APPROVED **[2023] IEHC 692**

THE HIGH COURT
JUDICIAL REVIEW

2019 504 JR

BETWEEN

A. (ALBANIA)

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 15 December 2023

INTRODUCTION

1. The within judicial review proceedings seek to challenge a decision to refuse the Applicant permission to remain in the Irish State. The impugned decision was made pursuant to Section 49 of the International Protection Act 2015.

2. The proceedings had been placed in a holding list pending the hearing and determination of an appeal taken to the Court of Appeal in respect of a lead case. The Court of Appeal has since delivered judgment in the lead case: *H.K. (Western Sahara) v. Minister for Justice and Equality* [2022] IECA 141.

3. Whereas the principal issue in the lead case has been resolved in a manner which is unfavourable to the Applicant herein, the findings of the Court of Appeal in respect of a secondary issue are of assistance to him. The findings are in respect of the proper interpretation of Section 49 of the International Protection Act 2015. The Court of Appeal held, relevantly, that the assessment under Section 49 requires more than simply a consideration of whether there has been a breach of the individual's rights under the European Convention on Human Rights.

4. For the reasons explained hereinafter, the impugned decision in the present case is vitiated by the same legal error as that identified by the Court of Appeal.

STATUTORY FRAMEWORK

5. Section 49 of the International Protection Act 2015 requires the Minister for Justice to consider whether an individual, whose application for international protection has been refused at first instance, should be granted permission to remain. It further provides for the possibility of a "*review*" of that initial decision where that individual's appeal against the refusal of international protection has been dismissed by the International Protection Appeals Tribunal ("*IPAT*").

6. The statutory criteria governing the grant of permission to remain are prescribed as follows under Section 49(3) of the Act:

> "In deciding whether to give an applicant a permission, the Minister shall have regard to the applicant's family and personal circumstances and his or her right to respect for his or her private and family life, having due regard to—
>
> (a) the nature of the applicant's connection with the State, if any,
>
> (b) humanitarian considerations,

(c) the character and conduct of the applicant both within and (where relevant and ascertainable) outside the State (including any criminal convictions),

(d) considerations of national security and public order, and

(e) any other considerations of the common good."

7. The Court of Appeal in *H.K. (Western Sahara) v. Minister for Justice and Equality* [2022] IECA 141 held (at paragraphs 101 to 108) that the assessment under Section 49 of the International Protection Act 2015 requires more than simply a consideration of whether there has been a breach of the person's rights under the European Convention on Human Rights ("*ECHR*"). The individual's rights under Article 8 ECHR must be considered, but the Section 49 considerations go further than that and reach into all aspects of private and family life. The inquiry is not confined to determining whether there has been an interference with private and family life that would engage the individual's rights under Article 8 ECHR. Rather, there must be a consideration of personal and family rights in the overall context of the grant or refusal of permission to remain.

8. The Court of Appeal held (at paragraph 104) that the review decision, which was impugned in those proceedings, was erroneous in that it was confined to a consideration of whether there had been a breach of the applicant's ECHR rights:

> "[…] It is an inescapable corollary of the obligation to give reasons for an administrative decision that the question of whether the decision-maker has complied with his or her statutory remit must be determined by reference to the reasons that are actually offered in the determination. In my view, the manner in which the decision-maker has framed his conclusions can only be interpreted as meaning that the conclusion in relation to the humanitarian considerations was directed, and directed only, to the matters referred to in the preceding paragraphs; that is in the assessment of how they affected Article 3 and Article 8 ECHR rights but not to a separate consideration of purely humanitarian concerns

> which did not reach the level of rights. Overall, the Review gives no indication that the reviewer considered and applied the legal requirement that humanitarian considerations must go further than considerations of whether Article 8 ECHR rights in particular had been violated. At no point were matters concerning the appellant's private and family interests expressly treated as possible considerations of a humanitarian nature. That means there was no apparent consideration of his mental health, which, although not reaching the standard of a breach of his rights if deported, could amount to a humanitarian ground on which he could or ought to be granted PTR."

