THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 74

Record Number: 2019/61

Baker J.
Haughton J.
Power J.

BETWEEN/

S

APPELLANT

- AND –

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice Power delivered on the 11th day of March 2020

1. This is an appeal against the judgment and order of the High Court delivered on 29 January 2019 (*S v Minister for Justice and Equality* [2019] IEHC 34) refusing an application by way of judicial review for an order of certiorari quashing the decision made by the respondent, the Minister for Justice and Equality (hereinafter 'the Minister'). The decision challenged by the appellant was a refusal by the Minister of his application for independent immigration status as a victim of domestic violence pursuant to *the Victims of Domestic Violence Immigration Guidelines 2012* (hereinafter 'the Guidelines').

Background

2. Subject to certain specified provisions, permission to remain in the State may be granted to a non-national on behalf of the respondent pursuant to s. 4 of the Immigration Act 2004. An Immigration Officer within the Garda National Information Bureau ('GNIB')

may grant such permission on the Minister's behalf.

3. On 23 April 2013, the appellant entered the State to undertake certain studies. He registered with GNIB and received a Stamp 2 permission which allowed him to study full-time in the State. He did not complete his studies and on 20 June 2014 his permission to reside in the State expired.

4. Thereafter, he married IZ, a European Union ('EU') citizen and a Latvian national. At the date of the marriage, 12 February 2015, the appellant had overstayed and was illegally present in the State. His wife is a mother of four children, two of whom were born subsequent to the marriage and none of whom is related to the appellant. On 20 March 2015, he applied for a residence card as a family member of IZ under the European

Communities (Free Movement of Persons) Regulations 2006 and 2008. On 20 October 2015, he was granted a 'Stamp 4 EUFam' permission to remain as the spouse of an EU national, valid until 19 October 2020. This entitled him to enter employment in the State.

5. On 2 August 2016, IZ left the State and returned to Latvia. The appellant has not lived with his wife since her departure from Ireland.

6. On 4 November 2016, the appellant made an application to the Irish Nationalisation and Immigration Service of the Department of Justice and Equality (hereinafter 'INIS') for retention of EU Treaty Rights. On the same day, he made a separate application to INIS for seeking permission to reside in the State with independent immigration status pursuant to the Guidelines. On 18 November 2017, his application for retention of EU Treaty Rights was refused and an appeal of this refusal is pending at the date of this judgment.

7. The present proceedings relate only to his application for independent immigration status pursuant to the Guidelines. By letter dated 4 December 2017, his application was refused. On 6 December 2017, he inquired as to whether an appeal procedure existed and on 13 December 2017 the Minister clarified that there was no official appeal permitted under the system. However, in the light of the request made, the Minister agreed to have the appellant's case re-examined by an Assistant Principal Officer. On 4 January 2018, the appellant filed further submissions in the context of the reconsideration of the refusal decision.

8. By letter of 29 March 2018, INIS issued its decision following the re-examination of the appellant's request. It noted that the grant of a review was an error on the part of the Minister as neither an appeal nor a review was provided for under the Guidelines. However, notwithstanding that error, the Minister agreed, on an exceptional basis, to have the original decision re-examined, including, in the light of new information submitted. The review upheld the Minister's original refusal to grant permission to remain in the State pursuant to the Guidelines.

9. On 30 April 2018, leave was granted to seek judicial review in respect of this decision. The appellant sought orders of *certiorari* quashing:

    (i) the Minister's decision on re-examination dated 29 March 2018 affirming his decision to refuse the appellant independent immigration permission in his own right pursuant to the Guidelines and;

    (ii) the decision of 4 December 2017 refusing the appellant independent immigration permission in his own right in light of the Guidelines.

10. On 29 January 2019, the application for relief by way of judicial review was refused by the High Court (Barrett J.). This is an appeal of that refusal.

Evidence

11. Before the High Court, the trial judge had available to him a grounding affidavit of 24 April 2018 and an additional affidavit of 2 January 2019 which had been sworn by the appellant in support of his claim. He made averments concerning the abusive nature of his relationship with his wife and the process through which he had sought to obtain permission from the Minister to remain in the State. In support of his claim seeking protection under the Guidelines, the appellant exhibited the following: -

- Copies of certain text messages that were said to have passed between the appellant and IZ;
- Two medical reports (issued on 28 October 2016 and 8 November 2016) signed by a Dr S. in India certifying that he had held two telephone consultations with the appellant (on 15 February 2016 and 2 March 2016) and noting that the appellant had complained of depression and headache and, in the later report, of his being a victim of domestic violence. These letters also noted that the appellant had 'been relieved of the symptoms';
- A letter from a Dublin based general practitioner ('GP') dated 4 January 2018 and confirming one consultation with the appellant on 10 February 2017 and noting a normal examination apart from slightly high blood pressure with stress being one possible cause;
- Two Fixed Charge Notices made pursuant to ss. 4 and 5 of the Criminal Justice (Public Order) Act 1994, as amended, dated 29 July 2016 and addressed to IZ concerning intoxication in a public place and disorderly conduct;
- A Safety Order made pursuant to s. 2 of the Domestic Violence Act 1996, which the appellant had obtained from the District Court and which was valid from 17 October 2016 until 17 October 2017; and
- A copy of a letter from a support group ('AMEN') for victims of domestic abuse.

