[2020] IEHC 146

THE HIGH COURT

[2019 No. 673 J.R.]

BETWEEN

H. Z. (IRAN)

APPLICANT

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 17th day of February, 2020

1. The applicant obtained refugee status in Greece. He was not happy living there so he immediately left, first to live for a while in France and then coming to the State where he claimed asylum. In that claim he falsely asserted that he had not been granted asylum elsewhere. This fraud was discovered by the Irish authorities through enquiries under the Eurodac system. The applicant could not be returned to Greece because the Greeks declined to accept him, his application having already been finalised. His application for asylum here was then declared inadmissible under s. 21 of the International Protection Act 2015. The applicant appealed to the International Protection Appeals Tribunal, with the same result. He now brings the present judicial review challenging that refusal. The Minister has made a proposal to deport the applicant which remains outstanding.

Facts

2. The applicant was born in Iran in 1999. He left that country on a date which he originally stated was 31st August, 2016 although he is now saying it was late August, 2017. He claims to have travelled by car to Turkey, stayed there for six days and then to have gone by road to Greece. He was fingerprinted in Greece on 23rd November, 2017 when he applied for asylum there. The date of fingerprinting is not consistent with the timelines given by the applicant, as pointed out later by the tribunal in correspondence dated 26th July, 2019. When this was put to the applicant in the Dublin III interview, he said that he had been in Greece for a week to ten days before being fingerprinted. That suggested a fifteen-month period unaccounted for, a gap which the applicant now seeks to bridge by saying that he left Iran in 2017 rather than 2016.

3. He claims that he was in Greece for a six-month period and was detained for four months because of his illegal entry. He obtained refugee status in Greece on 31st January, 2018. As soon as he got that status he left, travelling by air to France where he stayed for three or four months and then coming by air to the State on 16th January, 2019. On the date of his arrival, he applied for international protection here, falsely stating in his protection application that he had not been granted refugee status in any other country.

4. He was interviewed under the Dublin III regulation on 5th February, 2019. On 1st March, 2019 Greece refused to take the applicant back under Dublin III because he had already been granted asylum. The International Protection Office deemed his application inadmissible on 20th May, 2019. He appealed that decision to the IPAT by notice of appeal dated 4th June, 2019. On 11th July, 2019 the IPAT wrote to the applicant's

solicitor saying that the application would be adjourned pending other legal developments, but on 17th July, 2019 the tribunal changed its mind and said that the letter of 11th July, 2019 was issued in error and that a decision on the appeal would be made in due course.

5. On 26th July, 2019 the tribunal member wrote to the applicant's solicitor seeking clarification regarding the application and in particular regarding the applicant's experiences in Greece. A psychiatric report dated 16th August, 2019 was furnished on 20th August, 2019 and a further reply was furnished on 22nd August, 2019.

6. The IPAT decision was issued on 4th September, 2019 affirming the recommendation of the IPO that the application be deemed inadmissible. On 10th September, 2019 the Minister issued a proposal to deport the applicant, and submissions were made in response on 26th September, 2019. The present proceedings were filed on the same day, the primary relief sought being *certiorari* of the IPAT decision of 4th September, 2019.

7. On 7th October, 2019 further submissions were made against deportation, recycling the points made before the tribunal (and indeed in these proceedings) about why the applicant should not be sent to Greece. I granted leave on 21st October, 2019 and have now received helpful submissions from Mr. Michael Conlon S.C. (with Mr. James Buckley B.L.) for the applicant and from Mr. Robert Barron S.C. and Mr. Tim O'Connor B.L., who also addressed the court, for the respondents.

Applicability of Section 5 of Illegal Immigrants (Trafficking) Act 2000

8. The impugned decision was made under s. 21(9)(a) of the International Protection Act 2015 which provides that: "(9*) In relation to an appeal under subsection (6), the Tribunal may decide to— (a) affirm the recommendation of the international protection officer* …" Section 5 of the Illegal Immigrants (Trafficking) Act 2000 has been amended by s. 79(a)(ii) of the 2015 Act by the insertion in sub-s.(1) of a new para. (ob) which adds "*a decision of the International Protection Appeals Tribunal under section 21(9)(a) of the International Protection Act 2015"* to the list of decisions to which s. 5 applies. Accordingly, the applicant's submissions are correct to concede, at para. 4, that s. 5 of the 2000 Act applies to the present proceedings.

Should the IPAT consider conditions in a country that has granted asylum previously when considering whether a protection application is admissible?

