THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 430 J.R.]

BETWEEN

A.W.K. (PAKISTAN)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 25th day of September, 2018

1. The applicant claims he was born in Pakistan in 1991. He says that he went to Lahore in March, 2010 and to the United Kingdom on 28th January, 2011, where he studied accountancy and then subsequently apparently changed studies to the security industry. He applied for leave to remain. That application was rejected. He appealed in April, 2015 and, with his student permission about to expire as of December, 2015, he came to Ireland, arriving on 25th August, 2015. He then applied for asylum on 26th August, 2015, apparently never having sought protection during his years in the U.K. That application was rejected by the Refugee Applications Commissioner on 29th August, 2016. He appealed to the Refugee Appeals Tribunal against that rejection. Following the commencement of the International Protection Act 2015 on 31st December, 2016, he applied for subsidiary protection on 13th February, 2017, an application that was then remitted to the International Protection Office and refused on 10th July, 2017. An appeal to the International Protection Appeals Tribunal was dismissed on 13th October, 2017. On 26th July, 2017, he was informed that the Minister had refused permission to remain in the State under s. 49(4)(b) of the 2015 Act. On 15th and 24th November, 2017 he made representations out of time to review that decision under s. 49(7) and (9). On 15th March, 2018 the IPO rejected the review under s. 49(9) and the applicant was so notified on 23rd April, 2018. On 3rd May, 2018 he sought a further review. On 8th May, 2018 a deportation order was made. On 10th May, 2018 the IPO informed the applicant that the review had been completed and no further review arose. The present proceedings were filed on 31st May, 2018 and moved *ex parte* on 12th June, 2018.

2. I have received helpful submissions from Mr. Eamonn Dornan B.L. for the applicant and from Mr. David Conlan Smyth S.C. (with Ms. Sarah-Jane Hillery B.L.) for the respondents.

Relief sought

3. The primary relief sought falls essentially into two categories: (i) *certiorari* of the s. 49(9) decision of 15th March, 2018 and consequential *certiorari* of the deportation order and (ii) *mandamus* to compel the Minister to consider the further purported application under s. 49(9), made on 3rd May, 2018.

Is the case covered by s. 5 of the Illegal Immigrants (Trafficking) Act 2000?

4. Mr. Conlan Smyth submits that what is at issue is merely a review rather than a decision, but that is something of a mischaracterisation. The rejection of the review application is itself a form of decision and therefore, as Mr. Dornan puts it, "*a target for judicial review*". That does not, however, determine the issue as to whether or not it should be regarded as covered by s. 49(4)(b). Section 79 of the International Protection Act 2015 adds to the list of decisions covered by s. 5 of the Illegal Immigrants (Trafficking) Act 2000 a number of further decisions including a new para. (oi), which is "a *decision of the Minister under s. 49(4)(b)"* and a new para. (oj), which is "*a deportation order under s. 51*". The question then is whether a decision on a review under s. 49(7) is a decision under s. 49(4)(b) of the 2015 Act for the purposes of s. 5 of the 2000 Act, as so amended.

5. Section 49(8) provides that "*Subsections (2) to (5) shall apply to a review under subsection (7)"* subject to a qualification not relevant here. Therefore, on a literal interpretation, subs. (4) applies and a refusal of a review under subs. (7) should be deemed to be a decision under s. 49(4)(b).

6. If I am in any way wrong about that, a purposive interpretation favours the application of s. 5 here. The logic of paras. 41 and 42 of my decision in *K.R.A. v. Minister for Justice and Equality* [2016] IEHC 289 [2016] 5 JIC 1214 (Unreported, High Court, 12th May, 2016) applies, namely that the rejection of a review is an adverse immigration decision which is relevant to the presence or removal of an illegally present non-national. Therefore s. 5(1)(oi) of the 2000 Act should be construed in a manner that gives effect to that purpose. Furthermore, looking at that purpose in the very specific context of the sequence of deportation decisions, it would be totally illogical if a refusal of permission under s. 49(4) were to be subject to s. 5, the consequential deportation order were to be so subject and a decision refusing to revoke the deportation order under s. 3(11) of the Immigration Act 1999 were to be so subject (see *K.R.A. v. Minister for Justice and Equality* [2016] IEHC 289 and *K.R.A. v. Minister for Justice and Equality* [2017] IECA 284 (Unreported, Court of Appeal, 27th October, 2017)) but a review in between would not be so subject, and instead would be covered by the relatively leisurely three-month time limit pursuant to O. 84. That would make no sense whatsoever on any level.