9. On the facts, the submission made on behalf of the applicant had raised issues in respect of his mental health. The Court of Appeal held (at paragraph 106) that the Minister had erred in failing to consider this issue other than through the lens of the ECHR:

> "[…] Not only was there an onus on the Minister, through the Review, to deal with the [medical report] in so far as Article 8 ECHR rights were concerned, but there was an obligation on her to acknowledge and address that the report raised humanitarian considerations which went beyond whether the appellant's Article 8 ECHR rights had been interfered with. The failure to indicate clearly and unequivocally in the Review that these issues had been correctly addressed and considered is, in the particular circumstances of the present case, a failure to adequately explain the reason for refusing review based upon humanitarian considerations."

10. The Court of Appeal had earlier rejected an argument that the findings under the subheading "*Section 49(3) findings*" were sufficient (at paragraph 104):

> "[…] The overall impression from the Review is that humanitarian considerations were only addressed with respect to whether there was a breach of Article 3 and Article 8 ECHR rights, and that the decision-maker concluded that because there had been no violation of these rights, there were no relevant and applicable humanitarian considerations. I do not accept the Minister's contention that the separate reference under the heading 'Section 49(3) findings' which was apparently a final conclusion under the section, to the fact that '[a]ll of the applicant's family and personal circumstances, including those related to the applicant's right to respect for family and private life' is

> evidence that these matters were considered. On the contrary, that is preceded by a reference to a 'breach of the applicant's rights' whereas humanitarian considerations go further than the issue of whether an applicant's rights would be breached."

11. As explained under the next heading below, the formulation of the findings in the present case is identical to that condemned by the Court of Appeal.

THE IMPUGNED DECISION

12. The Applicant has been refused international protection at first instance, and, again, on appeal by IPAT. Thereafter, the Applicant, through his solicitors, applied on 27 May 2019 for a review of the Minister's initial decision to refuse him permission to remain. The application emphasised the Applicant's connection to the Irish State by reference, *inter alia*, to his employment history, his establishment of his own small business, and testimonials from work colleagues and friends. It was submitted that the Applicant is highly regarded in his local community.

13. In accordance with the *Carltona* principle, the decision on an application to review an earlier decision to refuse permission to remain is made by an official within the International Protection Office as the *alter ego* of the designated decision-maker, i.e. the Minister for Justice. (*ASA v. Minister for Justice and Equality* [2022] IESC 49). The practice is for the official to prepare a report which records both the consideration of the application and the formal decision.

14. The report/decision in the present case is dated 13 June 2019 and was notified to the Applicant's solicitors on 21 June 2019. For ease of exposition, the term "*the impugned decision*" will be used when referring to the report/decision.

15. The impugned decision makes the following findings in respect of the Applicant's Article 8 ECHR rights:

> "Having considered and weighed all the facts and circumstances in this case, it is not accepted that such potential interference will have consequences of such gravity as potentially to engage the operation of Article 8(1).
>
> Having considered and weighed all the facts and circumstances in this case, a decision to refuse the applicant permission to remain does not constitute a breach of the right to respect for private life under Article 8(1) of the ECHR."

16. The impugned decision adopts a thematic approach to the assessment under Section 49(3) of the International Protection Act 2015. Each of the five subparagraphs under Section 49(3) is used as a subheading as follows:

> "4. Section 49(3) (a) – Nature of the applicant's connection with the State
>
> It is submitted by the applicant's solicitor that the applicant has settled in Ireland since his arrival in 2018 and has made Ireland his home. He is highly regarded in his local community. The applicant submitted that '*Ireland is becoming my home every day and more since I came here. I live and work in Dublin*'.
>
> It is noted that the applicant illegally entered the State on 29/01/2018 and applied for International Protection in the State on the same date. This application was refused by the IPO and by the IPAT on appeal.
>
> The applicant was granted permission to access the labour market by the LMAU, valid from 16/08/2018 until 16/02/2019. This was renewed on 07/02/2019 until 07/08/2019 or until the applicant receives a final decision on his International Protection application, whichever comes first.
>
> It is noted that according to information on file, the applicant is currently residing in private accommodation within the State.
>
> 5. Section 49(3) (b) – Humanitarian Considerations
>
> The applicant has not submitted any substantive information under this heading in accordance with section 49(9),