9. Section 21(2) of the 2015 Act provides that: *"An application for international protection is inadmissible where one or more than one of the following circumstances applies in relation to the person who is the subject of the application: (a) another Member State has granted refugee status or subsidiary protection status to the person* …".

10. Section 21(3) makes clear that if this applies, the protection decision-maker is obliged to declare the application to be inadmissible. This gives effect to art. 25(1) of the asylum procedures directive 2005/85/EC, which provides *inter alia* that *"in addition to cases in which an application is not examined in accordance with Regulation (EC) No. 343/2003 member states are not required to examine whether the applicant qualifies as a refugee*

in accordance with Directive 2004/83/EC when application is considered inadmissible pursuant to this Article".

11. Article 25(2) of the procedures directive goes on to provide *inter alia* that: "*Member States may consider an application for asylum as inadmissible pursuant to this Article if: (a) another Member State has granted refugee status*…" (see also discussion at p. 204 of Hughes and Hughes, *International Protection Act: Annotated*, (Dublin, Clarus Press 2015)).

12. It is accepted by both sides in the present case that, given that inadmissibility is a creature of European law, the Irish legislation giving effect to that principle, while unqualified in its terms, should be read in the light of the decision of the CJEU in Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim v. Bundesrepublik Deutschland*, which provides that in a return or inadmissibility decision, the member state's competent authority should have regard to art. 4 of the EU Charter of Fundamental Rights which prohibits torture or inhuman and degrading treatment and thus prohibits treatment of that kind in another member state which "*must attain a particularly high level of severity*" in the limited number of cases where that may apply (see in particular paras. 86, 87 and 94). The principle of a conforming interpretation set out in Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-04135 is, therefore, the relevant one here, although not specifically referred to by the tribunal member in this case.

13. Thus, even apparently unqualified words in an Irish statute must be read as subject to European law. The effect of the IPAT decision (although the tribunal member did not put it this way) was that s. 21 is capable of being interpreted on a *Marleasing* basis in line with EU law so as not to apply if the particularly high level of severity amounting to torture or inhuman or degrading treatment in another member state was demonstrated.

14. On the other hand, art. 4 of the Charter cannot be infringed merely because of a decision declaring an application inadmissible. That possibility only arises at the expulsion stage. As against that, *Ibrahim* notes the right to asylum in art. 18 of the Charter (see para. 6), and, unlike art. 4, that right can arise at the inadmissibility stage. That presumably explains the reference in *Ibrahim* to the consideration of conditions in the country in which asylum was granted as being something that can arise at the admissibility stage of the process rather than the removal stage.

15. The applicant has helpfully identified seven questions arising in the proceedings. The seventh question, that of prematurity, which had been pleaded on behalf of the respondents does not now arise because I am informed by Mr. Barron that the respondent is not standing over any complaint of prematurity. Accordingly, this point falls and I can address the applicant's concerns on their merits.

Question 1: Irrationality

16. The applicant's first question is: "*did the first respondent make an unreasonable or irrational conclusion in finding that 'the appellant falls short of establishing that the*

fundamental rights he enjoys in international law particularly those protected by EU law and by the European Convention on Human Rights would be infringed if he was to be returned to Greece"".

17. Irrationality has not been shown here. The decision is a purely factual assessment of the material before the tribunal and was well within what was open to the tribunal in such circumstances. Mr. Conlon endeavoured to summarise the applicant's particular difficulties here as follows:

    (i). the applicant does not speak Greek; the tribunal notes this claim at para. 4.10 and does not seem to take issue with it, but that is not a basis to hold that the applicant is facing torture or inhuman or degrading treatment;

    (ii). the applicant has certain mental health issues; the tribunal accepted that he was on anti-depressants and was awaiting a psychiatric appointment, see para. 4.11, but again that is not a basis for holding that he is facing torture or inhuman or degrading treatment in Greece;

    (iii). the applicant claims that he had no access to accommodation or healthcare and was living on the streets in the past; in that regard the tribunal noted that the applicant had failed to document his situation or his efforts to obtain accommodation (see para. 4.12), and considered that the country information relied on by the applicant was of limited value in assessing current conditions in Greece given that the document from the PRO Asyl Foundation "*Protected only on paper: beneficiaries of international protection in Greece*" dated from 23rd July, 2017 - the tribunal by contrast relied on more up-to-date country material, particularly the Asylum Information Database (AIDA) country report, which showed certain progress on the social and economic facilities available to persons in the applicant's situation; and

    (iv). the applicant complained that accommodation that could be available is overcrowded; that difficulty was to some extent acknowledged by the tribunal, but does not in and of itself amount to torture or inhuman or degrading treatment or punishment.

