

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021] IEHC 302  
**RECORD NO. 2020/188JR**

**BETWEEN:**

**MAH**

**APPLICANT**

**- AND -**

**MINISTER FOR JUSTICE**

**RESPONDENT**

**JUDGMENT of Ms Justice Tara Burns delivered on the 30th April 2021.**

**General**

1. The Applicant is a Somalian national, a qualified doctor and a person who has been granted refugee status in Hungary. She was born on 10 August 1988 and is presently 32 years old.
2. The Applicant undertook her medical studies in Ukraine and once they were completed, she returned to Mogadishu where she commenced employment as a junior doctor in a local hospital. However, she was subjected to serious threats from a jihadist fundamentalist group because as a female she worked and did not wear a full burqa. Fearing for her life, she fled Somalia.
3. She returned to Ukraine after renewing her student visa, but when this expired she was unable to remain. Smugglers were paid by friends of hers to get her into Hungary. However, she was left by these smugglers at the Hungarian border where she remained for sixteen days. Having entered Hungary, the Hungarian authorities required her to apply for asylum in Hungary, otherwise she would be deported to Ukraine where she would face imprisonment.
4. In August 2015, the Applicant was granted refugee status in Hungary. However, as she did not have any accommodation and therefore did not have an address, she was unable to obtain work. She was housed in communal homeless shelters with people who had significant alcohol and drug addiction issues. The Applicant was physically assaulted by a man and feared being sexually assaulted by others. She does not speak Hungarian. She experienced constant racist abuse as she is of colour and wears a hijab. The Applicant avers at paragraph 7 of her affidavit:-

“I appealed for help to the social department, but they could not give me anywhere else to live. I could not speak the language, and no one would help me. I felt isolated and alone as a young Muslim woman and lived in constant fear of violence, including sexual violence, and for my life. I could not stay there. The fear I experienced in Hungary was worse than that I had experienced in Somalia.”

The facts set out by the Applicant with respect to her experiences in Hungary are not controverted by the Respondent.

5. The Applicant managed to leave Hungary, with the assistance of an agent, and came to Ireland arriving in this jurisdiction on 7 February 2016. She made an application for asylum but because she already had this status within the European Union, this application could not be considered.
6. In light of this determination, she was required to vacate direct provision accommodation on 25 May 2016. The Applicant has been homeless since then. She has resided with various people she has met along the way in direct provision. She cannot work and has no income. She relies on a €50 payment from St Vincent de Paul every two weeks. However, on a voluntary basis, the Applicant assists as a translator for members of the Muslim and Somalian community and attends GP and Hospital appointments with them, and she works as a volunteer with the Irish Cancer Society.
7. In June 2017, the Applicant's solicitors notified the Respondent that she wished to apply for permission to reside in the State. It was indicated that the way to go about this was for a proposal to deport to issue in response to which she could make representations. Accordingly, a proposal to deport issued in respect of the Applicant.
8. Representations were made by the Applicant's solicitor in response to the proposal to deport the Applicant on 12 June 2017. No response was forthcoming despite reminders in August and September 2017 and in March and July 2018.
9. On 25 June 2019, further representations were made to the Respondent by the Applicant's current solicitor which included several excellent references from a number of academics and medical personnel in Cork where she has been staying. A medico-legal report was also included with these representations which indicated that the Applicant had been diagnosed as suffering from major depressive disorder, the symptoms of which were of a severe degree. Dr Giller, who examined the Applicant, noted that the Applicant experiences a strong sense of hopelessness and despair about her situation and that she has symptoms of anxiety. Dr Giller was of the opinion that if the Applicant remained in her current situation of profound hopelessness, her mental and physical state are likely to deteriorate significantly.
10. A reminder was again sent to the Respondent by the Applicant's solicitor in September 2019 and a mandamus application was threatened in November 2019.
11. On 7 February 2020, the Applicant was notified that a deportation order to deport her to Ukraine issued against her on 17 January 2020. The reason stated by the Respondent for ordering the Applicant's deportation was that the Respondent was satisfied that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweighed such features of the case which might tend to support a decision not to make a deportation order in respect of the Applicant.
12. Leave to apply by way of Judicial Review seeking an order of Certiorari of the Deportation Order was granted by the High Court on 9 March 2020.

