[2019] IEHC 833

THE HIGH COURT

[2018 No. 812 JR]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED) AND IN THE MATTER OF THE INTERNATIONAL PROTECTION ACT 2015

BETWEEN

O

APPLICANT

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 9th December 2019.

1. It is useful to commence with a chronological summary:

10.11.2013.	Ms O enters Ireland.
21.05.2014.	Ms O applies to Office of the Refugee Applications Commissioner ("ORAC") for asylum.
23.12.2014.	Ms O gives birth to an Irish citizen daughter.
07.10.2015.	ORAC refuses Ms O's asylum application.
09.10.2015.	Ms O appeals to the Refugee Appeals Tribunal ("RAT").
06.01.2016.	Ms O granted Stamp 4 *Zambrano*-based permission to remain ("PTR").
21.06.2017.	Having made further application to the International Protection Office ("IPO") for international (subsidiary) protection, Ms O is interviewed under s.35 of the International Protection Act 2015 ("Act of 2015").
18.08.2017.	IPO refuses international protection application.
23.08.2017.	IPO issues decision denying PTR.
07.09.2017.	Ms O files a notice of appeal against the IPO's refusal of international protection application.
26.02.2018.	International Protection Appeals Tribunal ("IPAT") issues decision affirming IPO recommendation.
12.06.2018.	Minister issues Impugned Decision following s.49(7) review.
17.09.2018.	Department issues notice of Impugned Decision referencing Minister's decision that, inter alia, *"there has been no material change in your personal circumstances or country of origin circumstances concerning the prohibition of refoulement under s.50".*

2. Arising from the above, on 15.10.2018, Ms O was granted leave to bring the within judicial review application. In the statement of grounds, the following are offered as the grounds on which relief is now sought:

"1. The Respondent, his servants and agents, acted irrationally and inconsistently in making the determination that the Applicant should not be granted permission to remain:

(i) *The Impugned Decision acknowledges that the Applicant was granted Stamp 4 leave to remain as the mother of a three-year-old Irish citizen daughter on the 6th January 2016, which leave had been granted until the 6th January 2019. The decision-maker also acknowledged that, as a consequence, the Applicant* 'will not be returned to her country of origin and as a result no analysis of the prohibition of refoulement is necessary'.

(ii) The Respondent acted irrationally and inconsistently in recommending that the Applicant not be granted permission to remain, in circumstances where temporary permission to remain has already been granted under other provisions and remains valid;

(iii) *The Respondent engaged in irrationality or unfairness in the consideration of the nature of the Applicant's* 'connection to the State' *under s.49(3)(a)* [of the Act of 2015] *in light of the grant to her of leave to remain on a Stamp 4 basis.*

(iv) The Respondent failed to provide any, or any cogent, reasons for the recommendation that the Applicant not be granted permission to remain in the State on a temporary basis.

2. In making the Impugned Decision, the Respondent, his servants and agents erred in law and/or engaged in unfairness and irrationality in the consideration of the private and family law rights of the Applicant and in the manner in which the review under Section 49 of the Act [of 2015] was conducted:

(i) The Respondent failed to give due or proper regard to the rights and/or best interests of the Applicant's daughter, an infant Irish national resident in the State under Articles 40.3.1°, 41.1.1° and 41.2 of Bunreacht na hÉireann and/or Article 8 ECHR rights;

(ii) The Respondent erred in failing to make any proper assessment or determination of the Applicant's rights under Article 8 of the European Convention on Human Rights in light of the Spirasi medical report…dated 11th October 2017, which included pictures of scars on the Applicant's stomach and set out that she was symptomatic for anxiety and depression;

(iii) The Respondent erred in finding that 'the applicant's medical condition does not reach the threshold of a violation of Article 3 and therefore no

consideration of Article 3 is required.' *This determination was erroneous in that the right to respect for private and family life under the provisions of s.49(3) of the Act is not a matter for consideration under Article 3 ECHR but rather must be considered under the s.49(3) provisions as informed by* Bunreacht na hÉireann *and/or Article 8 ECHR*.

