THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 912 J.R.]

BETWEEN

O.B. (NIGERIA)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 23rd day of July, 2019

1. Pursuant to an amended statement of grounds dated 22nd July, 2019, the applicant seeks to challenge both a deportation order and a previous refusal of permission to remain under s. 49(4) of the International Protection Act 2015 and the underlying consideration under s. 49(3) of that Act. In this regard I have received helpful submissions from Mr. Garry O'Halloran B.L. for the applicant and from Ms. Sarah Cooney B.L. for the respondents.

2. Given the nature of the order I am proposing to make, only that bare sketch of the facts is necessary, and indeed all that is really required is to highlight the three key dates in this case. Firstly, the s. 49(4) refusal was dated 11th October, 2017. Secondly, the deportation order was notified to the applicant on 19th October, 2018 and thirdly, the proceedings were filed on 5th November, 2018. Sensibly, Ms. Cooney raised no issue in relation to time regarding the challenge to the deportation order as such.

The challenge to the s. 49(4) process

3. As far as the challenge to the s. 49(3) and (4) process is concerned, that is massively out of time. The applicant seeks to explain that by inadvertence. While inadvertence can be a reasonable basis for an expansion or variation of grounds in respect of a challenge to a decision which *has already* been challenged on other grounds within time (see *Keegan v. Garda Síochána Ombudsman Commission* [2012] IESC 29 [2012] 2 I.R. 570, *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296 [2018] 2 I.L.R.M. 56), it is not in itself a basis for instituting out of time a challenge from scratch to a totally separate decision that was not challenged on any grounds whatever within time.

4. Mr. O'Halloran argued that the applicant's legal advisers assumed that he could challenge the s. 49(3) and (4) process when the deportation order was made, but that is not a valid assumption. That decision itself stands if unchallenged (see by way of postscript the emphatic statement of that principle in a related context by Charleton J. in *X.X. v. Minister for Justice and Equality* (Unreported, Supreme Court, 23rd July, 2019)), but that does not mean that an applicant cannot draw new information to the attention of the Minister either on review under subs. (9), which this applicant did not do, or in an application to revoke the deportation order.

Grounds of challenge

5. I turn now to the grounds of challenge advanced. Grounds 1 to 4 have been deleted by the applicant in the amended statement of grounds.

6. Ground 5, which contends that the Minister erred in taking the applicants imprisonment and alleged torture in Libya into consideration when assessing the character of the applicant, relates to an alleged error in the s. 49(4) decision and thus is also out of time.

7. Ground 6 complains about *"the manner in which the Minister assessed the applicant's family and personal circumstances pursuant to s. 49(3) of the International Protection Act 2015 and thereafter decided to refuse the applicant permission to remain pursuant to s. 49(4) of the International Protection Act, 2015 and thereafter made the deportation order in respect of the applicant pursuant to s. 51(1) of the International Protection Act 2015"* on grounds essentially overlapping with those which are currently before the Court of Appeal on appeal from my decision in *S.T.E. v. Minister for Justice and Equality* [2016] IEHC 379 [2016] 6 JIC 2410 (Unreported, High Court, 24th June, 2016).

8. Insofar as ground 6 relates to the s. 49(3) and (4) process it is clearly out of time. Insofar as it relates to the deportation order and overlaps with the *S.T.E.* decision, the best approach is to adjourn that very limited aspect of the case to await the judgment of the Court of Appeal.

Order

9. Accordingly, the order will be as follows:

> (i). I will dismiss the proceedings as being out of time insofar as they concern reliefs D2 and D3, and in addition relief D1 insofar as it relates to ground 5 and insofar as it refers to the s. 49(3) and (4) process in ground 6.
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> (ii). I will adjourn the balance of the proceedings, namely relief D1 insofar as it is relates to the balance of ground 6, to the holding list to await the judgment of the Court of Appeal in *S.T.E. v. Minister for Justice and Equality* [Court of Appeal Record No. 2017/470].
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> (iii). Noting that when the matter was first before the court on 19th November, 2018 the respondents contested the applicant's application for an interlocutory stay but I granted that order, and subject to hearing from counsel, it would at first sight seem appropriate to continue that stay on the deportation of the applicant pending the final determination of the proceedings. I will also hear from the parties in relation to costs.

Postscript - costs

10. I have now heard from the parties on this issue. Ms. Cooney applies for all costs to date. The costs essentially cover three

periods, costs up to and including the injunction application, which the applicant won, costs from then until the *S.T.E.* point was first raised, and costs thereafter. As regards those three periods the appropriate orders are as follows:

> (i). Mr. O'Halloran was agreeable to the costs of the leave application and the injunction hearing of 19th November, 2018 being reserved, which I will do in the circumstances.
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> (ii). The costs from 20th November, 2018 to 29th April, 2019, which is the date Mr. O'Halloran contends he first produced a draft amended statement of grounds seeking to raise the *S.T.E.* point, have to follow the event in favour of the respondents because all points other than the *S.T.E*. point have failed as being out of time. There is something of a dispute as to when exactly that draft amended statement of grounds was produced but my taking the date of 29th April, 2019, being the applicant's version, is not intended to pre-judge that issue; and if it can be established at a later stage that the applicant didn't produce the draft amended statement until a later date then the respondents can apply for costs for that period.
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> (iii). Any costs after 29th April, 2019, for the time being anyway, and subject to any further order, will be reserved, because there is no event in relation to these costs as yet, although there will be in due course after the Court of Appeal gives judgment in *S.T.E.*

11. As the proceedings are ongoing, it appears to be appropriate to put a stay on the costs pending the final determination of proceedings and Ms. Cooney sensibly hasn't vigorously argued against that.