13. The grounds of challenge to the Deportation Order are, in summary, that:-
- (i) the Respondent erred in finding that there was no serious risk that the Applicant would be exposed to inhuman and degrading treatment if deported to Hungary, and/or in confining her consideration under Article 3 to "medical issues";
  - (ii) the Respondent erred in finding that the presumption that the fundamental rights of the Applicant would be observed in Hungary, as a member state of the EU had not been rebutted, and/or in not accepting that State protection is not available to her
  - (iii) the Respondent erred in considering in a selective and piecemeal manner the country of origin information submitted in respect of current conditions in Hungary and in finding that this only related to "illegal migrants and asylum seekers" rather than to refugees and immigrants more generally;
  - (iv) the Respondent erred in dismissing and/or discounting the finding made by under s. 3(6)(f) of the Immigration Act 1999 to the effect that the Applicant's employment prospects "would have to be deemed to be reasonable in the current economic climate, in the event that she held an appropriate immigration permission"; and
  - (v) the Respondent failed to carry out a proportionality assessment in respect of the Applicant's Article 8 rights pursuant to the European Convention of Human Rights.

**Deportation Order**

14. The Applicant's challenge relating to points i), ii) and iii) as set out above, arise from the Respondent's considerations contained in the "Examination of file under Section 3 of the Immigration Act 1999, as amended" document under the heading of "Prohibition of Refoulement" wherein it is stated:-

"I note that MAH has been granted refugee status in Hungary and this is not in dispute. She is therefore afforded the protection of the State of Hungary. I further note that Hungary is a member state of the European Union and subject to the laws and standards applicable to all member states.

Having considered the country of origin information and material submitted on behalf of MAH it is noted that the criticisms therein and the situation to which it relates is that pertaining to illegal migrants and asylum seekers. In circumstances where MAH has been granted refugee status she does not come within the class of persons to whom the material relates. In particular, the referral by the European Commission of Hungary to the CJEU is in respect of its treatment of asylum seekers and migrants and not in relation to those persons who have been granted protection.

I note that MAH was provided with accommodation by the authorities in Hungary and her concerns relate to the standard of that accommodation. However nothing has been submitted in this regard to suggest that her "life or freedom of the person would be threatened for reasons of race, religion, nationality, membership of a

particular social group or politic opinion” due to the standard of accommodation provided to her. Nor, is it accepted that the submissions made demonstrate that the standard of accommodation provide to MAH means that she “would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

While submission have been made to suggest that MAH fears for her safety if returned to Hungary as she suffered daily abuse because of her ethnicity and feared she would be raped or badly beaten by others residing at the accommodation centre and that such attaches were frequent and she feared she would also be a victim if she remained in Hungary, it is not accepted that State protection is not available to MAH in Hungary. It is submitted that she reported the threats to the management at the accommodation centre but no action was taken. However, no submissions have been made to suggest that MAH reported any such threats to police authorities, or that they were unwilling or unable to provide her protection.

In light of the above, having taken into consideration all of the facts of this case and the relevant country of origin information, I am of the opinion that repatriating MAH to Hungary is not contrary to Section 3A of the Immigration Act 1999, as amended.”

