (as occurred in *Idiakheua*) or the question of whether the applicant was or was not forced to leave her home (*Olatunji*) or the absence of a marriage certificate (*B.W.*).

17. In conclusion on this point, while the absence of evidence corroborating the applicant's version of events seems to have been a matter of substance and significance for the Tribunal, the law and, in particular, the EU duty of the national authority to cooperate, does not extend to something as general as the absence of corroboration - which is entirely different to the tangible pieces of evidence at issue in the case law where decisions were quashed for failures to put specified discrepancies to an applicant. The lack of evidence corroborating this applicant's claim of things he says he had been told were happening to his family in Pakistan, is not something that might have been more easily addressed by the national authority. It is something that could only ever be addressed by the applicant. The Tribunal did not breach its duty of cooperation in not advising the applicant that, in assessing the credibility of his claim, it might rely on the absence of evidence, including, but not limited to, the lack of any affidavit from the family members who are alleged to have heard the threats made against the applicant's life. That assessment was properly made by the Tribunal based on the evidence the applicant decides to put before it.

18. The duty of cooperation undoubtedly applies to *"the determination of the facts and circumstances qua evidence"* (as confirmed by the CJEU at para. 68 in *M.M.*), but does not relate to,

> *"…the appraisal of the conclusions to be drawn from the evidence provided in support of the application, when it is determined whether that evidence does in fact meet the conditions required for the international protection requested to be granted."* (at para. 69 of *M.M.*, my emphasis).

My conclusions in that regard are consistent with and informed by the wording of Article 4 and by the CJEU and domestic case law. No reference to the CJEU is necessary as I am satisfied that the point is *acte clair*.

19. Section 28(7) does not apply as the applicant's credibility had not been established and I follow the decision of Ferriter J. in *A.H. & ors v. IPAT* [2022] IEHC 84 in that regard where he stated at para. 17:

> *"In short, it is clear that before the benefit of the doubt can be given in relation to undocumented aspects of an applicant's claims, the applicant's general credibility must be established (see s.28(7)(e)). Once the applicant's general credibility has been established, undocumented aspects of the applicant's case do not need to be confirmed i.e. can get the benefit of the doubt where, but only where, the four other factors in s. 28 (7)(a) to (d) are satisfied."*

20. As held by Humphreys J. in *J.H. (Albania) v. IPAT* [2018] IEHC 752, *"[r]ejecting credibility in the absence of documentary evidence is not a breach of s. 28(7)"* (at para. 8).

21. For the avoidance of doubt, I confirm that I do not accept the applicant's contention that findings made by the IPO that this claim was credible, placed any additional obligation on the Tribunal. The appeal hearing before the Tribunal is a *de novo* hearing and it is a matter for the applicant to deal with his claim refreshed.

22. I reject the applicant's challenge on this ground.

(2) The undisclosed questionnaire

23. It is common case that the Tribunal referred to the first questionnaire, completed by the applicant in May 2017, in its decision in circumstances where the applicant's then legal advisors were never made aware of it, in spite of their diligent attempts to secure the applicant's full file. The applicant asserts an entitlement to his file from the duty of cooperation in EU law, the general principles of EU law reflecting Article 41 CFEU, Article 47

CFEU as well as Article 16(1) of the Procedures Directive and s. 46(8) of the 2015 Act. However, any breach of his entitlement to his file does not in itself impugn this decision. The issue is the extent to which the Tribunal relied on the contents of the questionnaire that he had previously completed but which was not disclosed to his legal advisers.

24. The Tribunal expressly denies in its statement of opposition that it relied on that questionnaire and its contents to deem that the applicant lacks credibility. Counsel for the Tribunal describes para. 46 of the Tribunal's decision, which refers to the questionnaire and its contents, as merely *"comments"* and *"facts"*. In particular, she asserted that this was not part of the applicant's evidence to which the Tribunal referred at para. 64 of its decision that it had considered *"in the round"* and the Tribunal's conclusion,

> *"…that the matters set out above in relation to the inconsistent timeframe of the alleged threatening phone calls to his family in Pakistan and the inconsistency regarding the reporting of those alleged phone threats to the police in Pakistan amount to a substantial inconsistencies, which render the Appellant's evidence unreliable and are damaging to his credibility and necessarily therefore the credibility of his claim."*

25. The only sworn evidence on behalf of the Tribunal was the affidavit of John Moore, a Higher Executive Officer at the Immigration Service Delivery Function of the Department of Justice, who averred to having made his affidavit on behalf of the respondents. There was no affidavit from the Tribunal member setting out their views or verifying Mr. Moore's averments. Mr. Moore swore at paras. 14, 15 and 16 the following:-

> *"14. The Tribunal does not, contrary to what is asserted by the Applicant, rely on the contents of the first Questionnaire to deem that the Applicant lacked credibility.*
>
> *15. Moreover, as far as it may relevant, the Applicant does not dispute that there is a discrepancy between the contents of the first Questionnaire and the second Questionnaire as highlighted by the Tribunal.*
>
> *16. As can be seen from the decision also, all the matters which were taken into account by the Tribunal in arriving at its negative conclusion were put to the Applicant for comment by the Presenting Officer."*

26. There is no basis therein for the claim made on behalf of the Tribunal that the *"comments"* made at para. 46 of the decision did not form part of the evidence *"in the round"* on which the Tribunal relied in making their decision. Neither is there anything in the decision or the evidence put before this Court to allow the reference made by the Tribunal at para. 69 to *"the unreliable and inconsistent evidence before it"* to exclude what the Tribunal clearly noted at para. 46 that the undisclosed questionnaire did not refer to threats having been made against his family members.

