

THE HIGH COURT

JUDICIAL REVIEW

[2019 No. 50 J.R.]

BETWEEN

F.M.O. (NIGERIA), M.O.O. AND A.I.O.

(A MINOR SUING BY THEIR MOTHER AND NEXT FRIEND F.M.O.)

AND

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANTS

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 8th day of July, 2019

1. In *F.M.O. (Nigeria) v. Minister for Justice and Equality (No. 1)* [2019] IEHC 371 (Unreported, High Court, 28th May, 2019), I refused *certiorari* of a review decision under s. 49(9) of the International Protection Act 2015, and of consequent deportation orders. The applicants now seek leave to appeal, and I have received helpful submissions from Mr. Eamonn Doman B.L. for the applicants and from Ms. Sarah K.M. Cooney B.L., for the respondent.

2. The criteria for such an application have been well rehearsed in previous caselaw, including *Glancre Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, MacMenamin J., 13th November, 2006), *Arklow Holidays v. An Bord Pleanála* [2008] IEHC 2, per Clarke J. (as he then was), *I.R. v. Minister for Justice and Equality* [2009] IEHC 510 [2015] 4 I.R. 144 per Cooke J., *M.A.U. v. Minister for Justice Equality and Law Reform (No. 3)* [2011] IEHC 59 (Unreported, High Court, 22nd February, 2011) per Hogan J. I have also discussed these criteria in a number of cases, including *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646 [2016] 11 JIC 1404 (Unreported, High Court, 14th November, 2016) (para. 2), and *Y.Y. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 185 [2017] 3 JIC 2405 (Unreported, High Court, 24th March, 2017) (para. 72).

Applicants' first question

3. The applicants' proposed first question is "Does the Respondent discharge his obligations to have regard to an applicant's family life under s.49(3) of the International Protection Act 2015 by setting out the s. 49(3) criteria?".

4. To contextualise this point in the circumstances of the present application, the findings in the No. 1 judgment relevant to this issue are set out at paras. 10 – 14. The primary points made in that part of the judgment are as follows:

(i) The Minister did not fail to have regard to the applicants' family rights. The s. 49 factors were cited expressly on p. 2 of the decision and that amounted to consideration, albeit not the sort of narrative discussion that the applicant wanted.

(ii) It was clear from the decision that the Minister did not conflate s. 49 with art. 8 of the ECHR, as applied by the European Convention on Human Rights Act 2003.

(iii) In any event, no submissions were made by the applicants under this heading and, therefore, they cannot seek to quash the decision on a basis which they never raised before the decision-maker.

(iv) This was a review decision so it should be read in tandem with the original s. 49 decision, which does at p. 2 refer to the various specific elements of the applicants' family life. It was not necessary for a review decision to repeat that discussion.

(v) Furthermore, the claim in submissions of a *de facto* family involving the applicants and the mother's brother appeared to be a mischaracterisation on the facts insofar as the brother lived in Dundalk while the applicants live in Sligo.

5. The point that seems to have eluded the applicants is that lack of narrative discussion of an issue does not amount to failure to consider that issue and that where a decision-maker states that something has been considered, the onus is on the applicant to put forward some proof either direct or inferential to displace that before he or she can obtain relief by way of judicial review. That has already been clarified by the Supreme Court in *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401 so there is no particular benefit in having further reiteration of the point by the appellate courts.

6. I suggested in the No. 1 judgment that the next time anyone confused the question of consideration on the one hand with narrative discussion on the other, counsel might beneficially list the cases in which this point has already been dealt with. Very helpfully indeed, Ms. Cooney has now provided what I am sure will be an invaluable resource to applicants' counsel in the future by listing in submissions the various cases in which this point has been repeatedly emphasised by the courts. The cases that she identifies are as follows:

(i) *F.A.Y. (Nigeria) v. Minister for Justice and Equality* [2019] IEHC 373 (Unreported, High Court, 6th June, 2019).

(ii) *F.Z. (Pakistan) v. Minister for Justice and Equality* [2019] IEHC 368 [2018] 11 JIC 2603 (Unreported, High Court, 26th November, 2018).

(iii) *F.A.F. (Nigeria) v. Minister for Justice and Equality* [2019] IEHC 263 [2019] 4 JIC 1216 (Unreported, High Court, 12th April, 2019).

(iv) *J.U.O. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 710 [2018] 12 JIC 0406 (Unreported, High Court, 4th December, 2018).

