[2019] IEHC 489

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 839 J.R.]

BETWEEN

M.N. (MALAWI)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of June, 2019

1. The applicant applied for asylum on 14th June, 2016. He failed to attend for interview on two occasions and the Refugee Applications Commissioner deemed his application to have been withdrawn. He then provided an explanation for his non-attendance and was given a new interview date which fell after the commencement of the International Protection Act 2015. He then made an application for subsidiary protection under that Act on 6th February, 2017. His protection claim was refused by the International Protection Office on 15th May, 2017.

2. On 19th May, 2017, the IPO issued an examination of file under s. 49(3) of the 2015 Act, which refused the applicant permission to remain and considered that the prohibition of *refoulement* in s. 50 of the 2015 Act did not preclude the applicant's return to Malawi. It also referred to "*country of origin information (Appendix A)*", although the version of the decision given to the applicant did not contain an Appendix A (which was, in fact, an extract from the 2016 US State Department Report on Malawi published on 3rd March, 2017). The applicant did not query the absence of Appendix A or take any steps whatsoever to go looking for it, even by writing a letter. In any event, it has subsequently been furnished and is exhibited: see exhibit GK1 to the affidavit of Grainne Keane and PS1 to the affidavit of Phillip Sullivan.

3. The applicant appealed the refusal of protection to the International Protection Appeals Tribunal on 8th June, 2017. That appeal was rejected on 19th July, 2018. It was then open to the applicant to make a submission seeking a review of the refusal of permission to remain under s. 49(9) of the 2015 Act, and in particular it was open to him to make any submissions regarding any further information going to the risk of *refoulement*. In fact, the applicant made no submission whatsoever under s. 49(9), thus passing up the opportunity for a review under s. 49(7). He made no submissions in relation to s. 50 of the 2015 Act either.

4. On 14th August, 2018, the IPO issued a document which is headed "*Review under section 49(7) of the International Protection Act 2015*". That document notes that no further information had been submitted by the applicant and thus no further consideration was required under s. 49(7). It also noted that no additional relevant information had been submitted in respect of any change of circumstances concerning the prohibition of *refoulement* and it set out the Minister's view having regard to "*all the circumstances of the case and relevant country of origin information*" that such information did not indicate that *refoulement* would arise.

5. This decision was then notified to the applicant by letter of 24th August, 2018. That letter advised the applicant of the option of returning voluntarily to Malawi and stated that if he did not promptly inform the Minister of his wish to take that option, a deportation order would be made. No such indication was given and accordingly a deportation order was made on 7th September, 2018, which was served under cover of a letter dated 28th September, 2018. That required the applicant to leave the State on or before 28th October, 2018 or to present for removal on 31st October, 2018.

6. Leave in the present proceedings was granted on 29th January, 2019, the primary relief sought being certiorari of "*the review decision of the First Named Respondent made under section 49(7) of the International Protection Act 2015 (the 'Act') dated 14th August, 2018*" and of the deportation order dated 7th September, 2018. A statement of opposition was filed on 5th April, 2019 and I have now received helpful submissions from Mr. Eamonn Dornan B.L., for the applicant and from Mr. Daniel Donnelly B.L., for the respondents.

What is the decision of 14th August, 2018 and was it necessary?

7. The decision of 14th August, 2018 is headed as a review under s. 49(7) but that sub-section only applies "*upon receiving information from an applicant in accordance with subsection (9)*". That is a jurisdictional requirement and, because no such information was provided in the present case, the document of 14th August, 2018 is not in law a decision under s. 49(7) as its heading states.

8. What it is, having regard to the affidavit of Mr. Sullivan, is firstly a record of the fact that a review is not being carried out under s. 49(7). It is not absolutely necessary to record that in a formal decision because that is simply a fact that arises from the absence of a submission being made by the applicant. Secondly, it is a record that the Minister remained of the view that the repatriation of the applicant would not contravene s. 50. Is that a necessary step? It seems appropriate in this context. The time to make the definitive s. 50 determination is at the time of the making of the deportation order itself.

9. Mr. Donnelly submits that s. 50 involves a prohibition rather than an obligation to make a decision. It is in one sense true that s. 50 is an ongoing prohibition but where an obligation to make a decision comes in is that the section is referenced in the terms of the deportation order itself. A "*record*" such as that of the document of 14th August, 2018, is simply the record of the reasons for the s. 50 decision which is inherently made by reason of the making of the deportation order.