18. Thus, it was certainly open to the tribunal to find that the allegation that the applicant was facing torture or other treatment in breach of art. 4 of the Charter was not established. The features of a case favourable to the applicant were short of the threshold at which the mutual trust between EU member states should completely break down. As the respondents' submissions correctly point out, *"to displace the presumption of mutual respect the threshold must be that of extreme material poverty, not even significant but extreme*". Thus, I would uphold the plea in para. 5 of the statement of opposition that the decision was not irrational as pleaded on behalf of the respondents: *"a decision is not rendered irrational solely by reason of [the possibility of] taking a different view".*

Question 2: Lack of reasons

19. The applicant's second question is: "*did the first respondent fail to give adequate reasons as to why the relevant tests were not met by reference to the evidence set out in the accepted country of origin information*"?

20. The reason given is relatively terse, but, nonetheless, it is clear the applicant fell short of establishing that his fundamental human rights would be infringed. It is clear that insofar as the applicant has shown the possibility of hardship and suffering, that falls short of the threshold of particular severity set out in EU law such as to amount to torture and inhuman and degrading treatment. Such reasons are sufficient in the circumstances. It is clear that the reasoning path of the tribunal can be followed in the sense discussed in *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61, [2018] 1 I.L.R.M. 109.

Question 3: Alleged failure to apply ECHR caselaw

21. The applicant's third question is: *"did the first respondent err in not applying the test set out in Tarakhel v. Switzerland Application No. 29217/12 which refers to the necessity for member states proposing transfer to carry out a thorough examination of the situation of the person facing transfer and the possibility that they "may be left without accommodation or accommodated in overcrowded facilities without any privacy or even insalubrious or violent conditions"".*

22. That is not a proper ground for judicial review for a host of reasons. The most obvious one is clear from the terms of the question itself: this applicant is not facing transfer in the impugned decision. All that has happened is that his asylum application has been declared inadmissible. Article 3 of the ECHR does not apply to the refusal of asylum or to a declaration that an asylum application is inadmissible. There is no Convention right to asylum. Article 3 only applies to a removal decision, and we have not got to that point yet. Furthermore, an individual decision from Strasbourg does not establish a "*test*", still less one that is directly effective in Irish law. The European Convention on Human Rights Act 2003 is not pleaded and, therefore, this point cannot succeed. But even if it had been pleaded, the 2015 Act is clear that the application must be rejected as inadmissible. Since the 2015 Act is based on EU law, it can be read in an EU-compatible manner, but even assuming for the sake of argument the very questionable (indeed almost certainly incorrect) proposition that art. 3 of the European Convention on Human Rights is more stringent than art. 4 of the EU Charter, there is no additional scope for allowing the interpretation of the 2015 Act to be cut back even further on the basis of Strasbourg caselaw, in circumstances where the transfer is not precluded by EU law. Thus, the plea as set out in para. 3 of the statement of opposition that under these circumstances the European Convention on Human Rights Act 2003 (even if it had been pleaded) does not displace s. 21 of the 2015 Act must succeed.

23. The applicant's submission relies on the judgment of Faherty J. in *Pfakacha v. Minister for Justice* [2017] IEHC 620 (Unreported, High Court, 19th July, 2017) where she quashed a decision which stated that all representations were considered, saying that these factors "*were not addressed in the decision*" (see para. 57), and interpreted a lack of narrative discussion as amounting to "*the absence of any meaningful consideration of the*

humanitarian considerations which the applicants put forward" (see para. 59). That decision, however, seemed to turn on a separate point to the effect that the decision-maker fettered his discretion (see paras. 59 and 64). So the comments of Faherty J. regarding consideration are *obiter*, but if interpreted in the sense incorrectly advanced by the applicant, they seem to conflate narrative discussion with lawful consideration and do not appear to factor in the well-established Supreme Court jurisprudence in *G.K. v. Minister for Justice, Equality and Law Reform per* Hardiman J. [2002] 2 I.R. 418, [2002] 1 I.L.R.M. 401, that if the decision-maker states that everything has been considered, it is for the applicant to discharge an onus to show that is not the case.

24. In *F.Z. (Pakistan) v. Minister for Justice and Equality* [2019] IEHC 368 (Unreported, High Court, 12th April, 2019), I rejected a similar argument on the basis that it involved the "*classic error of confusing failure to engage in narrative discussion with failure to consider relevant matters*" and, while not of precedential status, this part of my judgment was, for what it's worth, cited in the Supreme Court determination refusing leave to appeal (see *F.Z. v. The Minister for Justice and Equality* [2019] IESCDET 234 at para. 12).