The High Court judge also had before him the letter of 4 December 2017 from INIS to the appellant refusing his application for independent immigration status pursuant to the Guidelines. It stated that *'the Guidelines are only exercised in cases that involve extreme and urgent domestic abuse where the Minister feels that a victim requires immediate assistance in order to separate and live independently of their perpetrator.'* It confirmed that the Minister was of the opinion that the appellant had not demonstrated an urgent need of assistance. The trial judge also had before him the letter from INIS of 29 March 2018 which confirmed that, following the appellant's application for a review, a final decision was made which agreed with the original decision. It stated that the material provided by the appellant *'cannot be considered to constitute evidence showing ongoing domestic abuse.'*

12. An affidavit dated 8 November 2018 and sworn by Mr. Richard Troy, Assistant Principal Officer in INIS, was also before the High Court. In this affidavit, he verified facts

contained in the Minister's statement of opposition and explained the purpose behind the Guidelines and the context in which they had been created. A question may be raised as to the admissibility of the evidence contained in Mr Troy's affidavit in the light of a concern expressed by Keane J. in *Subhan and Others v The Minister for Justice and Equality* [2018] IEHC 458. In that case, the trial judge, citing earlier authorities, including, *Deerland Construction v Aquatic Licensing Appeals Board* [2009] I I.R. 673, expressed *'significant doubt about the correctness of permitting a decision-maker to adduce extrinsic evidence of what was intended to be conveyed by the decision ex post facto'*. To the extent that such a concern may arise in this case, I am satisfied that in swearing the affidavit of 8 November 2018, Mr Troy did no more than set out the context of and explain the background to the publication of the Guidelines. His explanation did not add anything to the substantive reasons for the Minister's refusal of the appellant's request for independent immigration status pursuant to the Guidelines. Consequently, I am satisfied that such evidence is admissible in the context of what this Court must decide.

13. In summary, Mr Troy's evidence was as follows. The Guidelines were developed in close co-operation with the National Office for the Prevention of Domestic, Sexual and Gender Based Violence. They were a response to situations involving foreign nationals who, being victims of domestic violence and resident in the State, had their immigration status derived from or dependent upon that of another person, namely, an EU National who was exercising free movement rights and who was, in fact, the perpetrator of domestic violence. If sponsored by the primary permit holder, a partner or spouse was assigned a reckonable Stamp 3 permission. The recipient of a Stamp 3 permission was not permitted to work in the State. In rare circumstances, this resulted in a partner or spouse being placed in a vulnerable position on two fronts: - their permission to reside in the State derived from their spouse or partner's permission and, being unable to work, they were financially dependent on their spouse. If the relationship was or became abusive, a vulnerable non-EEA spouse in such a position could find that he or she was unable to leave the relationship for fear of being deprived of permission to remain in the State. Being unable to access a living wage or any State supports, he or she was not in the same position as other people in need of refuge. The Guidelines were drawn up to assist such persons so that they might know it was possible for them to obtain permission to remain in the State that was independent of the permission that had been granted to their spouse or partner. They indicate that, generally, the immigration status granted would be at the same level as that which was previously held as a dependent (normally Stamp 3). Where, however, it became necessary for a victim to work in order to support himself or herself and/or family members, the Guidelines state that *'consideration will be given to granting permission to work'*. A Stamp 4 permission entitles a person to work.

High Court Judgment

14. The judgment of the High Court is characterised by a certain brevity. It runs to no more than a page and a half. Having set out the background to the claim, the trial judge examined, albeit briefly, a number of issues that arose for determination and he addressed each one of them, individually.

15. Concerning the alleged breach of the appellant's legitimate expectation that the Guidelines would be applied to his case, the trial judge held that the Guidelines do not fetter the Minister's inherent discretion and that he was entitled, when exercising that discretion, to have regard as he did to the *raison d'etre* behind the Guidelines. As to alleged irrationality/internal inconsistency in the Minister's decision, any ostensible inconsistency was explained by reference to different types of dependency. On the question of the alleged breach of Articles 3, 8 and 14 of the European Convention on Human Rights ('ECHR') interpreted in the light of Article 59 of the European Convention on Preventing and Combatting Violence Against Women and Domestic Violence 2011 ('the Istanbul Convention'), the trial judge found that the appellant could not rely, directly, on those provisions. He noted that the Guidelines do not, necessarily, apply only in cases of immediate or ongoing domestic abuse but that all applications made thereunder are treated on a case by case basis. The appellant's case was treated on its own merits and there was no evidence that the Minister had failed to have regard to the Guidelines in his decision. Concerning the alleged breach of the appellant's constitutional rights to privacy, dignity and equality, the trial judge found that there was no evidence of these rights having been breached. He found no failure on the part of the Minister to present or provide adequate reasons sufficient to convey the essential rationale of his decision. He rejected the appellant's contention that the Minister had acted unreasonably or failed to consider relevant material. He had considered all the supporting documentation provided. The weight to be attached to each item was a matter for the Minister. The trial judge held that the Minister's decision was clear as to how the submitted material had been treated. He, the Minister, had come to the view that the appellant had not submitted adequate evidence to support his application. The trial judge found no alleged unreasonableness or breach of legitimate expectation. Finally, as to the alleged breach of fair procedures in failing to have an independent transparent appeals process, the trial judge observed that the appellant had been afforded a re-examination of the initial refusal and that no authority had been cited to support the proposition that there ought to have been an appeal process in this case.

Grounds of Appeal

16. By notice dated 20 February 2019, the appellant sought to set aside the decision of the High Court. He claimed that the High Court judge erred in law and fact in finding that:

    1. the Minister could depart from the terms of the Guidelines and by finding that 'the Guidelines do not fetter the Minister's inherent discretion;

    2. the Minister had not breached the appellant's legitimate expectation that the Guidelines would be applied by including an additional criterion to their terms, as published, namely, the existence of 'immediate and urgent' domestic abuse;

    3. there was no irrationality or internal inconsistency in the contested decisions in the Minister's finding that the Guidelines encompass two types of dependants; the first type, who hold Stamp 3 permission and are legally and financially dependent upon another person, and the second who holds EU Treaty Rights permission which does not extend to financial dependency, as in the appellant's case;

4. adequate reasons sufficient to convey the essential rationale of the contested decisions were provided;

5. the Minister did not act unreasonably and/or fail to take into account relevant material and/or act in breach of the appellant's legitimate expectation that the terms of the Guidelines would be followed as regards supporting documentation; and

6. the impugned decisions did not involve an unjustified or disproportionate breach of the appellant's rights to privacy, dignity and equality.