> therefore the consideration previously undertaken under this heading remains valid and requires no additional consideration.
>
> 6. Section 49 (3) (c) – Character and conduct of the applicant both within and (where relevant and ascertainable) outside the State (including any criminal convictions)
>
> The character and conduct of the applicant both within and outside the State has been considered in this case.
>
> The applicant has submitted several references attesting to his good character and work ethic as set out in Section 2 (above). These submissions have been considered in the context of this review.
>
> 7. Section 49(3) (d) – Considerations of National Security and Public Order
>
> Considerations of national security and public order do not have a bearing on this case.
>
> 8. Section 49(3) (e) – The Common Good
>
> The applicant has not submitted any information under this heading in accordance with section 49(9), therefore the consideration previously undertaken under this heading remains valid and requires no additional consideration."

17. As appears from the foregoing, there is no assessment, in this part of the impugned decision, of the submissions made on behalf of the Applicant. Rather, the submissions are summarised without comment.

18. The impugned decision makes the following findings in respect of the assessment under Section 49(3):

> "10. Section 49(3) findings
>
> While noting and carefully considering the submissions received regarding the applicant's private and family life and the degree of interference that may occur should the applicant be refused permission to remain, it is found that a decision to refuse permission to remain does not constitute a breach of the applicant's rights. All of the applicant's family and personal circumstances, including those related to the applicant's right to respect for family and private life, have

> been considered in this review, and it is not considered that the applicant should be granted permission to remain in the State."

19. This formulation of the findings is identical to that used in the decision impugned in *F.K. (Western Sahara)*: see paragraph 100 of the judgment.

DISCUSSION

(A). MISINTERPRETATION OF THE STATUTORY TEST

20. The impugned decision suffers from precisely the same error of law as that identified by the Court of Appeal in *F.K. (Western Sahara)*. More specifically, it is apparent from the report/decision that the decision-maker has failed to appreciate that the inquiry under Section 49 of the International Protection Act 2015 requires more than simply a consideration of whether there has been a breach of the individual's rights under the ECHR.

21. There is almost nothing in the decision/report by way of engagement with or assessment of the submissions made by the Applicant. Such assessment as there is has been carried out through the lens of ECHR rights. This is evident, in particular, from §10 of the report (cited above). The wording used in the present case is identical to that held to be deficient by the Court of Appeal in *F.K. (Western Sahara)*. In each case, the decision-maker mistakenly confined their consideration to determining whether there had been a breach of the Applicant's ECHR rights. This approach fails to recognise that the inquiry under Section 49 is wider. It requires consideration, relevantly, of the Applicant's connection to the Irish State. Here, the impugned decision fails to assess at all the submissions made on behalf of the Applicant on 27 May 2019. It is not

sufficient simply to recite the submissions made without in any way engaging with same.

22. Counsel for the Minister has sought to characterise these judicial review proceedings as comprising no more than a technical complaint that the Applicant's connection with the Irish State, including, in particular, his employment history, has not been assessed under the subheading "*humanitarian considerations*". Having set up this man of straw, the Minister's written submissions then seek to answer this supposed complaint by saying that there is no need, and that it is simply not possible, to treat the subparagraphs of Section 49(3) of the Act as rigid categories or to require a conclusion under each subparagraph.

23. With respect, these submissions tend to ignore the more fundamental difficulty with the impugned decision, namely that the review decision fails to engage with the non-ECHR factors at all. That is the reason the decision is invalid.

24. Counsel for the Minister also makes the point that a review decision is principally concerned with matters which have changed or arisen *since* the initial decision to refuse permission to remain. With respect, the legal position is more nuanced. As explained at paragraph 96 of *H.K. (Western Sahara)*, new information may shed light on, or give support to, previous submissions that were made and it is in that context that they are to be considered in reaching the determination based upon the new information or change in circumstances.

25. The difficulty for the Minister in the present case is that none of the issues raised in the application for the review had been considered at the time of the initial decision. As appears from §5 of the decision of 14 December 2018, the sole consideration at that time was confined to the question of whether the Applicant

was at risk of torture, inhumane or degrading treatment or punishment in Albania. The type of personal circumstances now relied upon simply did not arise for consideration at the time of the initial decision.