Question 4: Was there an error in relying on the applicant's failure to provide evidence?

25. The applicant's fourth question is "*Did the first respondent err in law in applying the wrong test or act unreasonably in holding against the applicant that 'he had not provided any evidence of his own situation in Greece while he was living there or of the opportunity to obtain accommodation, employment or welfare supports'".*

26. The assessment of the evidence is quintessentially a matter for the decision-maker. No error of law has been demonstrated. It is not obviously impermissible to expect an applicant to have at least *some* documentary material in relation to at least *some* of his attempts to obtain accommodation. Therefore, it is not obviously impermissible to hold against an applicant the failure to produce *any* such documentary material. A decision-maker is not obliged to engage in a micro-analysis of each element of an applicant's claim and decide whether it believes or does not believe each such individual element, or indeed say precisely the relevance of each and every observation and specify what conclusions follow from each, as obstructively demanded on behalf of the applicant in para. 38 of his legal submissions.

27. Judicial review is not a process where the applicant puts himself in the driving seat and imposes demands on statutory decision-makers as to how precisely they need to go about their work. Nor is it a process enabling, still less requiring, the court to enforce such a detailed and misplaced form of bottom-up methodology by issuing *certiorari* should a decision-maker deviate in any way from the standards conveniently dictated and demanded after the fact by an applicant.

28. The reliance on s. 28(7) of the 2015 Act in the applicant's submissions is misplaced, as that relates to substantive consideration of an asylum claim, not the threshold rejection of the claim as inadmissible.

Question 5: Was there an illegality in failing to hold an oral hearing or failing to put the IPAT's specific concerns to the applicant?

29. The applicant's next question is: "*did the first respondent breach fair procedures being rejecting the credibility of the applicant's claims that he had sought and failed to obtain accommodation and welfare supports in Greece without permitting the applicant an opportunity to provide oral evidence on the question as requested by him".*

30. This is not a case where the applicant's credibility was rejected as such. The tribunal noted the lack of documentary support for any of the applicant's claims. That is a fact, not impugned as such. The tribunal went the extra mile in terms of fair procedures by not rejecting those claims as made outright, but by seeking considerable additional clarification from the applicant. There is no obligation in law, under the Constitution, in EU law or under the ECHR to have an oral hearing in circumstances such as in this case. In any event, no challenge to the legislation is made on the pleadings. The law is very clear in this respect. Section 21(7)(a) (which extraordinarily is entirely ignored in the applicant's written submissions) provides that "*the Tribunal shall make its decision without an oral hearin*g". As the Act is explicit on this point and is not challenged in any way in the case, this point cannot succeed.

31. The applicant claims that the tribunal was under an obligation to put its concerns to him. That is another instance of "applicant's logic", the conceit being that it is the prerogative of an applicant to specify and dictate the procedure after the event, thus creating a no-win situation for the decision-maker. The argument advanced is equivalent to a right to see and comment on a draft decision. Such an argument has been consistently rejected see *e.g. M.M. v. Minister for Justice and Equality* [2018] IESC 10, [2018] 1 I.L.R.M. 361.

32. The caselaw relied on by the applicant, such as *Moyosola v. Refugee Applications Commissioner* [2005] IEHC 218 (Unreported, High Court, Clarke J., 23rd June, 2005) and *B.W. (Nigeria) v. Refugee Appeals Tribunal* [2017] IECA 296, [2018] 2 I.L.R.M. 56, deals with a totally different situation and is all premised on there being an adverse credibility finding which should be put to an applicant. There is no analogy to this case.

Question 6: Should the Tribunal have sought assurances or further information from Greece?

33. The applicant's final question is: "*did the first respondent err in failing to make or to direct further inquiries of the Greek authorities and/or seek an assurance from that state in respect of the conditions the applicant would face if returned to Greece prior to making the impugned decision"*?

34. It is inherent in the system of mutual confidence between members of the EU that member states do not seek assurances from each other or make enquiries regarding conditions, unless a significant threshold is first overcome. Had the applicant demonstrated a *prima facie* case that art. 4 rights would be breached, the question of undertakings or information might have arisen, but he did not do so. In written submissions the applicant says that this point follows from ECHR caselaw, but that is incorrect for the reasons already explained.

Order

35. The application is dismissed.