7. It is submitted that the reasons provided by the High Court for its findings are inadequate and that the judgment contains insufficient reasoning.

Parties' Submissions

17. The appellant's submissions may be summarised as follows. Based on his experience of domestic abuse in his marriage and having an immigration status derived from that of his wife's, the correct application of the Guidelines would require that he be granted permission to remain. Too strict an interpretation of the Guidelines had been imposed in a manner that was inconsistent with the broad definitions relating to protection from domestic violence contained therein. He had a legitimate expectation that the Guidelines would be applied, and this was breached by the Minister's refusal. *Parhiar v Minister for Justice and Equality* [2014] IEHC 445 confirms that the Guidelines do, in fact, give rise to a reasonable expectation that the Minister's discretion will be exercised in a manner broadly consistent with them. His treatment of the appellant's evidence of domestic abuse was insufficient. The Minister had added, unfairly, a requirement of *'immediate and urgent'* domestic abuse which is not to be found in the Guidelines. The Minister's finding in relation to the requirement of a financial dependency was irrational and inconsistent with the Guidelines. Based on the appellant's Stamp 4 permission (his entitlement to work), the Minister had distinguished him from others to whom the Guidelines might apply. This was irrational as the Guidelines themselves contain no such distinction.

18. The appellant's rights to privacy, dignity and equality under the Constitution and the European Convention on Human Rights were breached. *Opuz v Turkey* App. No. 33401/02 (ECHR, 9 June 2009) and *A v Croatia* App. No. 55164/08 (ECHR, 14 October 2010) are authorities for the proposition that a failure to protect, proactively, against domestic violence is a violation of human rights. The inclusion of the additional criterion requiring 'extreme and urgent' domestic abuse means that the Guidelines fall short of what is required under the ECHR as interpreted in light of the Istanbul Convention. The Minister's reasons for refusing his application were inadequate in the light of *Mallak v Minister for Justice* [2012] 3 I.R. 297. The decision of the High Court was also flawed for want of reasons. The appellant is unable to understand why the High Court reached the decision it did.

19. The following is a summary of the Minister's submissions. The appellant's arguments have no regard to the fundamental facts of his application. He failed to establish that he is a victim of domestic violence in need of the protection of the Guidelines. The Minister was entitled to have regard to the purpose of the Guidelines as providing an *'escape route'* for vulnerable migrants in abusive relationships who are dependent upon their abusers. The Guidelines are not applicable to the facts of this case. The appellant's wife had already left the State when his application for protection was made. The Minister was entitled to take this fact into account. *Parhiar* is distinguishable because in that case the Minister had argued, unsuccessfully, that he was not bound by the Guidelines whereas, in this case, the Minister *did* consider the application in the light of the Guidelines and found that they did not apply to the appellant. The Guidelines confirm, expressly, that all decisions are at the Minister's discretion. The trial judge was correct in finding no breach of any legitimate expectation. The Minister was entitled to consider the factual circumstances of the case, including, whether the appellant was financially dependent upon his wife. This was not inconsistent with the Guidelines. It was a finding he was entitled to make on the basis of the evidence before him. The trial judge was correct in concluding that the reasons given are clear and need not be more extensive. The Minister, as the decision maker, was entitled to assess each item of evidence without having to conclude that it constituted evidence of domestic abuse. There was no interference with the appellant's rights under the ECHR or the Constitution. The judgment, though brief, sets out, clearly, the basis upon which the appellant was refused the relief he sought in the judicial review proceedings in the light of the evidence submitted.

Legal Principles

20. The weighing of evidence and the making of decisions in matters of asylum and immigration form part of the executive function of the Minister. However, it is well-established that such decisions are amenable to judicial review. When reviewing a discretionary decision of the High Court on appeal, the approach to be taken by this Court has been summarised by Irvine J. in *Collins v. Minister for Justice* [2015] IECA 27. At para. 79, Irvine J. stated that the true position is as set out by MacMenamin J. in *Lismore Homes*, namely: -

> *". . . that while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any a priori rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed."*

21. It is also a well settled principle of Irish law that a public law decision maker is obliged to provide reasons for decisions made. This obligation was stated by Murray C.J. in *Meadows v. Minister for Justice* [2010] 2 I.R. 701 (at paras. 93 and 94) in the following terms: -

> *"An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.*

Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective."

22. Where a decision maker is exercising an 'absolute discretion' he is not discharged from the obligation to provide reasons because *'the rule of law requires all decision-makers to act fairly and rationally'* (*per* Fennelly J. in *Mallak v Minister for Justice, Equality and Law Reform* [2012] 3. I.R. 297). Giving reasons is an intrinsic aspect of the fairness of proceedings. As Fennelly J. stated in *Mallak* at para. 68: -

> *"In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."*

23. Of course, as noted by Clarke C.J. in *A.P. v Minister for Justice and Equality* [2019] IESC 47, there may be debate about the extent to which decisions require to be reasoned and about the precise level of detail required. However, notwithstanding such debate, the party affected must always be enabled to identify the reasons for the decision and must be able to challenge this decision by way of judicial review, if necessary.

