THE HIGH COURT

JUDICIAL REVIEW

[2019 No. 61 J.R.]

BETWEEN

S.O. (NIGERIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 23rd day of July, 2019

1. The applicant is a Nigerian national who developed glaucoma in or around 2008. He appears to have left his home country with a view to coming to the State for the purposes of availing of superior medical treatment. He arrived in the U.K. on a visa in June, 2011, having given a date of birth in 1972. He then came to Ireland unlawfully in September, 2011, giving a date of birth in 1975. He also claims subsequently to have had a complete memory loss which prevented him from providing details in support of his claim.

2. He was present without permission in the State until he applied for asylum on 24th June, 2014. That was refused by the Refugee Applications Commissioner on 3rd March, 2015. He was then deemed to have made an application for protection on 31st December, 2016 on the commencement of the International Protection Act 2015, and on 18th August, 2017 the International Protection Office rejected his claim for subsidiary protection. On the same date the IPO refused permission to remain under s. 49(3) of the 2015 Act, together with a detailed consideration of the terms of s. 50 of the Act.

3. On 8th September, 2017 the applicant appealed to the International Protection Appeals Tribunal, which rejected the appeal on 13th July, 2018. The applicant then sought a review of the permission to remain refusal under s. 49(9) of the 2015 Act but the review decision upheld the original refusal on 28th September, 2018.

4. The applicant appears to have been notified of this on or around 28th December, 2018, although an alternative date of 3rd January, 2019 is given for the notification to his solicitors.

Procedural history

5. The proceedings were filed on 29th January, 2019, although the statement of grounds is undated. Depending on when precisely the decision was notified, the proceedings could be slightly out of time, but no particular objection has been pressed on behalf of the respondent. The relief sought in the proceedings is firstly, an order of *certiorari* against the review decision under s. 49(7) and (9) and secondly, an order of *certiorari* against "*the deportation order …when issued*". In fact, a deportation order has not issued so that relief does not arise at this point.

6. Leave was granted on 11th February, 2019 and a statement of opposition was filed on 27th May, 2019. On 29th May, 2019, the applicant submitted further material arguing that *refoulement* for the purposes of s. 50 of the 2015 Act would arise. The fact that the deportation order has not yet been made raises the question of whether, all other things being equal, the Minister's existing s. 50 reasoning as set out in the review decision could properly be challenged at this point. However, it appears to be part of the permission to remain decision and thus could be legitimately challenged (subject to the question of whether the applicant has properly set up that challenge, which I will deal with below) insofar as the Minister's view stands at the moment, albeit that the Minister is of course entitled to change his mind later if so advised. I have received helpful submissions from Mr. Eamonn Dornan B.L. for the applicant and from Mr. John P. Gallagher B.L. for the respondent.

The context - a review decision

7. As Mr. Gallagher correctly submits at para. 9 of his written legal submissions, *"the legal form of this review will not be the same as the original decision, if only for one obvious reason: it is explicitly stated to constitute a review of it. As with any review, it assumes the fact of there having been a decision in the first place and proceeds from that basis. Accordingly, it is not necessary to make every finding afresh, and conclusions arrived at in the previous decision may be adopted whole, or revisited only to the extent that it is necessary ".* Thus Mr. Dornan's complaint that the review decision "*does not expressly adopt all the previous considerations*" is fundamentally misconceived.

8. Mr. Dornan has abandoned a number of the grounds, and the remaining grounds being pressed are grounds E-1(ii), E-1-(v) and E-2.

Ground E-1(ii) alleged errors in relation to s. 49(3) and arts. 3 and 8 of the ECHR

9. This ground contends that "*In making the Impugned Decision, the Respondent, his servants and agents, erred in law, including under s. 49(3) of the Act and/or Article 8(1) of the European Convention on Human Rights ("ECHR"), and/or fettered his discretion and/or engaged in unfairness in the consideration of the private and family rights of the Applicant and in the manner in which the review under Section 49 of the Act was conducted. (i) The Respondent erred in law in adopting the IPO's finding that the Applicant's medical condition* "does not reach the threshold of a violation of Article 3. It was also found that Article 8 has not been engaged and there is no interference with respect to his private life on the basis of his medical grounds." *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 and the Applicant's medical condition does engage Article 8 ECHR".*

10. Leaving aside the failure of the applicant to plead the European Convention on Human Rights Act 2003, which though strictly speaking fatal might be seen to be an unduly technical basis for rejecting this ground, the applicant is correct that s. 49(3) of the 2015 Act is not exhausted by consideration of art. 3 of the ECHR, but so what? Consideration of art. 3 of the ECHR is a process in favour of the applicant, not against him: see *R.A. (Pakistan) v. Minister for Justice and Equality* [2019] IEHC 319 (Unreported, High Court, 10th May, 2019). But the Minister did not stop there. The s. 49(3) matters were considered and are expressly referred to at section 3 of the decision and the fact that s. 49 is considered is also stated at section 5 of the decision.