- (v) *J.M. (Malawi) v. International Protection Appeals Tribunal* [2018] IEHC 663 [2018] 11 JIC 2004 (Unreported, High Court, 20th November, 2018).
- (vi) *O.A. (Nigeria) v. International Protection Appeals Tribunal* [2018] IEHC 661 [2018] 11 JIC 2003 (Unreported, High Court, 20th November, 2018).
- (vii) *A.W.K. (Pakistan) v. Minister for Justice and Equality* [2018] IEHC 550 [2018] 9 JIC 2506 (Unreported, High Court, 25th September, 2018).
- (viii) *Y.Y. v. Minister for Justice and Equality (No. 7)* [2018] IEHC 459 [2018] 7 JIC 3134 (Unreported, High Court, 31st July, 2018).
- (ix) *O.M.A. (Sierra Leone) v. Refugee Appeals Tribunal* [2018] IEHC 370 [2018] 6 JIC 1206 (Unreported, High Court, 12th June, 2018).
- (x) *H.I. (Albania) v. Minister for Justice and Equality* [2018] IEHC 275 [2018] 4 JIC 1909 (Unreported, High Court, 19th April, 2018).
- (xi) *F.M. (Democratic Republic of Congo) v. Minister for Justice and Equality* [2018] IEHC 274 [2018] 4 JIC 1706 (Unreported, High Court, 17th April, 2018).
- (xii) *Martins v. Minister for Justice and Equality* [2018] IEHC 268 (Unreported, High Court, 2nd May, 2018).
- (xiii) *T.O. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 256 [2018] 4 JIC 1806 (Unreported, High Court, 18th April, 2018).
- (xiv) *S.B. (Zimbabwe) v. Minister for Justice and Equality* [2018] IEHC 235 [2018] 3 JIC 2207 (Unreported, High Court, 22nd March, 2018).
- (xv) *S.N. (South Africa) v. Minister for Justice and Equality* [2018] IEHC 234 [2018] 3 JIC 2007 (Unreported, High Court, 20th March, 2018).
- (xvi) *C.M. v. Minister for Justice and Equality* [2018] IEHC 217 [2018] 4 JIC 2501 (Unreported, High Court, 25th April, 2018).
- (xvii) *N.M. (Georgia) v. Minister for Justice and Equality* [2018] IEHC 186 [2018] 2 JIC 2710 (Unreported, High Court, 27th February, 2018).
- (xviii) *Jahangir v. Minister for Justice and Equality* [2018] IEHC 37 [2018] 2 JIC 0102 (Unreported, High Court, 1st February 2018).
- (xix) *C.M. (Zimbabwe) v. International Protection Appeals Tribunal* [2018] IEHC 35 [2018] 1 JIC 2304 (Unreported, High Court, 23rd January, 2018).
- (xx) *Y.Y. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 185 [2017] 3 JIC 2405 (Unreported, High Court, 24th March, 2017).
- (xxi) *A.B. (Albania) v. Minister for Justice and Equality* [2017] IEHC 814 [2017] 12 JIC 2113 (Unreported, High Court, 21st December, 2017).
- (xxii) *EMO v. Minister for Justice and Equality* [2016] IEHC 472 [2016] 7 JIC 2928 (Unreported, High Court, 29th July, 2016).
- (xxiii) *S.A. v. Minister for Justice and Equality* [2016] IEHC 462 [2016] 11 JIC 1404 (Unreported, High Court, 14th November, 2016).
- (xxiv) *X.X. v. Minister for Justice and Equality* [2016] IEHC 377 [2016] 6 JIC 2409 (Unreported, High Court, 24th June, 2016).
- (xxv) *S.T. v. Refugee Appeals Tribunal* [2016] IEHC 250 (Unreported, High Court, 26th January, 2016).
- (xxvi) *I.E. v. Minister for Justice and Equality* [2016] IEHC 85 [2016] 2 JIC 1505 (Unreported, High Court, 15th February, 2016).
- (xxvii) *L.A.A. (Bolivia) v Refugee Appeals Tribunal* [2016] IEHC 12 [2016] 1 JIC 1201 (Unreported, Stewart J., 12th January, 2016).
- (xxviii) *O'Neill v. Kerry County Council* [2015] IEHC 827 [2015] 12 JIC 2113 (Unreported, High Court, 21st December 2015).
- (xxix) *R.A. v. Refugee Appeals Tribunal* [2015] IEHC 686 [2015] 11 JIC 0403 (Unreported, High Court, 4th November 2015).
- (xxx) *Z.H. v. Refugee Appeals Tribunal* [2015] IEHC 88 [2015] 1 JIC 3007 (Unreported, Barr J., 30th January, 2015).
- (xxxi) *V.M. v. Refugee Appeals Tribunal* [2008] IEHC 142 [2008] 5 JIC 0813 (Unreported, MacMenamin J., 8th May, 2008).

7. The specific question posed by the applicant is tendentious. It does not arise on the facts because the Minister did not discharge the obligation to consider the s. 49 factors by setting out the criteria. He discharged the obligation to consider those factors by considering the factors. The setting out of the criteria is evidence that he considered those factors in the *G.K.* sense, being evidence which the applicant has not displaced, but for good measure, at p. 7 of the decision the Minister says expressly that "*the applicant's case was considered under s. 49 and s. 50 of the International Protection Act 2015*".

8. In submissions, Mr. Doman made some point about adequacy of reasons but that does not arise out of the question formulated. However, it does not appear to be a point of much substance. The reasons were perfectly adequate, especially having regard to the lack of submissions made on this issue and the nature of the decision being an immigration-related decision, especially one made at the review stage. Even if the point was not tendentious, it is fact-specific and thus unsuitable for leave to appeal.

Applicants' second question

9. The applicants' proposed section question of exceptional public importance is "*Did the Respondent confuse the nature of the assessment which he must conduct under s.49(3) of the International Protection Act 2015 with a stricter Art. 8 ECHR test in stating that "...it is not open to [the Applicant] to seek and rely on Article 8 to circumvent the immigration rules...?"*".

10. Mr. Doran has quite doggedly, if not positively repetitively, made the point in a number of cases that s. 49 of the 2015 Act is wider than art. 8 of the ECHR. But that is not an issue because no one is disagreeing with him. The question is tendentious in the sense that I found that the Minister did not confuse the two. That is clear from p. 7 of the decision where the Minister says that "*the applicant's case was considered under s. 49...consideration was also given to private and family rights under Article 8 of the ECHR*".

11. Thus, the Minister was clearly aware that those were two separate issues. One cannot simply pluck a sentence in isolation out of the decision and wrench it out of context as the question does, and go on to claim that the Minister is imposing a higher legal test. In any event, it is certainly not the case that if a decision-maker says anything that automatically must be taken as being a statement of the legal test.

12. Furthermore, the question is totally fact-specific. Finally, and most fatally of all, the applicants did not make any submissions under this heading. They cannot seriously expect to get leave to appeal on a point that was never made to the decision-maker.

Order

13. Accordingly, the application is dismissed.