The Status of Guidelines

24. The status of guidelines in Irish law has been considered in a range of cases. Some guidelines may be statutory in nature and the relevant public body may be mandated to implement them. Others may be non-statutory but have statutory context and status and the relevant public body may be obliged to 'have regard' to them. Others, yet again, may be entirely non-statutory but may been created after a consultative process with relevant stakeholders. In *Parhiar v Minister for Justice and Equality* [2014] IEHC 445, the High Court considered the extent to which entirely non-statutory guidelines may, nevertheless, give rise to a legitimate expectation that they will be applied. He examined the Minister's refusal to grant immigration permission to an alleged victim of domestic violence pursuant to the same Guidelines that arise for consideration in this case. Ms Parhiar had been granted a Stamp 3 permission to reside in the State as a dependant of her husband, who was lawfully present. She claimed that their relationship deteriorated and that her husband became violent. In view of the protection outlined in the Guidelines, she applied for a Stamp 4 permission to remain in the State. The Minister claimed that he was free to depart from the Guidelines as they did not have the force of law. Noonan J. was of the view that the Guidelines, at the very least,

> *". . . constitute an invitation to persons who find themselves in the position of the applicant to engage with the respondent in relation to their immigration status without fear of being disadvantaged thereby."*

Accordingly, he held that the Minister was not free to disregard the Guidelines. Notwithstanding their non-statutory status, they *'give rise to a reasonable expectation on the part of persons to whom they relate that the respondent will exercise his undoubted discretion in such matters in a manner broadly consistent with them.'*

25. The application of strategic planning guidelines has been considered in the context of several planning cases. In *McEvoy v. Meath County Council* [2003] 1 I.R. 208, Quirke J. considered the scope of the obligation to *'have regard'* to matters referred to in guidelines. In his view, actions connoted by the term 'regard' are permissive in nature. They involve volition and not prescription. In deciding that the local authority was not obliged to comply, rigidly, with the guidelines' recommendations or even the policies set out therein, he took guidance from the words of Keane C.J. in *Glencar Exploration plc v Mayo County Council (No. 2)* [2002] 1 I.R. 84 at 142 when he was considering the duty of the defendant council to 'have regard' to certain policies.

> *"The fact that they are obliged to have regard to policies and objectives of the Government or a particular minister does not mean that, in every case, it is obliged to implement the policies and objectives in question. If the Oireachtas had intended such an obligation to rest on the planning authority in a case such as the present, it would have said so."*

Quirke J. held that the obligation to *'have regard'* to guidelines did not require the planning authority to *'slavishly'* adhere to them. The authority may depart from them *'for bona fide reasons consistent with the proper planning and development of the areas for which they have planning responsibility.'*

26. In *Balz v An Bord Pleanála* [2019] IESC 90, the Supreme Court granted leave to appeal on an matter relating to the application of the Wind Energy Development Guidelines that had issued pursuant to s. 28 of the Planning and Development Act 2000 (as amended). The appellant had submitted that the guidelines were outdated and not fit for purpose in light of modern technology in an area where knowledge had advanced, considerably. The respondent considered itself bound to have regard to the guidelines. The Supreme Court held (per O'Donnell J.) that it was open to a party to suggest to a decision maker that he or she should depart from the guidelines, to a greater or lesser extent, and that in such a case the decision maker must engage with that submission. The Board had erred in failing to consider submissions to the effect that the guidelines were no longer adequate.

27. The consequences of what is included in or omitted from non-statutory guidelines was considered by this Court in *Secular Schools Ireland Ltd v Minister for Education and Skills* [2017] IECA 57. The appellant submitted that a decision by the Minister for Education to exclude it from consideration for patronage of a new primary school was invalid. This had occurred because the Minister considered its application to be deficient as it did not

contain appropriate declarations of compliance with Departmental requirements. The appellant argued that it was not clear that the guidelines required prospective applicants to make mandatory commitments in the applications. Ryan P. allowed the appeal. In his view, it was a case of confused thinking based on a misleading choice of words. The Department's understanding of its own document was erroneous, and the guidelines did not state that commitments must be expressed in the application. It had, therefore, erred in excluding the appellant's application from consideration on this basis.

28. Certain principles may be distilled from a brief review of the case law on guidelines. Where a decision maker has indicated that guidelines will apply, he or she cannot then proceed to ignore or disregard them (*Parhiar*). That said, however, they need not be *'slavishly adhered to'* and may be departed from for *bona fide* reasons (*McEvoy v. Meath County Council*.) Indeed, a party is entitled to suggest that a decision maker depart from guidelines, where appropriate, and if such a submission is made then a decision maker is obliged to 'engage' with it (Balz). It would seem to make sense that the corollary should also apply, namely, that where urged to comply with particular guidelines, the decision maker should engage with that submission, too. Finally, where a decision maker seeks to exclude a person from a process for a failure to adhere to the terms of guidelines, the requirements in respect of which specific compliance is needed must be set out clearly in the guidelines.

29. In *McEvoy* and *Balz* the planning guidelines under review both had a statutory background. They were made pursuant to a statutory power and they were promulgated after a consultative process. The decision maker in each instance was obliged to have regard to them. By contrast, the Guidelines under consideration in this case, are entirely non-statutory although the evidence indicates that there had been advance consultation with stakeholders. Whilst there is, undoubtedly, an expectation that an application for independent immigration status would be considered based on the Guidelines, this is not a statutory imperative. In these circumstances, the principles arising from *McEvoy* apply, a *fortiori*, and with even more force to the Guidelines in this case. It would be strange if planning guidelines made in a statutory context did not have to be followed *'slavishly'* and could be departed from, whilst entirely non-statutory Guidelines fell to be construed, narrowly, and had to be followed to the letter without regard to their purpose or spirit.

Domestic Abuse and the ECHR

30. Domestic abuse was the subject of an application to the European Court of Human Rights in the notable case of *Opuz v Turkey* App. No. 33401/02 (ECHR, 9 June 2009.) The applicant and her mother were both victims of domestic violence at the hands of the applicant's husband. Reports of serious assaults had been made to the authorities by the applicant but then she retracted them, subsequently. Hospital admissions confirmed evidence of serious assaults. Eventually, the applicant's mother was killed by the perpetrator of the abuse and the applicant was seriously injured. The Court found that the respondent State had been in violation of its obligations under Articles 2 and 3 of the ECHR for failing to protect the applicant and her mother from the attacks perpetrated by the abuser. It noted that it is not uncommon for victims to retract allegations of abuse

because of their fear of the abusers. It was held that Turkey had neglected to take adequate steps to protect victims of repeated domestic violence in circumstances where there was a known pattern of violent abuse. Consequently, it found that there exists a positive obligation on States that are signatories to the Convention to take measures to ensure that victims of domestic abuse are afforded adequate protection.