7. Even if s. 5 of the Interpretation Act 2005 does not apply, and for the avoidance of doubt I consider that that does not need to be addressed because there is not ambiguity in the provisions of para. (oi) and s. 49, a purposive interpretation applies to any legal text. The point was made by Hart and Sacks that *"Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living… Legal arrangements (laws) are provisions for the future in aid of this effort. Sane people do not make provisions for the future which are purposeless"* (Henry Hart and Albert Sacks, *The Legal Process* (Cambridge, C.U.P., 1958) at p. 148). I should add that similar views were expressed by Judge Aharon Barak, whose work "*presents purposive interpretation as a general system of interpretation to be used for all legal texts"* (*Purposive Interpretation in Law* (Princeton, 2005) p. xi): "*Law has a purpose. It is a social device. The goal of interpretation is to achieve the social goal of law. That is the theoretical basis for the centrality of purpose in purposive interpretation*" (p. xv). On such an analysis, even independently of s. 5 which excludes penal or other sanctions, the rule on purposive interpretation applies to any form of legal instrument, legislative or otherwise.

8. In any event, if there is any ambiguity s. 5 of the 2005 Act does apply because a deportation order is neither penal nor a sanction; rather it is a civil consequence of an applicant's illegal presence in the State. Mr. Dornan characterises it as an interference with liberty but that is an over-dramatization. A deportation order is the formalisation of the status of a person who is present in the State without the permission of the Minister and whose presence is therefore unlawful for all purposes under the Immigration Act 2004. Such

a person has at all times the option of voluntarily leaving the State and it is only if he or she has failed to do so that the deportation order is made; and indeed in practical terms it is only if they fail to do so following the making of that order that the order will be enforced by arrest. Indeed I might add that all civil law obligations are ultimately enforceable by arrest if non-compliance turns into contempt of court, but that does not turn all law into penal law.

9. Reliance was placed on *Sessions v. Dimaya*, 584 U.S. ___ (2018), but that is not a hugely convincing decision and strikes one, very respectfully, as a questionable approach which if applied here would certainly amount to a wrong turning in the law, specifically the description of deportation as a sanction and the view that the criteria for deportation can be reviewed as void for vagueness. Certainly as far as Irish law is concerned, deportation cannot be viewed as a sanction. In any event, the U.S. caselaw relied on in *Dimaya* refers to deportation by reason of the applicant having committed a crime. Here, however, deportation arises not because the applicant has committed a crime but because he is unlawfully present. But even if it were based on criminal offending it would be a civil consequence of the offending behaviour rather than a criminal punishment. As regards the vagueness doctrine, the dissenting judgment of Thomas J., particularly at slip op. pp. 19-20, that the core of the deportation statute is not vague, is considerably more attractive. The majority opinion relies heavily on *Johnson v. United States*, 576 U.S. ___ (2015) but again, if I may very respectfully say so, the characteristically elegantly written dissent of Alito J. is considerably more powerful, particularly where he refers at slip op. p. 1 to "*the well-established rule that a statute is void for vagueness only if it is vague in all its applications"* (see also slip op. p. 14 citing *Village of Hoffman Estates v. The Flipside*, *Hoffman Estates Inc*. 455 U.S. 489 (1982) at 494-495 and *Chapman v. United States* 500 U.S. 453 (1991) at 467).

Inadequate consideration of submissions
10. Two important contextual matters regarding the complaint that the Minister inadequately considered the applicant's submissions need to be noted. First of all, this was an applicant who had already been refused permission and was now seeking a review of that decision. Secondly, this was also an applicant who had no permission to be in the State other than the temporary and expired permission as a failed protection seeker. The decision under challenge states that all submissions were considered and the onus is on the applicant to demonstrate that that is not the case: see the judgment of Hardiman J. in *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401, which the applicant has failed to do here. While it is true that s. 49(3) of the 2015 Act requires the Minister to consider family rights, that does not detract from the well-established Strasbourg caselaw that deportation of an unsettled migrant will only breach art. 8 of the ECHR in exceptional circumstances (as applied here under the European Convention on Human Rights Act 2003, see for example *Costello-Roberts v. the United Kingdom* [1993] 19 E.H.R.R. 112 (Application no. 13134/87, European Court of Human Rights, 25th March, 1993) and *Rodrigues de Silva and Hoogkamer v. The Netherlands* (Application No. 50435/99, European Court of Human Rights, 31st January, 2006, para. 39).