10. It could be argued that, strictly speaking, the general rule might be that decision-maker does not have to state reasons unless he or she is requested to do so. But in the specific context of deportation orders, s. 51(3) of the 2015 Act requires that the applicant be notified of the reasons for the order, so in this instance there is a specific requirement for the reasons. The so-called review decision was, in reality, the records of those reasons as far as the s. 50 consideration was concerned.

11. Thus, the decision was appropriate although mis-headed. An appropriate heading might be something along the lines of "Consideration of s. 50 of International Protection Act 2015". However, the document is certainly not invalid on the grounds of the

heading alone. Indeed, more generally, the appropriate heading for review decisions might possibly be something along the lines of "Review under s. 49(7) of the International Protection Act 2015 and consideration of s. 50 of the Act". However, again, I would make the point that it would trivialise judicial review to quash a decision simply because there is some infelicity in the drafting of a heading.

Alleged failure to have regard to all circumstances and relevant country material

12. Ground 1(i) alleges 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. (i) 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."*

13. The fundamental stumbling-block for the applicant here is that the decision-maker says that all relevant information was considered. As Hardiman J. put it in *G.K. v. Minister for Justice and Equality* [2002] 2 I.R. 418 at pp. 426 – 427: "*a person claiming that a decision making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case*." The applicant has not done so here.

14. Mr. Donnelly in written submissions pithily notes at para. 22 that: "*this statement has been followed and applied innumerable times*", citing in particular *C.M. v. Minister for Justice and Equality* [2018] IEHC 217 [2018] 4 JIC 2501 (Unreported, High Court, 25th April, 2018) at para. 7 and *A.W.K. (Pakistan) v. Minister for Justice and Equality* [2018] IEHC 550 [2018] 9 JIC 2506 (Unreported, High Court, 25th September, 2018) at para. 10. As Mr. Donnelly puts it in oral submissions "*one doesn't begin from the assumption that the Minister has failed to comply with a statutory obligation".*

15. The applicant makes complaint that "*the impugned decision does not disclose any country of origin information which had been considered*" (written submissions, para. 16). But that information does not have to be disclosed in the sense argued, that is of being listed *in extenso*. The material considered simply has to be ascertainable on judicial review and there is nothing to demonstrate that the material before the Minister in this case was not ascertainable.

16. The tribunal decision says that country material was considered, particular items are identified and the items that are more generally referred to were certainly ascertainable had anybody taken any steps to request them.

17. Apart from the foregoing, there are two further independent grounds why the application must fail. Firstly, the applicant never sought clarification of what country material was considered. Had that been sought that would have been readily provided. Clarification has since been provided: see para. 6 of the affidavit of Mr. Sullivan.

18. Secondly, and most fundamentally of all, the applicant failed to make any submissions following the refusal of international protection. He certainly cannot get *certiorari* of the deportation order and the underlying s. 50 decision on a ground that he never sought to advance: see *Lingurar v. Minister for Justice and Equality* [2018] IEHC 96 [2018] 2 JIC 0808 (Unreported, High Court, 8th February 2018) at para. 9 which refers to the point made by Cooke J. in *I.S.O.F. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 457 (Unreported, High Court, 17th December, 2010) that the context for judicial review must begin with the actual submission made.

19. Thus, the present case is fundamentally distinct on a number of grounds from the case on which the applicant majors, *K.A. (Ghana) v. Minister for Justice and Equality* [2018] IEHC 511 [2018] 9 JIC 1703 (Unreported, High Court, 17th September, 2018). In that case, the applicant *did* make submissions under s. 49(9) (see para. 2). Reliance was also placed on *H.A.A. v. Minister for Justice and Equality* [2018] IEHC 34 [2018] 1 JIC 2303 (Unreported, High Court, 23rd January 2018), but there is nothing in that judgment to suggest that no submissions were made by the applicant.

Alleged failure to disclose what country material was considered

20. Ground 1(ii) complains that *"the Respondent erred in stating that* '…the country of origin information does not indicate that the life or freedom of the applicant would be threatened…" *etc. The impugned decision does not disclose any country of origin information which had been considered by the respondent*."

21. As noted above, the Minister is not required to list particular items of country of origin information considered. The actual information considered was readily ascertainable at all times and clearly referable to the material on file. As noted above, further clarification has been provided by Mr. Sullivan.

22. The argument is made in oral submissions that giving the "*reasons*" under s. 51(3) of the 2015 Act means listing all the country information considered. But that is not so. The requirement is that reasons be given. Those reasons must be ascertainable, but listing all discrete matters, documents or country material *in extenso* is an entirely separate matter and is not part of the statutory obligation. Anyway, s. 51(3) is not pleaded, so the applicant cannot succeed under that heading.