The Guidelines

31. A review of the Guidelines indicates that, essentially, they are a signpost to the possibility of a route out of a violent or abusive relationship without having to bear the additional burden of losing one's right to remain in the State. The opening paragraph sets out their purpose and it provides as follows: -

> *"The purpose of this document is to set out how the Irish immigration system deals with cases of domestic violence where the victim is a foreign national and whose immigration status is currently derived from or dependant on that of the perpetrator of domestic violence. It is aimed at explaining how a victim of domestic violence whose relationship has broken down can apply for independent immigration permission in his/her own right."*

The Guidelines thus provide an explanation of how the Irish immigration system deals with a discreet issue. They set out how victims of domestic violence whose immigration status is derived from that of the perpetrators of the abuse can apply for an independent immigration status.

32. A definition of what constitutes domestic violence is provided at s. 1: -

> *"Domestic Violence refers to the use of physical or emotional force or threat of physical force, including sexual violence in close adult relationships. This includes violence perpetrated by a spouse, partner, son or daughter or any other person who has a close or blood relationship with the victim. The term 'domestic violence' goes beyond actual physical violence. It can also involve emotional abuse; the destruction of property; isolation from friends, family and other potential sources of support; threats to others including children; stalking; and control over access to money, personal items, food, transportation and the telephone."*

This gender-neutral definition of domestic violence contained in the Guidelines reflects, broadly, the definition to be found in the Istanbul Convention. The definition is non-exhaustive (see, for example, phrases like *'This includes'* or *'It can also involve'*) and nowhere in the Guidelines does one find a definition of who is or what constitutes a *'victim'* of domestic violence.

33. As a signpost, the Guidelines are designed in such a way as to assist a relevant victim of domestic violence to make a claim for protection thereunder. Section 2 informs applicants to set out details of the domestic violence suffered and to disclose any relevant family circumstances, *'including information on whether the applicant or the perpetrator has left*

the family home'. Section 3 is entitled 'Evidence to support application' and it provides as follows:

> *"In order that INIS can fully consider your application for independent status under this policy, it will be necessary to supply as much information as possible in support of your claim that you are a victim of domestic violence. The sort of documents that would be helpful in establishing this would include (original documents required)*
>
> ☐ *Protection Order, Safety Order or Barring Order from the Courts*
>
> ☐ *Medical reports indicating injuries consistent with domestic violence. Details of doctor and dates of consultation should be supplied*
>
> ☐ *A Garda report of incidents of domestic violence*
>
> ☐ *A letter from a State body (such as the Health Service Executive) indicating that it is dealing with your case as an issue of domestic violence*
>
> ☐ *A letter of support from a domestic violence support organisation*
>
> ☐ *Any other evidence indicating that you are the victim of domestic violence."*

34. On any reading it seems clear that the Guidelines were drafted with a cohort of particularly vulnerable people in mind. The persons contemplated by the Guidelines are those who may find themselves in what might best be described as a 'conundrum'; whereas they may want, desperately, to escape from an abusive relationship they may fear that by taking steps so to do they risk losing their right to remain in the State and may, therefore, feel compelled to remain in the degrading situation from which they want to escape. The potential consequences of seeking protection may be the very thing that discourages them from so doing.

35. It is of some importance in the context of this appeal that the definition of domestic violence in the Guidelines is not limited to physical abuse but includes various situations where coercive control, including, financial control, is exerted. The Guidelines acknowledge (at s. 1) that victims of domestic violence may be isolated from family and friends and may have no control over money, personal necessities, transport or telephone communications. Thus, they recognise, implicitly, that a victim's sense of powerlessness may be compounded by financial vulnerability. Whereas s. 4 provides that, generally, the independent immigration status that would be granted to a successful applicant would be at the same level as that which was previously held as a dependent (normally Stamp 3), the Guidelines go on to state that: -

> *"Where it becomes necessary for the victim to work in order to support themselves or family members lawfully residing in the State, consideration will be given to granting permission to work."*

In so providing, the cycle of financial dependence of the abused upon the abuser that may inhere in an abusive relationship can be broken. Protected victims would no longer be dependent on their abusive spouse or partner who would have *'no say in whether the applicant is permitted to stay in Ireland.'* The successful applicant would have his or her right to be present in the State disentangled from that of the abusive spouse.

36. Whereas the Guidelines expressly confirm that *'all decisions are at the Minister's discretion,'* it has to be acknowledged that they, nevertheless, create a level of hope for a persons who finds himself or herself unable to work ('normally Stamp 3') and thus trapped in an abusive relationship because his or her permission to remain is dependent upon the immigration status of an abusing partner. The Guidelines inform such an individual that it is possible to obtain permission to remain in Ireland independently of his or her partner or spouse.

Discussion

37. The appellant has claimed that the trial judge was wrong in finding that the Minister could depart from the Guidelines. The trial judge rejected this argument, noting that the Guidelines confirm that *'All decisions are at the Minister's discretion'*. Consequently, in his view, the Minister's inherent discretion could not be fettered. As noted above, the case law confirms that even where a decision maker is exercising an absolute discretion, he or she is obliged to comply with the rule of law and cannot be discharged from the obligation to act fairly and to give reasons for decisions made (see *Mallak* cited above at para. 22). It must be considered whether the Minister, in exercising his discretion in this case, did so in a manner that was fair and reasonable.