3. The Respondent has engaged in illegality, and has acted irrationally and/or inconsistently, in the consideration of permission to remain, having regard to the Respondent's obligations under s.50 of the Act:

(i) The Respondent made a s.50 determination on refoulement in the original s.49(4)(b) PTR decision and stated that 'repatriating the applicant to [Stated Country]…is not contrary to Section 50 of the International Protection Act 2015, in this instance, for the reasons set out above'. *The Impugned Decision stated that as the Applicant has been granted permission to remain in the State on the basis of her Irish citizen child and would not be returned to her country of origin then* 'no analysis of the prohibition on refoulement is necessary.' *The Respondent then acted inconsistently in stating in the notification to the Applicant of the terms of the Permission to Remain Decision dated 17th September 2018 (the 'Notice') that* 'the Minister has decided that there has been no material change in your personal circumstances or country of origin circumstances concerning the prohibition of refoulement under section 50.'

(ii) In circumstances where the Respondent has made a s.50 determination in the PTR Decision which has not been revoked, the Respondent was obliged to issue the Applicant with a deportation order under s.51(1) of the Act [of 2015] *following the refusal of a s.49(4) permission to remain, but has not done so. If the Respondent did not, or does not, intend to issue a deportation order, then the Respondent must either grant the Applicant permission to remain under s.49(4) or s.50(3) of the Act* [of 2015].

(iii) The Respondent has engaged in illegality in refusing to grant the Applicant permission to remain on a temporary basis under s.49(4)(b) of the Act [of 2015] in circumstances where the Respondent has not issued a deportation order under s.51 of the Act [of 2015] *and/or has not formed the intention to issue a deportation order under s.51 of the Act* [of 2015] *and/or does not intend to issue a deportation order under s.51 of the Act* [of 2015] *within any reasonable period of time."*

3. Arising from the above-mentioned claimed wrongs, the principal relief sought by Ms O is "[a]*n order of* certiorari [setting aside]…*the review decision of the* [Minister]…*made under Sections 49(7) and 49(9) of the International Protection Act 2015…dated 12th June 2018 and issued to the Applicant on the 18th September 2018 (the 'Impugned Decision') finding that there has been no material change in the Applicant's personal circumstances , and that she should not be given permission to remain in the State."*

4. The foregoing yields three questions which fall to the court for resolution, *viz*. [1] are the within proceedings moot or unnecessary?; [2] was the Minister's decision in relation to prohibition of *refoulement* unlawful under s.50(1) and s.51(1) of the Act of 2015 or otherwise unlawful or irrational?; and [3] was the decision not to grant Ms O permission to remain under s.49(4) of the Act of 2015 irrational or unlawful? The court turns to address these questions below.

5. Question [1]: Are the within proceedings moot or unnecessary?

6. 'No'. The Minister maintains that as Ms O now has Stamp 4 *Zambrano*-based PTR, the within proceedings are pointless and moot. The court respectfully disagrees. Where a PTR is denied under s.49(4) of the Act of 2015, a deportation order must follow (see *I.I. (Nigeria) v. The Minister for Justice and Equality* [2018] IEHC 392, para. 5 for an elaboration on the procedure presenting). There is no statutory provision which allows the Minister to forego a s.50 determination once a s.49(4) refusal has issued. A temporary *Zambrano*-based (derivative) PTR is not dispositive of the Minister's obligations under the Act of 2015; Ms O is entitled to a final decision on the application commenced in her own right. The *refoulement* dimension of matters is of continuing importance to Ms O in the event that her circumstances should change and her temporary permission is not extended. But she is entitled in any event to seek, and see prosecuted to its legally mandated conclusion, an application lawfully made for what she perceives to be the most secure basis legally open to her to remain in Ireland. If the Oireachtas had intended that a temporary *Zambrano*-based permission displaced the need for the correct and proper application of statutory decision-making, it could have so provided in the Act of 2015, and it did not. It should be clear from all of the foregoing that no issue of mootness arises. The court has been referred, *inter alia, to Goold v. Collins & Ors*. [2005] 1 ILRM 1. However, there is no need to get into the legal minutiae of mootness: clearly there is a real and substantive legal dispute between the parties that is of practical significance to Ms O.

7. [2] Was the Minister's decision in relation to prohibition of refoulement unlawful under s.50(1) and s.51(1) of the Act of 2015 or otherwise unlawful or irrational?

8. 'Yes'. Three points might usefully be made in this regard:

   . In the s.49(3) examination of file of 23.08.2017, the IPO states, *inter alia,* that "[R]*epatriating the applicant to* [Stated Country]*…is not contrary to Section 50 of the International Protection Act 2015*". In the Impugned Decision, the IPO states, *inter alia, "As the applicant has been granted permission to remain in the State on 06/01/2016 on the basis of her Irish citizen child, the applicant will not be returned to her country of origin and as a result, no analysis of the prohibition of refoulement is necessary*". As a result, the original s.50 determination remains extant; but, having regard to the just-quoted text, that just cannot be what the decision-maker who made the Impugned Decision intended, making the decision, unfortunately, irrational in this regard.

