THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 669 J.R.]

BETWEEN

R.H. (ALBANIA)

APPLICANT

AND

THE CHIEF INTERNATIONAL PROTECTION OFFICER AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 8th day of October, 2018

1. This stay application is the latest consequence of the litigation relating to the unlikely assertion that the first instance protection process cannot lawfully be carried out with the assistance of contractors.

Legal background

2. By way of background, I rejected leave on that point in *M.Y.A. v. Refugee Applications Commissioner* [2016] IEHC 647 [2016] 11 JIC 1405 (Unreported, High Court, 14th November, 2016) and refused leave to appeal to the Court of Appeal in *M.Y.A. v. Refugee Applications Commissioner (No. 2)* [2017] IEHC 73 [2017] 2 JIC 1302 (Unreported, High Court, 13th February, 2017). Leave to apply was then granted on leapfrog appeal by the Supreme Court in *I.G. v. Refugee Applications Commissioner* [2018] IESC 25 (Unreported, Supreme Court, 16th May, 2018).

3. In *N.A. v. Chief International Protection Officer* [2018] IEHC 499 [2018] 9 JIC 1001 (Unreported, High Court, 10th September, 2018) I refused a stay on the hearing and determination by the International Protection Appeals Tribunal of appeals which had been launched against first instance decisions where judicial reviews had also been sought challenging those first instance decisions. In *I.G. v. Chief International Protection Officer* [2018] IEHC 509 [2018] 9 JIC 1702 (Unreported, High Court, 17th September, 2018) I refused a stay in a similar case where further arguments had been advanced. A number of the stay refusals were then appealed to the Court of Appeal and on 5th October, 2018, Irvine J. refused a stay in *F.K. v. Chief International Protection Officer* [2018 No. 535 J.R.], which was one of the cases that was part of the *N.A.* judgment. The Court of Appeal is due to substantively consider the issue on 15th October, 2018 on the basis of a hearing of one representative case, *R.S. v. Chief International Protection Officer* [2018 No. 476 J.R.], which is an appeal from an *ex tempore* refusal by me of a stay on similar grounds on 25th September, 2018.

Facts

4. The applicant arrived in the State from Spain on 21st February, 2017 with false Italian documents and was returned from whence he came the following day. He came back to the State on 11th March, 2017 with false French documents and applied for international protection. That was refused and the applicant was so notified by letter dated 11th July, 2018. I granted leave challenging that decision on 31st July, 2018 and on 4th September, 2018 the applicant got notice of the date of a proposed tribunal hearing on 16th October, 2018. He sought an adjournment, which was refused by the IPAT in a letter dated 2nd October, 2018 on the basis of the jurisprudence in *H.T.K. v. Minister for Justice, Equality and Law Reform* [2016] IEHC 43 [2016] 1 JIC 1505 (Unreported, High Court, 15th January, 2016) and my decision in *N.A. v. Chief International Protection Officer.*

5. The applicant has now applied on notice (relying on an ex parte docket for that purpose rather than a notice of motion, having regard to Practice Direction HC 78) for essentially two reliefs: firstly, an order making the IPAT a notice party, which seems an appropriate step given the nature of the substantive application being made, and secondly, a stay on the operation of the IPO decision pending the determination of the proceedings. In oral submissions, the applicant expanded this to seek the alternative option of a stay pending the determination of the matters currently before the Court of Appeal.

6. I have received helpful submissions from Mr. Paul O'Shea B.L. for the applicant and Mr. Mark J. Dunne B.L. for the respondent.

Application for a stay

7. Mr. O'Shea formally moves the points rejected previously in *N.A.* and *I.G.* In addition to the legalistic matters previously rejected, Mr. O'Shea also raises a new point, which is that refusal of a stay after leave has been granted is a breach of the principle of effectiveness. That submission is fundamentally misconceived.

8. Refusal of a stay does not deprive the applicant of a remedy; rather, it changes the nature of the remedy. Instead of it being primarily judicial review, the remedy will be the IPAT appeal, which is a full rehearing on matters of fact and law. Mr. O'Shea submits that if the IPAT hearing goes ahead and renders the proceedings moot, he will have been deprived of his right to challenge the first instance decision under EU law, including the Charter on Fundamental Rights. That is a totally legalistic and academic submission. The appeal is a full rehearing on fact and law on an *ex nunc* basis, which is the gold standard for an effective remedy. The only shortcoming is that it does not deal with purely legalistic objections to the first instance decision, but the applicant has got the present judicial review to deal with that. Obviously, he will have to persuade some future court that the present proceedings are not moot and that may be something of an ask, but if hypothetically the present case is deemed to be moot at some future point that does not mean that the applicant has not had an effective remedy because the remedy that will actually have been afforded will have gone to the substance of his case. It is worth saying in passing that such an approach is also equivalent for the purposes of EU law because it treats Irish and European law challenges the same. Any such challenges are at risk of being held to be moot if the applicant's points are simply superseded by a fresh decision after full rehearing. No injustice in any meaningful sense is done to the applicant in that regard.

Order

9. Accordingly, I will order as follows.

(i). that there be an order adding the IPAT as a notice party; and

(ii). that the application for a stay be refused.