38. A central complaint of the appellant is that the Minister's treatment of his evidence of domestic abuse was insufficient. In considering and in re-examining the appellant's application for independent status as a victim of domestic abuse, the Minister had before him the various items submitted by the appellant in support of his claim. These included certain text messages that were said to have passed between the appellant and IZ, copies of two letters signed by a doctor in India, a short report from a Dublin based GP, two Fixed Charge Notices relating to IZ's disorderly conduct and intoxication in a public place, a Safety Order in favour of the appellant against IZ and a copy of a letter from AMEN, a support group for victims of domestic abuse.

39. The letters of 4 December 2017 and 29 March 2018 from INIS confirm that consideration was given to each item of evidence. The text messages, submitted in support of the appellant's claim that he was a victim of domestic abuse, are somewhat difficult to decipher although they contain offensive terms such as *'idiot'* and they indicate that a request for money was made. They also appear to contain threats to end the marriage and thereby bring about the removal of the appellant's visa.

40. It is also difficult to conclude that the medical evidence tendered by the appellant constituted independent corroboration of his claim that he was the victim of domestic abuse. The fact that a doctor in India issued two brief reports some eight and nine months after telephone consultations with the appellant, is a matter which the Minister

was entitled to consider when assessing the weight of the 'medical evidence'. That evidence was hardly enhanced by an additional report from a Dublin based GP which was issued on 4 January 2018 and which referred to a single consultation with the appellant some eleven months earlier. The GP noted that the appellant's examination was normal with slightly raised blood pressure, one possible reason for which could be stress. In the confirmation of refusal letter of 29 March 2018, it is noted that a causal link between the appellant's medical condition and his alleged abuse is asserted. However, such a link is not confirmed in the medical report of the GP. The Minister came to the view, as part of the overall assessment, that this information did not *'constitute or establish evidence of individual or systemic domestic abuse.'* Counsel for the appellant objected to the use of *'systemic'* as no such criterion exists in the Guidelines. Whilst his submission in this regard is correct, the use of the word *'systemic'* did not heighten the test being applied since *'systemic'* is used in the alternative to *'individual'*. Having considered, carefully, the medical evidence submitted, I am satisfied that the Minister was entitled to conclude that it did not, in itself, constitute evidence of the appellant having suffered individual domestic abuse.

41. Nor do the Fixed Charge Notices which the appellant submitted substantiate his claim that he was a victim of domestic abuse. They refer only to the fact of IZ being drunk and disorderly in a public place during the early hours of a morning in July 2016. They make no reference to the appellant. The Minister came to the view that such notices could not be considered as equivalent to a Garda report of an incident of domestic abuse. I am satisfied that he was entitled to form the view that they were not corroborative of the appellant's claim that he was a victim of domestic abuse perpetrated upon him by his former wife.

42. The Safety Order submitted by the appellant was sought and obtained at a time when the alleged perpetrator of the domestic abuse was no longer living with the appellant nor was she within the jurisdiction. The Order was dated 17 October 2016 and it remained valid until the 16 October 2017. It was made on foot of uncontested evidence given by the appellant in the District Court. At that time, his former wife had also sought such an Order but, having left the jurisdiction over two months earlier, her application did not proceed. The Minister was entitled to have regard to the circumstances surrounding the making of the Safety Order. The weight which was to be attached to this Order was a matter for the Minister. Finally, the Minister observed that the letter submitted by the appellant from AMEN, a support group for victims of domestic abuse, had indicated only that the appellant had first contacted the service on 27 October 2016 (over two months after his wife had left the jurisdiction) and that he had attended a one-on-one session on one occasion on 11 November 2016.

43. It will be recalled that the sort of documents described as 'helpful' in establishing a claim for independent immigration status are set out in s. 3 of the Guidelines. The list is illustrative of what might constitute supportive evidence, but it cannot be treated as a 'box ticking' exercise. The mere fact that an applicant has managed to submit at least one document under each of the six categories cannot, in itself, give rise to any entitlement to

succeed. Equally, it is not mandatory that an applicant provides documentation under each category nor must the information furnished in support of an application be confined to this list. The Minister must consider what is submitted and must take into account all relevant circumstances. Having done so, he is then entitled to come to a view on that evidence and to find it unsatisfactory or of little weight, and to exercise his discretion to refuse the application.

44. It will also be recalled that the Guidelines require applicants to disclose to the Minister whether the perpetrator has left the family home. In considering the appellant's application and having regard to the nature of the evidence submitted by him in making his claim, the Minister came to the view that it could not be considered to constitute evidence of ongoing domestic abuse. He did not find the evidence supportive or corroborative of the appellant's claim. As of the date of the making of his determination and following a re-examination of the application, the Minister did not accept that the appellant was a victim of domestic abuse. To my mind, he was entitled to come to that view based on the evidence submitted and I do not accept the submission that the Minister's treatment of the appellant's evidence of domestic abuse was insufficient.

45. As to the claim of alleged irrationality or internal inconsistency in the Minister's decision based on considerations of no financial dependence on the part of the appellant, the trial judge observed that the Minister was considering different aspects of dependency and that financial dependence was a relevant issue. There are, indeed, different types of dependency envisaged in the Guidelines. There is, of course, immigration status dependency (which the appellant clearly had) but, as noted earlier, the Guidelines also recognise other types of dependency, including, that created through the exertion of financial control over a victim. Whereas the Guidelines were intended to protect people whose immigration status was dependent upon that of their EU spouse and who were ('normally') financially dependent on their spouse (*'having normally a Stamp 3 permission'*), the Minister, in my view, was entitled to have regard to the fact that the appellant was not, in any way, financially dependent upon the alleged perpetrator of the abuse. I consider that the trial judge was also entitled to distinguish between the different types of dependency that arise for consideration within the Guidelines and that he was entitled to conclude that the Minister had, lawfully, made such a distinction as part of the rationale for his refusal of the appellant's request.

