

**THE HIGH COURT
JUDICIAL REVIEW**

[2019 No. 774 JR]

BETWEEN

R.K. (ALBANIA)

APPLICANT

AND

**THE MINISTER FOR JUSTICE AND EQUALITY, THE CHIEF INTERNATIONAL
PROTECTION OFFICER, THE ATTORNEY GENERAL AND IRELAND**

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 3rd day of June, 2020

1. The applicant was born in Albania in 1989. He arrived in the State on 5th May, 2015 and applied for asylum. Following the commencement of the International Protection Act 2015, he submitted an application for international protection on 15th February, 2017. That application was rejected by the International Protection Office on 14th August, 2018 as was his application for permission to remain. The letter of rejection put him on notice (although he did not need to be notified because he had legal advisers anyway) of the procedure for review of the permission to remain decision.
2. On 22nd August, 2018 the applicant appealed the protection refusal to the International Protection Appeals Tribunal (IPAT), an appeal which was rejected by the tribunal on 18th December, 2018. That rejection was notified to the applicant on 21st December, 2018.
3. The notification of a tribunal decision triggers the period for review of the permission to remain refusal under s. 49(9) of the 2015 Act. The time period for such review is specified in reg. 2 of the International Protection Act (Permission to Remain) Regulations 2016 (S.I. No. 664 of 2016), as being a period of five days following receipt by an applicant of the tribunal's decision. No review application was made by the applicant within that period, even on a without prejudice basis, so no review took place.
4. On 16th January, 2019 the applicant filed judicial review proceedings challenging the tribunal decision [*R.K. v. IPAT* 2019 No. 23 JR]. I granted leave on 25th March, 2019 but in the meantime on 12th March, 2019 the Department informed the applicant of the formal refusal of protection, noting that no review submissions had been made. The letter also stated that the applicant's temporary residence permission had now ended, and informed the applicant of the option to voluntarily return to his country of origin and of the Minister's proposal to make a deportation order if the applicant did not do so. Hence, the process had significantly moved on since the applicant's failure to request a review.
5. The applicant's solicitors replied on 15th March, 2019 referring to the existence of judicial review proceedings, but needless to say the issuing of judicial review proceedings or even the subsequent grant of leave does not amount to a stay on the process unless the court so orders; which I might say in the asylum context normally the court does not, simply because if the judicial review is successful any subsequent steps would have to be unwound, and on the balance of justice and convenience it is normally worth allowing the

Minister to make any decision and then review its legality if negative, rather than to simply throw a spanner in the statutory works with some sort of unnecessary stay.

6. Following the decision in *E.G. (Albania) v. IPAT* [2019] IEHC 474, [2019] 6 JIC 0409 (Unreported, High Court, 4th June, 2019), the applicant's side considered that the points sought to be made in the judicial review had been disposed of adversely to the position intended to be argued for. Accordingly the applicant's first judicial review proceedings were withdrawn; and on 1st July, 2019 I made an order that in view of the reasonable approach of the applicant's side in withdrawing the proceedings forthwith upon the view being taken that they weren't legally tenable, the respondents would only recover 50% of the costs of the statement of opposition.
7. On 24th July, 2019 the applicant's solicitors then submitted a purported review application to the IPO. In oral submissions this was sought to be characterised essentially as something along the lines of a late application or alternatively an application for an extension of time for review; although the letter does not actually ask for an extension of time and is not phrased in that way.
8. On 31st July, 2019 the IPO replied making essentially three points:
 - (i). that pursuant to *A.W.K. (Pakistan) v. Minister for Justice and Equality* [2018] IEHC 550, [2018] 9 JIC 2506 (Unreported, High Court, 25th September, 2018), an applicant can only have one review under s. 49(9) of the 2015 Act;
 - (ii). that the applicant had already had a review and accordingly the latest correspondence could not be considered; and
 - (iii). that any change in circumstances could be dealt with under s. 3(11) of the Immigration Act 1999.
9. It is accepted (see para. 9 of the statement of opposition) that it was inaccurate to say that the applicant had already had a review; as noted above the applicant did not request a review so one did not take place. Further correspondence then ensued, but did not materially alter the posture adopted by the IPO. The Minister then made a deportation order on 9th September, 2019 which was notified to the applicant on 30th September, 2019.
10. The present proceedings were filed on 30th October, 2019 the main reliefs sought being:
 - (i). an order of *certiorari* directed to the deportation order;
 - (ii). an order of *certiorari* directed to the letter of 31st July, 2019 which was variously characterised as a "review" or alternatively a "decision . . . to refuse to consider and determine the review application"; and
 - (iii). an order of *mandamus* directing the IPO to consider the alleged review application of 24th July, 2019.

11. I granted leave and an extension of time on 4th November, 2019 and a statement of opposition was delivered dated 13th January, 2020. I have now received helpful submissions from Mr. Garry O'Halloran B.L. for the applicant and from Ms. Sarah McKechnie B.L. for the respondent.