#### **Assessment of Country of Origin Information**

15. Country of Origin information had been forwarded to the Respondent, on the Applicant’s behalf, to inform the Respondent’s considerations regarding issuing a deportation order. Furthermore, an affidavit sworn by the Applicant’s solicitor in these proceedings, exhibited a report from the Commissioner for Human Rights of the Council of Europe. As this report was being opened to the Court, Counsel for the Respondent raised objection to it on the basis that the report had not been placed before the Respondent at the time she was considering whether to issue a deportation order. However, it is clear that the Respondent’s attention was drawn to this report in the representations letter from the Applicant’s solicitor, which is also exhibited before me. Reference is made in that letter to a report in the Guardian newspaper to the effect that “Europe’s top human rights watchdog has accused Hungary’s government of violating people’s rights and using anti-migrant rhetoric that fuels “xenophobic attitudes, fear and hatred.” Further extracts are also referred to and the newspaper report is also included. In light of the source of this document and the fact that the Respondent has indicated that she had considered “the country of origin information and material submitted on behalf of MAH”, I am of the view that the Respondent was indeed aware of this report, or if she was not, she should have been and was properly placed on notice of it.
16. The COI which the Respondent was referred to was characterised by the Applicant’s solicitor in her representations to the Respondent as confirming “that there are severe levels of anti-Muslim and anti-immigrant sentiment” in Hungary “resulting in xenophobic violence. That this is condoned and indeed incited by Hungarian state actors is also made clear.”

17. A very brief overview of some of the COI before the Respondent reads as follows:-

Commissioner for Human Rights of the Council of Europe, 21 May 2019

"Xenophobia and Lack of Integration Measures

34. The Commissioner is deeply concerned that the anti-immigrant stance adopted by the Hungarian government reflected in constitutional and secondary legislation and the continuation of the "crisis situation due to mass immigration" is fuelling xenophobic attitudes, fear and hatred among the population. Recent surveys have demonstrated strong prejudice against refugees among Hungarians. 2016 research by the PEW Research Centre put Hungary on top of the surveyed European countries in negative attitudes towards refugees. This was also the case for unfavourable views of Muslims. Most recent asylum seekers in Hungary have come from majority Muslim countries. According to a 2017 survey carried out by the social research institute Tarki, 60% of the population would allow no asylum seekers to enter Hungary.
36. The Commissioner points out that xenophobic rhetoric and attitudes also have a harmful effect on the integration of recognised refugees in Hungary.
44. The Commissioner is deeply concerned that the anti-immigrant stance of the Hungarian government is fuelling xenophobic attitudes, fear and hatred among the population. The high level of xenophobic prejudice identified among the population in Hungary also has a harmful effect on the integration of recognised refugees in Hungary. The Commissioner calls on the government to refrain from using anti-immigrant rhetoric and campaigns which fan xenophobic prejudice. She also urges the authorities to facilitate the integration of beneficiaries of international protection and to provide support to their integration programmes and services aimed at improving their access to housing, health services, education and employment."

Article from the Independent – Hungary is the worst: Refugees become punch bag under PM Viktor Orban

' "In 2018 – despite its rich multicultural history – Hungary has become the most anti-migrant country in Europe. Consulting firm Gallup recently devised a Migrant Acceptance Index to measure how accepting populations were on issues such as "an immigrant becoming your neighbour". Hungary recorded the third worst score in the entire world. Hungary's Prime Minister Viktor Orban... was re-elected for a fourth term in April's landslide election win and relentlessly campaigned to a drumbeat of xenophobic rhetoric – laying the blame for the entirety of Hungary's woes from its collapsing education system to widespread political corruption, at the feet of the migrant"

18. As is apparent from the extract from the Deportation Order cited above, the Respondent was of the view that the COI was not of relevance to the Applicant in light of her status as a refugee rather than as an asylum seek or an unlawful migrant. At the hearing before

this Court, Counsel for the Respondent urged caution regarding this COI, which it was submitted, although concerning in its own right, was limited with respect to its applicability in the instant case. While that argument is relevant to a degree, it is clearly not the case that the COI only relates to asylum seekers and not to refugees: it very obviously relates to refugees and their treatment by wider society in Hungary, with an assertion that this is fuelled by the government's actions. The Respondent erred in her dismissal of the COI in this manner and failed to have any regard to the concerning issues arising. She failed to assess the Applicant's representations not to have a deportation order issued against her having regard to this COI by dismissing it on an erroneous basis.