23. Furthermore, independently of the foregoing, in the absence of submissions under s. 49(9) and in the absence of having sought particulars of what country information was considered the applicant cannot succeed on this ground.

Alleged non-entitlement to rely on the IPAT decision

24. Ground 1(iii) contends that "*the Respondent may not rely on the decision of the International Protection Appeals Tribunal ('IPAT') in arriving at his opinion on non-refoulement. The IPAT denied the applicant's appeal on credibility grounds and lack of documentation. The IPAT decision does not disclose that any country of origin information was considered in denying the appeal."*

25. The premise of this ground is not correct. The IPAT decision does disclose that the country of origin information was considered, although in fairness to the applicant, it does not list that information *in extenso* (see para. 2.3 of the decision). If there was any doubt about what was before the tribunal that could have been readily obtained from the file.

26. 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.

27. Mr. Dornan draws attention to the comments made in John Stanley's textbook, *Immigration and Citizenship Law* (Dublin, 2017) p. 350, in terms of the lack of specificity of the wording of s. 50, a matter that is further discussed at some length in an article by Siobhán Stack S.C., "*New Rules for Refugees*" 2017, 22(1) *Bar Review* 15. In that article, Ms. Stack states that: "*It is the view of the*

writer that, logically, no risk of refoulement exists where an application for international protection has either not been made or has been made unsuccessfully, and where no s. 22 application is under consideration. While Meadows requires the Minister to satisfy herself that the risk does not exist, it does not consider whether this might be done by simply adopting the final decision on the application for refugee status and, indeed, the confirmation in the judgment that the procedures applicable to the Minister's consideration are extremely limited suggests that such an argument would succeed. Such a finding would be consistent with the generally applicable nature of the qualifying phrase in s. 3: for many of the classes of person to whom s. 3(2) of the 1999 Act applies, the question of refoulement does not arise. It would therefore be strange if an express consideration of the principle was always required, and to derive such an obligation from the qualifying phrase in s. 3 would be bordering on the absurd. This opportunity to remove what appears to be an unnecessary additional consideration has now been missed, as s. 50 applies to 'a person who is, or was, an applicant'. Failed applicants, to whom the principle generally has no application, are therefore included and, in practice, will be its primary beneficiaries."

28. She goes on to say that: "*Moreover, s. 50 seems to undermine the argument that the application of the principle of non-refoulement can be determined by reference to the outcome of the application for international protection, as s. 50(2) contains specific provisions for what must be considered by the Minister and these are stated to be the information submitted in the course of the application for international protection, and any further information that might be submitted relating to a change of circumstances. For some reason, the international protection recommendation and any decision of the IPAT on appeal are not included as matters to which the Minister* 'shall have regard', *nor is there any general provision permitting the consideration of any relevant matter. This looks very like a wasteful obligation to reconsider the whole matter, which is arguably inconsistent with Meadows, although it is possible that the section would be interpreted purposively to include those decisions as relevant considerations."*

29. In relation to those concerns, one can say as follows. Firstly, s. 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.

30. In the present case, Mr. Sullivan adopted that approach and "*had regard to and followed the decision of the IPAT*" (see para. 6 of his affidavit). That was a lawful approach. He also specifies the particular country information he considered.

Alleged non-compliance with s. 50

31. Ground 2 contends that "*in making the Deportation Order, the Respondent erred in asserting that there had been compliance with the provisions of section 50 (prohibition of* refoulement*) of the International Protection Act 2015".*

32. That is not a ground for judicial review as such in that it does not specify any legally cognizable error of any particular kind. But in any event, the complaint has no basis because no error in compliance with s. 50 has been demonstrated.

33. Mr. Dornan did say in oral submissions that ground 2 is derivative on ground 1 and that the reason for a lack of proper s. 50 consideration was the lack of a proper consideration of country material. However, because country material *was* properly considered, ground 2 also fails.

Order

34. As noted above, the applicant failed to submit information triggering s. 49(9), did not allege any change of circumstances in Malawi relevant to *refoulement*, did not inform the Minister of any such change, made no attempt to identify or request what country material was considered at any stage of the process and made no attempt to seek reasons for any of the decisions at an earlier stage of the process. Those features of the present case are fatal to the claim for relief against the decisions challenged here. But even if they were not, the complaints fail on their own merits.

35. Accordingly, the order will be:

(i) that the proceedings be dismissed; and

(ii) that the respondent be discharged from his undertaking not to deport the applicant.