Preliminary objection - respondent's claim that there is no decision here

12. Paragraph 5 of the statement of opposition denies that the Minister made any decision that is "*capable of being judicially reviewed*". Essentially the respondent's position is that all that the IPO said was that they were not in a position to deal with the correspondence and essentially saw themselves as just reiterating the legislative provision rather than making any substantive decision. The allegation that that is not a reviewable decision raises an interesting conceptual problem, but to answer it one must go back to first principles.
13. The basic principle is that the court has to have whatever jurisdiction is necessary to review the legality of the approach taken by executive and administrative bodies. In any given case the approach that is subject to review might take the shape of a decision, a failure to act or simply an interpretation of the law. The stance taken by the IPO here (in particular the letter of 31st July, 2019) could plausibly be viewed as falling under any one or more of those three headings. But whatever way one chooses to characterise it doesn't make any difference to the court's entitlement to review the lawfulness of that stance, whether that review be sought by way of *certiorari*, *mandamus*, declaration or otherwise. I do not think that the court should normally hold against an applicant merely because of the specific remedy chosen, particularly in a borderline, ambiguous situation. The real issue is getting to the substance of the approach of the public body concerned and deciding as to whether it was lawful or not.
14. Ms. McKechnie submits that something is not a decision unless the body concerned is exercising a discretion. One can certainly see where she is coming from in that submission, but the problem with it is that the operative legal question is not whether something is a *decision* or not; the real question is whether the approach taken by the public body is *lawful* or not. The court can get into that issue irrespective of whether it characterises the public body's approach as being a formal decision or simply an interpretation of its powers or of the law. Having said that, where a decision is merely a reiteration of a position that had been previously stated, time may be held to run from when the position was first articulated by the public body. Provoking a body into repeating its decision or reiterating its interpretation of the law does not restart the clock for judicial review purposes; but such problems are best viewed as time issues rather than as illustrative of a proposition that a reiterative statement is never a reviewable act.

Did the IPO unlawfully fail to consider the purported review application?

15. Grounds 1 and 2 in the statement of grounds essentially relate to the same point. Ground 1 pleads that "*The deportation order was made without consideration of the review application made by the Applicant, contrary to s. 51(1)(c) and s. 49(7) of the International protection Act, 2015.*". Ground 2 contends that "*The International Protection Officer erred in fact and in law in refusing to consider and determine the review*

application made by letter dated 24 July, 2019 by reason that "...an applicant can have only one review under s.49(9) of the International Protection Act 2015. The review...took place on 12 March 2019. No consideration of this correspondence can be given under the 2015 Act", in circumstances where no such review [had] taken place on 12 March, 2019 or at any other time."

16. The problem with this submission is that there was no valid review application. The time-limits are statutory thresholds, not simply optional suggestions. One cannot assert an entitlement to make a review application at some later stage having failed to take up the option for review within the statutory time-limit or having exercised that option unsuccessfully. That is the ratio of *A.W.K. (Pakistan)*, which was (in this context) legitimately referred to by the IPO in the disputed correspondence of 31st July, 2019. I should perhaps note here that an appeal from my decision in *A.W.K.* was dismissed in *A.W.K. v. Minister for Justice and Equality* [2020] IESC 10 (Unreported, Supreme Court, McKechnie J. (O'Donnell, MacMenamin, Charleton and Irvine JJ. concurring), 25th March, 2020). The Supreme Court judgment does not address that particular finding because it wasn't specifically disputed on appeal by the appellants.
17. No injustice is done to an applicant by that approach because (as the IPO pointed out in the disputed correspondence) an applicant is not shut out and can make an application under s. 3(11) of the 1999 Act. I therefore uphold the plea to that effect at para. 11(iv) of the statement of opposition.
18. Ms. McKechnie is also correct that the applicant did not trigger the review and so the Minister had no obligation to conduct a review, as pleaded at para. 3 of the statement of opposition, and indeed in contending that by the point in time when the purported review was ultimately sought, such a review could not lawfully take place, as pleaded at para. 4 of the statement of opposition. The reason for that is that the process had moved on to the next stage by that time by reason of the refusal of protection.
19. In oral submissions, Mr. O'Halloran sought to re-characterise the whole thing as really a late application for a review. Leaving aside that the purported review is not phrased as an application for an extension of time, and leaving aside the fact that the statute does not allow for an extension of time, if (which has not been particularly established or explored in evidence) any extensions are allowed in practice, that is simply an administrative concession. Such a possible concession could only have relevance up to the point at which the process moves on to the next stage. That happened on 12th March, 2019 when protection was formally refused, months before the purported late review application.

Overall futility of the application

20. Mr. O'Halloran submits that the respondents were subsequently to offer reasons which would have made the letter of 31st July, 2019 lawful, but only did so after the event in the shape of the opposition papers and submissions made in the present proceedings.

21. That being so, it is hard to see what the point of the proceedings really is. Even if the letter of 31st July, 2019 is to be regarded as completely flawed, such a conclusion doesn't create a jurisdiction in the IPO to conduct a review after the expiration of the five-day period and after the process has moved on to the next or subsequent stages. Leaving aside any sort of extra-statutory concession to consider late appeals before matters move on to a subsequent stage of the process, the IPO simply does not have such a jurisdiction to consider a review after that happens. Therefore, there is no actual benefit to quashing the disputed letter, because even if I were minded to do so (which I amn't), the applicant would be no better off. The purported review application was too late and could not be entertained. The applicant's point is simply going nowhere. Some sort of blunder in the precise wording of official documents is not in itself a basis for judicial review if it does not make any difference to the bottom line.
22. The decision in *I.E. v. Minister for Justice and Equality* [2016] IEHC 85, [2016] 2 JIC 1505 (Unreported, High Court, 15th February, 2016) concerning errors in decisions, relied on by Mr. O'Halloran, is therefore not of any relevance here. This is not a case of a decision which depends on a number of grounds, some of which are flawed. The so-called decision is in substance really just an interpretation of the IPO's jurisdiction, and the interpretation that the IPO did not have jurisdiction is correct, albeit for reasons that require slight rephrasing from those articulated. Quashing the letter doesn't create a jurisdiction that doesn't exist, so there is no point doing so.

Order

23. The application is dismissed.