

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 588

RECORD NO. 2020/256JR

BETWEEN

**ZB, DB AND RB (A MINOR) SUING BY HIS FATHER
AND NEXT FRIEND ZB**

APPLICANTS

-AND-

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms. Justice Tara Burns delivered on 13 September 2021

General

1. The Applicants are nationals of Albania. The First and Second Applicants entered the State in May 2015 and applied for asylum shortly thereafter. The Third Applicant is their son who was born in this jurisdiction in March 2016.
2. The First and Second Applicants' applications for refugee status were made to and processed by the Office of the Refugee Applications Commissioner (hereinafter referred to as "ORAC") which, having found that only some of the material elements of the Applicants' claim were credible, made a recommendation in April 2016 that they be refused a declaration of refugee status.
3. The Applicants' subsidiary protection claim was assessed pursuant to the International Protection Act 2015 (hereinafter referred to as "the 2015 Act"). On 31 July 2018, an International Protection Officer (hereinafter referred to as an "IPO"), also found that only some of the material elements of the Applicants' claim were credible and made a recommendation that they be refused subsidiary protection.
4. On 1 August 2018, the Respondent refused to grant the Applicants permission to remain pursuant to s. 49(4) of the 2015 Act.
5. An appeal of the negative international protection recommendations was made to the International Protection Appeals Tribunal (hereinafter referred to as "IPAT"). On 25 October 2019, it affirmed the first instance recommendations and also recommended that the Applicants should be granted neither a refugee nor subsidiary protection declaration.
6. On 6 November 2019, the Applicants sought a review of the s. 49(4) decision. Submissions were made regarding the prohibition of refoulement in the following terms:-

"The IPAT decision are not a reliable assessment of the applicants international protection needs. Their credibility findings are vitiated by the delay in the making of the decisions. Because of the delay between hearing and the making of the decisions, the decisions have not had proper regard to the applicant's oral evidence. The applicants are embroiled in a blood feud and will face a threat to their lives and/or freedoms and/or a breach of their rights under Article 3 ECHR if forced to return to Albania. The applicants are also at risk in this regard because of their support for and association with the Democratic Party."

7. By letter dated 16 December 2019, the Applicants' solicitor made further substantial representations to the Respondent regarding the s. 49(7) review application. Country of Origin material was included which was material to a finding by the IPAT regarding the police evidence before it to the effect that a blood feud did not exist. A challenge was also made to the basis of a negative credibility finding made by the IPAT against the First and Second Applicants. Specifically, the Applicants' solicitor submitted that the omission by the IPAT regarding the oral evidence before it "was a very significant omission which rendered the credibility findings in both IPAT decisions unreliable for the purposes of the protection assessment to be undertaken by the Minister in these s. 49 review applications."
8. On 2 March 2020, the Respondent affirmed the earlier s. 49(4) decision and refused the Applicants permission to remain on foot of the s. 49(7) review. The Respondent found that "there had been no material change in your personal circumstances or country of origin circumstances concerning the prohibition of refoulement under section 50" of the 2015 Act.
9. Leave to apply by way Judicial Review seeking an order of *certiorari* of the s. 49(7) review decision was granted by the High Court on 29 May 2021 on the single ground that the Respondent had failed to provide reasons in respect of why deportation would not expose the Applicants to a risk of refoulement contrary to s. 50(1) of the 2015 Act.

Section 49(7) Review Decision

10. In relation to the prohibition of refoulement, the s. 49(7) review decision relating to the First and Third Applicant, having set out s. 50(1) and (3) of the 2015 Act, stated:-

"The applicant has made representations regarding the prohibition of refoulement for himself and his dependent. Representations have stated that there is a clear lack of effective state protection against the phenomenon of blood feuds in Albania and the applicant lives or freedoms will be threatened for reasons of membership of a particular social group.

The applicant's international protection claim was refused by the IPO and affirmed by the IPAT as he was determined to be a person not in need of international protection.

The following country of origin information from the US Department of State Human Rights Report: Albania 2018 states:

"The constitution and law provide for freedom of internal movement, foreign travel, emigration and repatriation and the government generally respected these rights. The government cooperated with the Office of the UN High Commissioner for Refugees (UNHCR) and other humanitarian organisations in providing protection and assistance to refugees, returning refugees, asylum seekers, stateless persons, and other persons of concern. Police allowed UNHCR, the Office of the Ombudsman, and the NGO Caritas to monitor the

processing, detention, and deportation of some migrants, especially in southern Albania" (Ref 2)

It is noted that the applicant's parents reside in Albania.