. Having invoked the s.49 process, Ms O is entitled to see that process carried through to the conclusion required by law: if the Minister did/does not intend to issue a deportation order he must grant Ms O a PTR under s.49(4) or 50(4) of the Act of 2015.

. The decision-letter of 17.09.2018 states, *inter alia*, that "*the Minister has decided that there has been no material change in your personal circumstances or country of origin circumstances concerning the prohibition of refoulement under section 50*." The court respectfully does not see how this conclusion could be reached properly, given the grant, on 06.01.2016, of the *Zambrano*-based Stamp 4 status, a change relevant to refoulement.

9. [3] Was the decision not to grant Ms O permission to remain under s.49(4) of the Act of 2015 irrational or unlawful?

10. It was unlawful. In reaching his decision under s.49(4), the Minister was required by that provision to consider, *inter alia*, the family/personal matters referred to in s.49(3). However, in proceeding in this regard the Minister brought solely an Art.3 ECHR analysis to bear. There is no express consideration of Art.8 ECHR. (Nor, in passing, does the Minister appear to have given any consideration to the constitutional (family) rights of Ms O *vis-à-vis* her daughter). As to the required consideration of "*humanitarian considerations"*, as referenced in s.49(3)(b), the court recalls in this regard the observation of O'Donnell J. in *D.E. v. Minister for Justice and Equality* [2018] 3 IR 326, para. 92 that *"[h]umanitarian considerations are not limited to, or defined by, the necessarily high threshold for consideration of breaches of article 3….Situations which may not reach the high threshold posed by article 3 may nevertheless properly be taken into account by a decision-maker in considering the broad question of humanitarian leave to remain"*. In reaching his decision under s.49(4), the Minister did not conform with s.49(3).

11. For the reasons stated, the court will exercise its discretion so as to grant the order of *certiorari* referenced above and itemised at item 1. of the notice of motion. For the sake of completeness, the court notes that it respectfully rejects the bases offered by counsel for the Minister as to why it should exercise its discretion so as to refuse the relief that the court has just indicated that it will grant:

Basis 1 *"Despite the fact that the Minister clearly indicated in the letter of 17 September 2018 that the instructions relating to deportation do not apply to her as she has a permission to remain, the Applicant has nonetheless averred…that 'I say and am advised that a deportation order will follow as a matter of course"*. The letter in fact states that *"the paragraphs below* [concerning deportation] *do not affect you at this time"* [emphasis added], so Ms O was correct to read this that she could be affected at some future time (and she could). The court would also refer in this regard to its observations at para. 6 above.

Basis 2. *"In circumstances where the Applicant was granted permission to remain on the basis of the decision in* Zambrano*, it is entirely unreasonable of the Applicant to have instituted the within proceedings which have as their ultimate goal a reconsideration of her application for permission to remain"*. As will be clear from the preceding pages and, especially, para. 6 above, there is rather more to the within application than is posited in the just-quoted text.

Basis 3. "*At no point prior to the issuance of the within proceedings did the Applicant seek…clarification as to whether the Minister actually intended on issuing her with a deportation order. In fact, no pre-litigation letter was ever sent*." Given the stance adopted by the Minister in the within proceedings such a letter, which is not required by law, would have been pointless. Moreover, notwithstanding the absence of such letter, there was nothing to stop the Minister from offering at any time such assurances/undertakings as might have resolved the within proceedings.

Basis 4. "[G]*ranting relief against the Minister would be, it is submitted, unfair….Relief will not avail the Applicant personally or put her in a better position than she is currently in".* If the Minister does not consider to be optimal the position that now presents whereby a PTR can issue by reference to *Zambrano* but a deportation order must issue (because a PTR has been refused under s.49(4) of the Act of 2015), he is well-placed to seek to change the statutory position presenting by proposing suitable legislation to the Oireachtas, should he be so minded. For the reasons indicated above, Ms O has good and lawful reason for bringing the within application. What would be most unfair, and legally wrong, would be to refuse her the relief that she has sought when all that she is seeking is due operation of the mandatory requirements of existing statute-law.