46. The appellant submitted that the Minister cannot apply the Guidelines in a manner contrary to their express terms. He claimed that, in making the assessment, the Minister had, unfairly, read into the Guidelines an additional criterion of 'immediate and urgent abuse' as a precondition for protection being afforded thereunder. This requirement of urgency and immediacy, he submitted, is not contained within the Guidelines. The judgment in Secular Schools may appear to lend some weight to the appellant's argument in this respect. In that case, the Court of Appeal held that a decision maker who excludes a person from a process for failure to adhere to the terms of published guidelines, must ensure that the guidelines set out clearly what is required in order to comply with the terms thereof. That case, however, is distinguishable. In this case, the Minister did not

exclude the appellant from the protection offered in the Guidelines because he had failed to reach the threshold of 'immediate and urgent abuse'. Rather, the Minister considered the application for independent immigration permission but refused it because he did not accept, on the facts, that the appellant was a victim of domestic abuse or that he was in need of any protection. Had he found that the appellant was a victim of domestic abuse but not a victim of 'urgent and immediate abuse' then the ruling in *Secular Schools* may, by analogy, have had some applicability—though not necessarily a determinative one—to the facts of this case. However, given the Minister's finding that the appellant was not a victim of domestic abuse, the judgment in *Secular Schools* does not support the appeal. I am satisfied that the Minister was entitled to conclude that the Guidelines had no application to the appellant's situation.

47. The appellant also claimed that the Minister breached his legitimate expectation by applying additional conditions beyond those expressed in the published Guidelines. Relying on *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 A.C. 629, he argued that when the Minister, as a public authority, has promised to follow a certain procedure, he should act fairly and implement his promise. I accept, as did Noonan J. in *Parhiar*, that the Guidelines create a 'reasonable' expectation on the part of persons to whom they relate that the Minister will exercise his discretion in a manner broadly consistent with them. At s. 1 they state that:

> *"Migrants may have additional vulnerability in this area in that the person committing domestic violence may say 'if you report this you will lose your immigration status'.* ***This is not true****. Domestic violence should always be reported,* ***and you do not have to remain in an abusive relationship in order to preserve your entitlement to remain in Ireland.****"*

It appears to me, however, that the focus of this passage is more on discouraging victims from believing the threats of abusive spouses or partners than on holding out a promise of independent immigration status. The underlined phrase ***'you do not have to remain in an abusive relationship in order to preserve your entitlement to remain in Ireland'*** is drafted in broad terms and, arguably, if taken in isolation may yield an interpretation suggestive of *'an entitlement to remain'*.

48. The Guidelines, however, must be read, holistically, and this particular extract cannot be viewed in isolation from the rest of the Guidelines. It must be seen in the context of their overall purpose. That purpose and the situation that they sought to redress was set out in the affidavit of Mr. Troy who identified the purpose as being:

> *"to allow such victims a route to obtaining a permission independent of their spouse to allow them leave the relationship and to guide the officer to quickly discern the need and validity of the claim to ensure that such a victim (and their children) find a safe environment without delay, given the threats that might be involved in some situations".*

I consider that whilst it was reasonable for the appellant to expect that the Minister would engage with his application in the light of the requirements set out in the Guidelines, the evidence establishes that the Minister did so engage, in all the circumstances of this case. For the reasons explained above, I do not consider that he applied a higher threshold or imposed additional conditions beyond those contained in the Guidelines. Having examined and re-examined the application, he was entitled to exercise his discretion in a manner which led him to form the view that the appellant was not a person to whom the Guidelines relate.

49. At the hearing of this appeal, an important submission made by counsel for the appellant was that the Guidelines involve a 'reach back' protection. They refer to a victim of domestic abuse *'whose relationship has broken down'*. There is no requirement for the parties to be living together. In counsel's view, the Minister had erred by including an apparent prerequisite that an applicant be in a situation of 'ongoing domestic abuse'. To require 'currency' in terms of the abuse suffered, it was submitted, involves a failure to recognise that many 'current' victims are unable to seek help. They ought not be deprived of the protection of the Guidelines by a requirement of ongoing abuse.

50. I agree with counsel's submission in this regard. The Guidelines contain no requirement that a victim seeking protection thereunder is obliged to provide evidence of *'ongoing domestic abuse.'* I also accept that they cannot be interpreted as requiring immediately proximate abuse as a precondition for their application. If so interpreted, the protection they offer may never, in fact, be capable of being utilised. It is fair to say that a victim of domestic abuse will, almost inevitably, need some 'window'—some moment of freedom—some temporary period of respite within which to garner the courage to make an application for protection. That said, however, it seems to me to be self-evident that some element of ongoing risk (as distinct from ongoing abuse) or some reasonable apprehension of future abuse must be present if the protection of the Guidelines is to be triggered. If no such risk is present and an individual is free to live his or her life without fear of abuse, then why would protection be needed?

51. I have come to the view that, when determining an application under the Guidelines, the Minister is entitled to have regard to the context envisaged by the Guidelines and the purpose for which they were created. Whereas 'ongoing' (in the sense of immediately proximate) abuse cannot be a precondition for eligibility to apply under the Guidelines, it is reasonable for the Minister to have regard to whether the abusive relationship in question has ended or whether it continues to subsist at the time when an assessment is made. It is in that sense that the Guidelines are to be seen as offering the possibility of an 'escape route' from an abusive relationship without the victim having to lose his or her right to remain in the State. In this case, the Minister had regard to the fact that IZ had left the State some months prior to the application being made. Consequently, whilst the Guidelines do involve some element of 'reach back', a significant lapse of time after an abusive relationship has ended may diminish, considerably, the likelihood of success for an applicant seeking independent immigration status pursuant thereto.