27. The Tribunal also disputes that the issues in relation to the undisclosed questionnaire were of substance or significance in relation to its decision and therefore contends they fell outside of the Tribunal's duties of fair procedures and its duty of cooperation. If that was so, it is difficult to understand why the undisclosed questionnaire was mentioned at all and/or mentioned under the Tribunal's own heading entitled *"The Appellant's initial claim"*. A similar attempt to minimise the significance of something mentioned in a decision of the Tribunal that was never put to an appellant was unsuccessfully made in *B.W. v. RAT* where Peart J., for the Court of Appeal, stated at para. 54:

> *"In my view, there was no need for the Tribunal to mention the absence of a verifying marriage certificate if it was something of little or no significance. As it must be taken to have been something of some significance at least in relation to credibility, the absence of a marriage certificate is something which should have been put to the applicant as a matter of fair procedures, where it was being relied upon by the tribunal. In so far as the absence of a marriage certificate was put into the basket of concerns which led to an adverse credibility finding on a cumulative basis, I would remove it from the basket so to speak, as it could not be relied upon in the absence of fair procedures being accorded to the applicant."*

28. I do not accept the Tribunal's submission that no reliance was placed on the undisclosed questionnaire and I find that submission to be inconsistent with the wording of the decision, particularly at paras. 45, 46, 64 and 69 (all of which are quoted above). It is unclear from the decision of the Tribunal just how much reliance was placed on the undisclosed questionnaire and it is clear that the Tribunal also relied on other matters of concern around what it found to be *"the unreliable and inconsistent evidence before it"* (at para. 69). However, counsel for the applicant made a compelling argument that it is sufficient to establish that the decision might have been different had it not been for what

the court has found constituted a breach of the appellant's rights to fair procedures and the Tribunal's duty of cooperation, relying on the decision of the CJEU in *X v. IPAT* and its discussion of the principle of effectiveness at paras. 69 to 71:

> *"69. As regards the principle of effectiveness, it does not appear that the burden of demonstrating that the decision of the IPO and/or the IPAT might have been different in the absence of a proven breach of the duty of cooperation would make it impossible in practice or excessively difficult to exercise the rights conferred by EU law, which is, however, for the referring court to determine.*
>
> *70. First, such a burden does not appear to entail that an applicant for international protection must demonstrate that the decision would have been different had it not been for that breach, but only that it cannot be ruled out that the decision might have been different.*
>
> *71. Secondly, if it appears at the outset or if the competent authority is able to demonstrate before the referring court, if necessary in response to the allegations of the applicant for international protection, that, even in the absence of that breach, the decision could not in any event have been different, it does not appear that there are rights conferred by EU law the exercise of which would be rendered impossible in practice or excessively difficult. The referring court itself thus presents itself as carrying out a review of whether that decision is well founded, with the result that, in such a case, the annulment and remittal of the case to the IPAT would risk duplicating that review and needlessly prolonging the procedure."*

29. That decision of the CJEU is clearly binding on this Court. I find on the facts here that it cannot be ruled out that the Tribunal's decision might have been different had the first questionnaire been disclosed to the applicant's solicitor and had the Tribunal advised the applicant of its concerns as to the contents of that questionnaire. I do not consider that remitting the matter to the Tribunal would risk duplicating a review or needlessly prolonging the proceedings.

(3) A material error of fact

30. The applicant pleads that the Tribunal made a material error of fact in finding at para. 61 of the decision:-

> *"…at the Section 35 interview he confirmed that these threatening phone calls were not reported to the police because 'The police are corrupt there. They will not take any action'".*

The applicant accepted in the course of oral submissions that para. 61 was not a finding made by the Tribunal. It clearly only sets out what the Presenting Officer stated and/or submitted at the appeal hearing before the Tribunal. If the applicant or his legal representative has an issue with that, it should have been raised before the Tribunal at the hearing. There was no material error of fact contained in those paragraphs of the Tribunal's decision.

Conclusion

31. For the reasons set out above and arising from the applicant's challenge under (2) above relating to the first questionnaire of May 2017 not having been disclosed to the applicant's solicitors, I quash the decision of the Tribunal of January 2023 and remit the matter to the Tribunal for a fresh appeal hearing.

Indicative view on costs

32. In accordance with s. 169 of the Legal Services Regulation Act 2015 and in circumstances where the applicant has succeeded in its challenge to the decision of the Tribunal, my indicative view on costs is that the applicant is entitled to his costs to be adjudicated upon in default of agreement. I will put the matter in at 10.30am before me on 12 November 2024 for final orders.

Counsel for the applicant: Michael Conlon SC, Noeleen Healy BL

Counsel for the respondents: Silvia Martinez BL