19. Counsel for the Respondent asserted that the Respondent did accept that the COI confirmed that there were severe levels of anti-Muslim and anti-immigrant sentiment in Hungary and that therefore the issues arising in the COI were considered by the Respondent with respect to whether a deportation order should issue. However, that is clearly not the case and is a misreading of the "Examination of File under s. 3 of the 1999 Act" document. What that document in fact records reads as follows:-

"In representations dated the 25 June 2019 submitted by [the Applicant's] Solicitors further submissions are made under the heading refoulement with respect to the situation in Hungary. It is submitted that:-

COI confirms that there are severe levels of anti-Muslim and anti-immigrant sentiment in Hungary currently, resulting in xenophobic violence that is condoned and indeed incited by Hungarian state actors."

20. Accordingly, the reference to COI confirming certain matters relates to what the Applicant's solicitor submitted the COI confirmed rather than the Respondent determining that it so confirmed. No such finding was made by the Respondent.
21. With respect to the reference in the "Examination of file under s. 3 of the 1999 Act" document to the effect that it was not accepted that State protection was not available to the Applicant, this obviously relates to the Applicant's fear of being the subject of physical or sexual assaults rather than state protection from general xenophobic hatred.

**Fundamental rights of the Applicant will be observed in Hungary**

22. In the portion of the "Examination of file pursuant to s. 3 of the 1999 Act" document set out above, the Respondent fails to engage in any assessment of whether the Applicant's fundamental rights would be observed in Hungary on the basis that simply because Hungary is a member state of the European Union and subject to its laws and standards, the Applicant's rights will be observed.
23. While the Respondent is permitted to apply a presumption that an individual's fundamental rights will be upheld in a particular member state because that member state is subject to the laws and standards of the EU, that presumption is rebuttable.
24. In the instant case, no consideration is given as to whether the presumption has been rebutted despite the Applicant's account of her experiences in Hungary, which are not

controverted by the Respondent; the concerning COI already cited; the referral by the European Commission of Hungary to the CJEU in respect of its treatment of asylum seekers and migrants (which resulted in a finding in December 2020 against Hungary in respect of all five complaints of the Commission), which of itself raises concerns regarding the attitude towards the wider society of refugees; and the European Parliament's resolution calling on the European Council to determine the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded referencing, amongst other concerns, Hungary's treatment of the fundamental rights of migrants, asylum seekers and refugees.

25. The presumption is simply applied without any regard to the above considerations so as to at least consider whether the presumption has been rebutted. This is an error in the Respondent's approach to the Applicant's representations.

**The Respondent's consideration under s. 3(6)(f) of the 1999 Act relating to the employment prospects of the proposed deportee**

26. The "Examination of file under Section 3 of the 1999 Act" document stated the following in relation to s. 3(6)(f) of the 1999 Act, regarding the employment prospects of the proposed deportee:-

"It is submitted on behalf of MAH that she "would easily take up employment in the State as a qualified medical doctor." It is further submitted that "this is a critical skill in the State at present and she is likely to be a considerable asset to Irish medical services."

In light of her work history, her age, her work ethic and her apparent good health, her employment prospects would have to be deemed to be reasonable in the current economic climate, in the event that she held an appropriate immigration permission. However, she does not have the permission of the Minister to reside or work in the State at this time and there is no obligation on the Minister to grant MAH permission to remain in the State in order to facilitate her employment in this State.