52. Several factors pertaining to the appellant's factual circumstances take him beyond the parameters of the purpose for which the Guidelines were created. The obvious and most critical one is the fact that he no longer lives with his former wife. She had been out of the jurisdiction for some considerable time when he made his application to the Minister. She left Ireland on 2 August 2016 and the application was made on 4 November 2016. Three months had passed since IZ had returned to her home country of Latvia. There was no evidence or suggestion that she intended to return to this jurisdiction. In those circumstances, the abusive relationship of which the appellant had complained was one from which he had been extracted by reason of his wife's departure from Ireland. Secondly, unlike, at least, some of the victims contemplated by the Guidelines, the appellant had not, either at the time of the application or ever, had any form of financial dependence upon his former wife nor was there any evidence that he was subjected to her control in terms of access to money, materials or communication with the outside world. Thirdly, the appellant, clearly, had other options available to him through which he could apply for permission to remain in the State and, in this regard, it must be observed that he has exercised at least one of those options.

53. Arguably, the appellant presented with a number of factors which, on a literal reading of the Guidelines, brought him within their parameters. He is an immigrant, who was married to an EU citizen, with a derived immigration status and a claim of domestic abuse. Whilst the applicant had a reasonable expectation that the Minister would engage with his application in the light of the Guidelines, it would be unreasonable for any applicant to expect that an application would be granted on the basis of a 'box ticking' exercise. The appellant submitted that he did everything in his power to comply with the Guidelines. What was not part of his application, however, was the factual context of being compelled to remain in an abusive relationship as his only means of remaining in the State. Such a context embraces an inability to make free choices—to direct one's own affairs—because of the nexus between one's victim status, one's derived immigration permission and one's relationship with an abusive partner. The appellant has argued that if 'something more' was required then that should have been stated, clearly, in the Guidelines. It is unfair, he submits, to offer a broad definition of domestic violence and then to refuse relief based on a stricter test. Domestic violence is, indeed, given a broad definition in the Guidelines. Such abuse cannot be defined by way of neat definition and, by its very nature, it is secretive, insidious and sinister. However, it must be recalled that relief in this case was not refused on the basis of the application of a stricter test but rather because Minister did not consider, at the time when the application was assessed, that the evidence supported the appellant's claim that he was a victim of domestic abuse. The departure of the appellant's wife, the ending of the abusive relationship, his financial independence and the availability of other opportunities to apply for a residence permit—all of these factors, when taken together, took the appellant, in the Minister's view, outside of the scope and purpose of the Guidelines. I am satisfied that the Minister was entitled to have regard to these important factors and to weigh them in the balance, together with the evidence tendered, when coming to the decision that he made.

54. The appellant has alleged breaches of his rights under Articles 3, 8 and 14 of the ECHR. Insofar as he relied upon *Opuz v Turkey* to support his contention that a breach of his fundamental rights has occurred, I am satisfied that the appellant's claim is readily distinguishable. Mrs Opuz had made numerous reports of domestic violence to the Turkish authorities and they had failed to act to protect her. Because of their failure to act on foot of such reports, the applicant's mother was killed and she herself suffered serious physical assaults. By contrast, there is no evidence in this case of the appellant reporting incidents of domestic violence to the police authorities during the course of his allegedly abusive relationship. His non-contested evidence in support of a Safety Order was tendered some two months after his wife had left the jurisdiction and, in circumstances where she had sought a similar order as against the appellant. This case is not in *Opuz* territory and I can find no interference, as claimed, with the appellant's rights under Article 3 of the ECHR. For the avoidance of doubt, however, I am cognisant of the fact that *Opuz* recognises that men may also be victims of domestic violence. I accept, unequivocally, the truth of that proposition. Article 8 guarantees the right to respect for private and family life and Article 14 prohibits discrimination in the exercise of rights protected under the ECHR. Whilst general claims are made about breaches of these protected rights, the appellant has not substantiated his claim by demonstrating any unlawful interference in his private or family life, nor has he pointed to any failure on the part of the State to comply with its positive obligations under the ECHR. In particular, he has not established any discrimination, on the basis of gender, in connection with the exercise of his rights.

Conclusion

55. I am satisfied that what the law requires was fulfilled in this case. The appellant applied for independent immigration status under the Guidelines. He had a reasonable expectation that his application would be considered in the light of the Guidelines and it was. He was refused based on detailed reasoning. He was afforded a review of that decision and an opportunity to make further submissions. The materials he submitted were examined, individually, and assessed, appropriately. The process was fair, open and transparent. I can find no irrationality or inconsistency in the decision making process nor did it involve any breach of the appellant's rights to privacy, dignity or equality, whether under the Constitution or the ECHR. As the Supreme Court in *Mallak* recalled, the most obvious means of achieving fairness is for reasons to accompany the decision. The reasons furnished by the Minister were such as to enable the appellant to know why his application for independent immigration status under the Guidelines was refused. I can make no criticism of the decision making process in this case nor of the High Court's finding that the Minister was entitled, when exercising his discretion, to have regard, as he did, to the *raison d'etre* of the Guidelines themselves.

56. It is, in principle, desirable for a trial judge to recall the various arguments that had been canvassed by the parties and to weigh them, one against the other, and to say why he prefers one set of arguments over the other. It might have been preferable, in this case, if the trial judge had provided a slightly more detailed analysis. However, brief though his judgment may be, it cannot be said that the appellant is left in a situation in which he

does not know why he failed in his application both before the Minister and the High Court. Each point raised by the appellant was addressed. As Peart J. noted in *Criminal Assets Bureau v. McCarthy* [2019] IECA 140, it may always be possible to discover some paragraph in a decision that might have been better phrased or some particular piece of evidence that might have been better analysed but that, in itself, *'is not a ground upon which to set aside a judgment unless the perceived defect represents a fundamental flaw in the judgment such that it is fatally undermined.'* I cannot say that the trial judge's judgment is vitiated by a flaw so fundamental that it is fatally undermined.

57. It is an affront to human dignity for anyone to be subjected to domestic abuse and, in this regard, I concur with the trial judge's final comment concerning the appellant.

58. However, for the reasons set out in this judgment, I would dismiss the appeal.