I have considered all the facts of this case together with relevant current country of origin information in respect of Albania. The prohibition of refoulement was also considered in the context of the International Protection determination. The prohibition of refoulement has also been considered in the context of this report. The country of origin information does not indicate that the prohibition of refoulement applies if the applicant and his dependent is returned to Albania.

Accordingly, having considered all of the facts in this case and relevant country of origin information, I am of the opinion that repatriating the applicant and his dependent to Albania is not contrary to Section 50 of the [2015 Act], in this instance, for the reasons set out above."

11. The s. 49(7) review decision in relation to the Second Applicant is in similar terms.

Statutory Provisions Relating to the s. 49(7) Review Process

12. With respect to the review of a s. 49(4) decision, the following provisions apply pursuant to s. 49(7) and (9) of the 2015 Act:-

"(7) Where the Tribunal affirms a recommendation [of an IPO], the Minister shall, upon receiving information from an applicant in accordance with subsection (9), review a decision made by him or her under subsection (4)(b) in respect of the applicant concerned.

(9) An applicant, for the purposes of a review under subsection (7), and within [5 days] following receipt by him or her... of the decision of the Tribunal...

(a) may submit information that would have been relevant to the making of a decision under paragraph (b) of subsection (4) had it been in the possession of the Minister when making such decision, and

(b) shall, where he or she becomes aware of a change of circumstances that would have been relevant to the making of a decision under subsection (4)(b) had it been in the possession of the Minister when making such decision, inform the Minister, forthwith, of that change."

Prohibition on Refoulement

13. Section 50 of the 2015 Act provides:-

"(1) A person shall not be expelled or returned in any manner whatsoever to the frontier of a territory where, in the opinion of the Minister-

(a) The life or freedom of the person would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or

- (b) There is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.
- (2) In forming his or her opinion of the matters referred to in subsection (1), the Minister shall have regard to-
- (a) the information (if any) submitted by the person under subsection (3), and
 - (b) any relevant information presented by the person in his or her application for international protection, including any statement made by him or her at his or her preliminary interview and personal interview.
- (3) A person shall, where he or she becomes aware of a change of circumstances that would be relevant to the formation of an opinion by the Minister under this section, inform the Minister forthwith of that change."

Entitlement of the Respondent to Consider Earlier Protection Decisions when Considering s. 50 of the 2015 Act

14. It is well established that the First Respondent is entitled to rely on decisions previously made in relation to an applicant by an IPO or the IPAT when considering s. 50 of the 2015 Act.

15. In *WJF v. Minister for Justice* [2016] IEHC 737, O'Regan J., having conducted an analysis of several authorities in this area, concluded at paragraphs 30 and 31 of her judgment:-

"From the foregoing case law the following principles emerge:-

- (i) The rationale for the decision must be patent or capable of being inferred from its terms and context.
- (ii) The Minister is entitled to adopt the RAT findings, however, if so adopting, the Minister must ensure that the findings were reasonable as, if unreasonable, the Minister's decision will be infected with the unreasonable portion of the RAT finding.
- (iii) Subject to the foregoing, there is no obligation on the Minister to reconsider the same facts and events to decide whether they are plausible or credible in the absence of new evidence, information or other basis capable of demonstrating the original findings were vitiated by material error.

31. Applying the foregoing, in circumstances where no new facts or evidence was adduced to the Minister to demonstrate that the original findings of the RAT were vitiated by material error, the Minister was entitled to adopt the RAT findings..."

16. In *M.N. (Malawi) v. Minister for Justice* [2019] IEHC 489, Humphreys J. stated at paragraph 26 of the judgment:-

"More broadly, it is certainly not correct to say that the Minister, in making a Deportation Order or refusing permission to remain, cannot rely on protection decisions including IPAT decisions. A Deportation Order is the end-stage of a lengthy process of carefully calibrated steps. It is clear that any decision-maker can consider appropriately what happened during previous steps."