11. The decision in any event provides quite a degree of express reference to the detail of the applicant's submission under the heading of his private life rights. At p. 1 it refers to correspondence submitted on behalf of the applicant and his network of friends in the country. At p. 2 it refers to his photography diploma, his involvement in various groups, his education and training, his character references, including from the providers of accommodation, and his various certificates and qualifications. At p. 3 reference is made to his job offer, his voluntary work, his involvement in a theatre group and a dance group, a letter from his accommodation centre and character references. So while there is no obligation on the IPO to engage in narrative discussion of all the various points in favour of the applicant, that was very much done here.

12. The allegation is made by Mr. Dornan that the IPO "*disregarded*" the material submitted but that is most certainly not the case and involves the classic error of confusing failure to engage in lengthy or any narrative discussion with failure to consider material or submissions made. Indeed, the oral submission made that the respondents "*did not consider the job offer, qualifications and character references*" is manifestly unsustainable – indeed unstateable - having regard to the terms of the decision. Insofar as the view was taken that the majority of the issues arising in relation to the applicant's private life predated his presence in the State there seems to be quite a degree of factual support for that.

13. Reliance was placed on the judgment of Clark J. in *Igiba v. Minister for Justice, Equality and Law Reform* [2009] IEHC 593 (Unreported, High Court, 2nd December, 2009) where at para. 20 she said that certain UK caselaw regarding art. 8 had *"no impact on the Irish situation as no "exceptionality" test has ever applied here*". It is by no means clear what that statement was intended to mean but if it means that exceptional circumstances are not required to show a breach of art. 8 for an unsettled migrant then I respectfully must conclude that such a view would be clearly incorrect, because well-established Strasbourg caselaw repeatedly emphasises the contrary. Whatever that sentence means in any event, it is superseded by the judgments of the Court of Appeal in *C.I. v. Minister for Justice and Equality* [2015] IECA 192 [2015] 3 I.R. 385 and the Supreme Court in *P.O. v. Minister for Justice and Equality* [2015] 3 I.R. 164 [2015] IESC 64 and by the extensive body of Strasbourg caselaw to the effect that deportation of unsettled migrants breaches art. 8 only in exceptional circumstances

14. It is true that in *Luximon v. Minister for Justice and Equality* [2018] IESC 24 [2018] 2 I.L.R.M. 153, the Supreme Court took the view that it was going too far to say that the art. 8 rights of unsettled migrants were minimal to non-existent, but that certainly does not change the fundamental point that deportation of such an unsettled migrant only breaches art. 8 in exceptional circumstances. Therefore, there was no illegality in the Minister having regard to the lack of any such exceptional circumstances here.

Refusal to consider further request for review
15. Section 49(9) of the 2015 Act provides that the applicant may make a submission seeking a review "*within such period following receipt by him or her under s. 46(6) of the decision of the Tribunal as may be prescribed".*

16. The International Protection Act 2015 (Permission to Remain) Regulations 2016 (S.I. No. 664 of 2016) prescribes a period of five days following receipt of the decision of the tribunal for this purpose. The interpretative rule in s. 18(a) of the Interpretation Act 2005 that the singular includes the plural is subject to the context otherwise requiring: see s. 4(1) of the 2005 Act. By definition, the wording of s. 49(9) is such that there can only be one such review because an applicant only gets the tribunal decision once. The applicant's further attempt to invoke s. 49(9) is therefore totally misconceived and legally baseless.

17. Furthermore, the applicant in these proceedings seems to have sought the incorrect relief in the sense that no *certiorari* of the refusal to consider the further or later view is sought. If the point had any substance it might have been possible to consider how that procedural difficulty could be circumvented, but as the point is manifestly unsustainable that issue does not arise. In any event, the applicant is not without a remedy because if there is any fundamental change of circumstances after the s. 49(9) review, s. 3(11) of the 1999 Act applies: see s. 51(4) of the 2015 Act.

Time
18. The application is out of time because s. 5 of the 2000 Act applies, but I do not need to base my order on that issue because I am rejecting the proceedings on their merits.

Order

19. Accordingly, the order will be:

(i). that the application be dismissed; and

(ii). that the respondents be released from their undertaking not to enforce the deportation order.