11. The Minister's view that the applicant's medical condition does not engage art. 8 was within the range of decisions lawfully open

to him, particularly in circumstances where no independent firmly-established art. 8 rights in the State had been demonstrated: see *per* Moses L.J. in *G.S. (India) v. Secretary of State for the Home Department* [2015] EWCA Civ. 40 at para. 23. The bar to demonstrate engagement, not to mention breach, of art. 8, is a high one in such circumstances: see *D.E. v. Minister for Justice and Equality* [2018] IESC 16 [2018] 2 I.L.R.M. 324; *Secretary of State for the Home Department v. P.F. (Nigeria)* [2019] EWCA Civ. 1139 *per* Hickinbottom L.J. at paras. 93 to 99.

Ground E-1(v)
12. This ground contends that "*the respondent erred in law in finding that any decision to refuse the applicant permission to remain does not constitute a* 'breach of the right to respect for private life under …Article 8(1) of the ECHR'".

13. This ground does not allege any particular error of law. Mr. Gallagher's complaint in written submissions here is that "*It is somewhat difficult to properly address this complaint, as [it] is not indicated by way of any more particularised pleading how this error manifested; it could be rejected for this reason alone*." It could indeed, and it is so rejected.

14. But if I am wrong to do so, there was not an error of law. Given the applicant's status as an unsettled migrant at all material times, it is axiomatic that the deportation of such a migrant breaches art. 8 only in exceptional circumstances: see (among an avalanche of authorities to that effect) *Costello-Roberts v. United Kingdom* [1993] 19 E.H.R.R. 112 (Application no. 13134/87, European Court of Human Rights, 25th March, 1993), *Rodrigues de Silva and Hoogkamer v. The Netherlands* (Application No. 50435/99, European Court of Human Rights, 31st January, 2006), *C.I. v. Minister for Justice and Equality* [2015] IECA 192 [2015] 3 I.R. 385, at 408 *per* Finlay-Geoghegan J., *P.O. v. Minister for Justice and Equality* [2015] 3 I.R. 164 [2015] IESC 64, *P.S.M. v. Minister for Justice and Equality* [2016] IEHC 474 [2016] 7 JIC 2930 (Unreported, High Court, 29th July, 2016), *Nagra v. Minister for Justice and Equality* [2018] IEHC 398 para. 5, C.*M. v. Minister for Justice and Equality* [2018] IEHC 217 [2018] 4 JIC 2501 (Unreported, High Court, 25th April, 2018) para. 9.

Ground 2
This ground contends that: "In *making the Impugned Decision, the Respondent, his servants and agents, erred in law and/or fettered his discretion and/or engaged in unfairness in the consideration of the prohibition of* refoulement *and the manner in which the review was conducted under Section 50 of the Act: (vi) In forming his opinion under s. 50(2) of the Act that there was no threat to the Applicant's life or freedom for Convention reasons, and no risk to him of serious harm, the Respondent failed to have regard to all the circumstances of the case and in particular to relevant country of origin information* ("COI"); *(vii) The Respondent erred by engaging in a selective review of COI amounting to a paragraph relating to training facilities for disabled indigents and/or state assistance to help persons with disabilities become self-supporting, and a paragraph on constitutional guarantee of freedom of movement. The COI submitted by the Applicant appears to have been disregarded by the Respondent. (viii) The Respondent may not rely on COI considered in the decision of the International Protection Appeals Tribunal* ("IPAT") *and must form his opinion on non-refoulement based on COI considered".*

15. While in principle an applicant can challenge a s. 50 reasoning as part of a leave to remain decision at this stage, even in the absence of a deportation order, as I have noted above, this particular applicant cannot make this point because he did not make any submissions regarding *refoulement*. The context for judicial review begins with the actual submission made: see *Lingurar v. Minister for Justice and Equality* [2018] IEHC 96 [2018] 2 JIC 0808 (Unreported, High Court, 8th February, 2018) and authority cited therein.

16. If I am wrong about that and if the applicant can make this point, it is one of no substance. The alleged failure of the Minister to have regard to relevant matters or his alleged selective regard or disregard has not been made out: see G.*K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401 *per* Hardiman J.

17. The notion that the Minister cannot consider at the s. 49 stage material that was before the protection decision-makers has already been rejected. That approach would be contrary to s. 49(2). Mr. Gallagher's submission on this issue is so good that it deserves quotation and endorsement at some length. He poses the question: "*How can the Minister form a balanced and informed view as to whether* "the life or freedom of the person would be threatened …" … or whether, "there is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment" *…without the facility of referring to all relevant country information, from whatever quarter it may be sourced?… Can the Applicant exclusively dictate what the Minister refers to in this regard? Surely not. On the contrary, it is inherent in the nature of Ministerial decision-making of this kind that it may draw information from a wide variety of sources. The section is silent because this is glaringly obvious - the Minister may consult his departmental records, request immigration records from another State, consult reputable news sources or country information….the list goes on".* This correct statement of the position is a complete answer to the entirely unmeritorious point made by the applicant under this heading.

Order
18. Mr. Gallagher submits at para. 34 that the case "*amounts to an endeavour to establish by implication a right for any person to remain in the State indefinitely, once it can be shown that the person has significant medical needs which can be better met in this country than their own, and irrespective of any other qualification, such as familial presence or prior connection with the State.*" As there is no such right, absent exceptional circumstances which do not feature here, and in the absence of any other unlawfulness having been demonstrated, the application is dismissed.