Specifically, regarding s. 50 of the 2015 Act, he stated at paragraph 29:-

“[Section] 50 does not require a *de novo* reconsideration of all matters at this stage of making the Deportation Order. The Minister can consider all of the relevant circumstances of the case. That is implicit, and by definition that must include the decisions or recommendations of the IPO and IPAT. It is open to the Minister to in effect adopt the reasoning and conclusions of a protection decision for the purposes of the Deportation Order, and indeed, this is normally implicit in the Minister's decision-making. Furthermore, in particular, the outcome of the *refoulement* consideration can normally be determined by reference to the outcome of the protection claim, unless exceptional circumstances arise such as the application of the exclusion clause or anything distinctly new or additional presented such as to persuade the Minister otherwise: see the point made in *Meadows v. Minister for Justice and Equality* [2010] IESC 3 [2010] 2 I.R. 701 at 731 *per* Murray C.J., citing *Baby O v. Minister, Equality and Law Reform* [2002] IESC 44 [2002] 2 I.R. 169 at 193, to the effect that if the applicant did not make submissions regarding *refoulement*, the decision ‘*would have been one of form only and not required any rationale*’. That clearly implies that it is not necessary to reconsider the matters *de novo* and that there is an entitlement to rely on previous rejections.”

17. This Court has very recently considered the Respondent's obligations when considering s. 50 of the 2015 Act. In *IN v. Minister for Justice* (Unreported, High Court, 9th September 2021), I stated at paragraph 27 of the judgment:-

“Section 50(2) of the 2015 Act requires the First Respondent to have regard to any relevant information presented by an Applicant in the course of her international protection claim.... It is then open to the First Respondent to either adopt the factual findings of the IPO and the IPAT or not, although it is fairly indicated by the First Respondent that generally the findings of the international protection bodies are adopted. In the instant case, having considered all the facts, the First Respondent did not demur from the credibility findings of the IPO and the IPAT (no reason having even been proffered as to why she should have). There is no obligation on the First Respondent to provide reasons as to why she accepts the earlier findings of the IPO and the IPAT as this would in effect amount to her re-determining the applicant's claim which she is not required to do. Of note, s. 50(2)(b) requires the First Respondent to “have regard” to relevant information provided by the Applicant in the international protection process. It is clear that the First Respondent did have regard to the underlying claim of the Applicant but relied and adopted the findings of the IPO and the IPAT with respect to accepted facts, as she was entitled to do, no further submissions having been made relevant to the issue of *refoulement*.”

18. The central issue which arises in the instant case is whether in light of the submissions regarding *refoulement* which were made on behalf of the Applicant together with the extensive submissions challenging two important findings of the IPAT, one of which

related to the negative credibility findings of the IPAT and the other of which challenged evidence relied upon by the IPAT, the Respondent complied with her duty to give reasons by inferentially dismissing these representations.

Duty to Give Reasons

19. This Court has considered the onus on a decision maker to give reasons having regard to established principles of law in *SKS v. IPAT* [2020] IEHC 560, wherein I stated:-

"21. The duty to give reasons is so well established that perhaps an engagement with the essence of the duty is sometimes overlooked. In *Connelly v. An Bord Pleanála* [2018] IESC 31, Clarke CJ set out, at paragraph 5.4 of the report, the purpose behind the duty to give reasons which illuminates a decision maker's duty in this regard. He stated:-

"One of the matters which administrative law requires of any decision maker is that all relevant factors are taken into account and all irrelevant factors are excluded from the consideration. It is useful, therefore, for the decision to clearly identify the factors taken into account so that an assessment can be made, if necessary, by a court in which the decision is challenged, as to whether those requirements were met. But it will be rarely sufficient simply to indicate the factors taken into account and assert, that as a result of those factors, the decision goes one way or the other. That does not enlighten any interested party as to why the decision went the way it did. It may be appropriate, and perhaps even necessary, that the decision maker make clear that the appropriate factors were taken into account, but it will rarely be the case that a statement to that effect will be sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons.

Having considered a number of cases in this area, Clarke CJ continued at paragraph 6.15 of the judgment:-

"Therefore it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Clearly related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review."

22. Dealing with a situation where the reasons for a decision are not apparent on the face of a document issuing a determination, Clarke CJ referred to the decision of Fennelly J in

Mallak v. Minister for Justice [2012] IESC 59 wherein Fennelly J stated at paragraph 66 of the judgment:-

"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. In *YY v. Minister for Justice* [2017] IESC 61, O'Donnell J., made the following remarks regarding the question of whether adequate reasons had been given for the issuance of a deportation order, at paragraph 80 of the report:-

"I consider that a court should be astute to avoid the type of over-refined scrutiny which seeks to hold civil servants preparing decisions to the more exacting standards sometimes, although not always achieved by judgements of the Superior Courts. All that is necessary is that a party, and in due course a reviewing court can genuinely understand the reasoning process."