It would, of course, be open to a prospective employer to apply for a Work Permit in respect of MAH from outside the State. The process provided for under section 3 of the Immigration Act 1999 (as amended) is clearly not the means by which Ireland's labour market needs should be met"

27. Section 3(6) of the Immigration Act 1999, as amended provides:-

"In determining whether to make a deportation order in relation to a person, the Minister shall have regard to—

- (a) the age of the person;
- (b) the duration of residence in the State of the person;
- (c) the family and domestic circumstances of the person;
- (d) the nature of the person's connection with the State, if any;

- (e) the employment (including self-employment) record of the person;
- (f) the employment (including self-employment) prospects of the person;
- (g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);
- (h) humanitarian considerations;
- (i) any representations duly made by or on behalf of the person;
- (j) the common good; and
- (k) considerations of national security and public policy, so far as they appear or are known to the Minister.”

28. Section 3(6) clearly places a mandatory onus on the Respondent to consider particular, specified issues when determining whether a deportation order should issue in respect of a proposed deportee. Whilst the Respondent did consider the Applicant’s employment prospects, she reversed the clearly positive outcome in respect of that heading by having regard to the fact that the Applicant does not hold a work visa in respect of such employment prospects, nor has permission to remain in the State. These are inappropriate matters to have regard to under this sub-heading. Had the Applicant a work visa or a permission to remain in the State, a consideration pursuant to s. 3(6) of the 1999 Act would not arise in the first place. Accordingly, what s. 3(6) requires of the Respondent is to initially consider each of the sub-headings on a standalone basis and to then engage in a balancing act to determine whether a deportation order should issue having regard to all issues mandated to be considered pursuant to s. 3(6).
29. Incorrectly, the Respondent nullified the separate consideration of the good employment prospects which the Applicant was found to have by reference to her not having a work visa or permission to be in the State. These issues are separate to her employment prospects: they can clearly be taken into account by the Respondent in the balancing exercise which she must conduct but they should not be utilised in a compartmentalised determination regarding her employment prospects simpliciter. This was an error on the Respondent’s part.

**Proportionality assessment in respect of Article 8 rights**

30. The Applicant has submitted that she is entitled to have a proportionality assessment conducted in relation to whether her article 8 rights have been breached rather than having to establish exceptional circumstances before her article 8 are identified as having become engaged.
31. This Court has very recently delivered a judgment in relation to this exact point in *MK v. Minister for Justice* [2021] IEHC 275. The parties were made aware that judgment in that matter was about to be delivered at the time of the hearing before me. Counsel for the Applicant agreed that the judgment of this Court in the MK matter would be binding on the Applicant as the High Court decision in this matter.
32. In *MK*, I found at paragraph 27 of my judgment:-

“[T]hat the jurisprudence of the Irish Courts is extremely well settled to the effect that a migrant with a non-settled or precarious residential status cannot assert



Article 8 rights unless exceptional circumstances arise. Accordingly, a proportionality assessment does not arise.”

33. Accordingly, the Applicant, as a migrant with a precarious residential status, is not entitled to have a proportionality assessment carried out with respect to asserted Article 8 rights in the absence of establishing exceptional circumstances.

**Inhuman/Degrading Treatment**

34. In light of the fact that I am of the view that the Respondent incorrectly assessed the COI; failed to consider whether the presumption that her fundamental rights would be upheld in Hungary had been rebutted; and failed to properly consider the Applicant’s employment prospects pursuant to s. 3(6)(f) of the 1999 Act, the Respondent’s determination in respect of the Deportation Order is vitiated by these errors.
35. The Court does not intend to address the impressive arguments made by the Applicant regarding the core aspect of her claim to the effect that the Respondent erred in her finding that the Applicant would not be subject to inhuman or degrading treatment if returned to Hungary and that her Article 3 rights pursuant to the European Convention of Human Rights would not be breached, in light of the fact that the manner in which the decision has been arrived at is clearly in error.
36. As a concluding remark, it seems to me that the founding architects of the system of international protection which is in place in Europe today, would be of the view that we, as a people, have badly failed the Applicant in this case.
37. Accordingly, I will grant the Applicant the relief sought and make an order for the Applicant’s costs as against the Respondent