Having analysed the reasons given in that case, O'Donnell J. continued:-

"I cannot have the level of assurance that is necessary that the decision sets out a clear and reasoned path, and moreover one that was not flawed or incorrectly constrained by unjustifiable limitations of irrelevant legal considerations."

Application to this Case

20. Specific submissions regarding refoulement and findings of the IPAT were made to the Respondent. Reference is made within the s. 49(7) decision to receipt of these submissions by the Respondent and there is also an indication that "all representations and correspondence received from or on behalf of the applicant and his dependent relating to permissions to remain and permission to remain (review) have been considered in the context of drafting this report...". The portion of the s. 49(7) decision of the Respondent relating to the prohibition on refoulement has been set out earlier. Whilst reference is made to the fact that representations regarding the prohibition of refoulement were made on behalf of the Applicant, asserting that there is a lack of state protection against the phenomenon of blood feuds in Albania, and that the Applicants' lives or freedoms would be threatened because of political allegiances, there is no consideration or indeed reference to the representations which were made regarding the underlying findings of the IPAT.
21. The framework of the s. 49(7) review process requires the Respondent to consider new information submitted to it. Section 50(1) of the 2015 Act places a positive obligation on the Respondent not to deport a person if the Respondent is of the opinion that that person's life or freedom would be threatened because of his political opinion (amongst other matters), or that there is a serious risk that the person would be subjected to the

death penalty, torture or other inhuman or degrading treatment or punishment. In making this determination, the Respondent is required pursuant to s. 50(2) to have regard to any relevant information presented by an Applicant in the course of his international protection claim.

22. For proper effect to be given to s. 49(7) in conjunction with s. 50(2) of the 2015 Act, for the purpose of forming an opinion pursuant to s. 50(1) of the 2015 Act, consideration must be given by the Respondent to representations made by the Applicant even if those representations relate to the IPAT findings.
23. In the instant case, representations were made which called into question a finding of the IPAT in light of country of origin information, and the credibility findings of the IPAT in light of a note of the evidence given by the Applicant. While the Respondent's role in determining the refoulement issue is most certainly not to re-determine the international protection claim, nonetheless in deciding whether to adopt the earlier findings of the protection bodies, regard must be had to representations made regarding those determinations which are relevant to the refoulement issue. Both of the issues raised in the instant case were so relevant as they related to the IPAT's determination that a blood feud did not exist, and the credibility of the Applicant. Accordingly, it was incumbent on the Respondent to consider these representations.
24. The Respondent has indicated that all representations were considered but has failed to make any reference as to why these representations were dismissed by it. No pathway can be found as to why concerns raised by the Applicant regarding the IPAT's determination were rejected, as the decision is silent on this issue.
25. The Respondent argues that it would be inappropriate for her to consider these issues as this in effect would operate as an appeal against the decision of the IPAT. However, that submission fails to recognise the independent task imposed upon the Respondent pursuant to s. 50 of the 2015 Act; the fact that there is an obligation on the Respondent to consider the information of an applicant given in the course of an international protection claim and representations made to the Respondent for the purpose of a s. 49(7) review; and the fact that the Respondent is not obliged to accept the findings of the protection bodies.
26. Furthermore, on a practical level, a challenge to the IPAT decision on these grounds is likely to be met with an argument that the country of origin information produced to the Respondent was not before the IPAT; and that the dispute regarding the evidence is a factual or interpretation issue, thereby leading to an argument that these issues are not susceptible to judicial review.
27. The Respondent has failed to engage whatsoever with the representations of the Applicant. In light of her obligations pursuant to s. 50 of the 2015 Act in conjunction with s. 49(7), there is a requirement for the Respondent to explain her reasons for her acceptance of the earlier protection decisions, in light of the particular representations and information submitted to her.

28. As it is unclear to the Court that any consideration was given to these concerns, it is not appropriate that this matter be remitted to the Respondent simply to give reasons for her decision.
29. The Court will grant an order of *certiorari* of that portion of the s. 49(7) decision which relates to the prohibition of refoulement and remit the matter back to the Respondent for a fresh consideration of s. 50 of the 2015 Act. The Court will also grant an order for the Applicants' costs as against the Respondent.