26. In conclusion, it is not sufficient for the decision-maker simply to summarise the submissions made on behalf of an applicant, without any engagement or assessment. Here, the only assessment carried out was through the lens of ECHR rights.

(B). FAILURE TO PROVIDE ADEQUATE REASONS

27. As explained above, the impugned decision is invalid on the ground that it is apparent from the limited reasons stated that the decision-maker misinterpreted the statutory test, and, in consequence, failed to ask himself the right question. The validity of the impugned decision can equally be considered from the perspective of the duty to give reasons. On this alternative analysis, the impugned decision is also invalid.

28. The nature of the duty to give reasons has been summarised by the Supreme Court in *Connelly v. An Bord Pleanála* [2021] IESC 31, [2021] 2 I.R. 752 as follows (at paragraph 46 of the reported judgment):

> "Therefore, it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision-maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review."

29. The position is put as follows in *Balz v. An Bord Pleanála* [2019] IESC 90, [2020] 1 I.L.R.M. 367 (at paragraph 57):

> "[…] It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live."

30. The impugned decision fails to meet this standard. It is simply not possible to know from the terms of the decision as to why the Applicant's submissions were rejected.

31. Counsel on behalf of the Minister contends that a discursive decision is not required and that many of the personal circumstances which were put forward on behalf of the Applicant "*speak for themselves*" and "*needs little more than to be repeated or noted to be properly addressed*".

32. With respect, these contentions are not consistent with the modern case law on the duty to give reasons. Whereas it is correct to say that a discursive decision may not be required, it goes too far to suggest that it may be enough to merely repeat or note a submission made. The correct legal position is stated as follows in *Connelly v. An Bord Pleanála* (at paragraph 84):

> "There is a middle ground between the sort of broad discursive consideration which might be found in the judgment of a court, on the one hand, and an entirely perfunctory statement that, having regard to a series of factors taken into account, the decision goes one way or the other. There is at least an obligation on the part of decision-makers to move into that middle ground, although precisely how far will depend on the nature of the questions which the decision-maker had to answer before coming to a conclusion."

33. In the present case, the impugned decision fails to engage at all with the submissions made in respect of the Applicant's connection to the Irish State. The impugned decision simply summarises the submissions without comment.

34. In conclusion, the paucity of reasoning in the impugned decision can be analysed in one of two ways. First, such limited reasons as are stated in the impugned decision disclose the error of law identified under the previous heading above. Secondly, the failure to engage at all with the submissions made by the Applicant in respect of his family and personal circumstances and his connection with the Irish State represents a breach of the duty to state reasons.

WHETHER ERRORS LED TO AN UNLAWFUL OUTCOME

35. Counsel on behalf of the Minister submits, as a fallback position, that even if the court were to hold that there were errors in the decision-making process, same did not lead to an unlawful outcome. It is further submitted that relief by way of judicial review should be refused. These submissions are made by reference to the majority judgments of the Supreme Court in *M.K. (Albania) v. Minister for Justice and Equality* [2022] IESC 48.

36. With respect, the circumstances of the present case are distinguishable from those considered by the Supreme Court. The appeal in *M.K. (Albania)* had been confined, principally, to the question of whether the Article 8 ECHR rights had been properly assessed. A majority of the Supreme Court held that whereas the decision-maker had erred in the sequence in which the issues were addressed, it could not be said that any flaw in the sequencing had led to an unlawful outcome.

37. The position is put as follows by O'Donnell C.J. (at paragraph 30 of his judgment):

> "The jurisprudence of the ECtHR makes it clear that removal of a precarious resident in accordance with law will only be a breach of the Article 8 right to private life in exceptional circumstances. This was the test addressed by the decisionmaker, the error was to do so in order to determine if there was impact of sufficient gravity to engage Article 8 rather than to assess proportionality. The height of the hurdle at stage two was too high, but the hurdle which the applicant failed to surmount was that which would have been addressed at stage five. The finding that there were no such exceptional circumstances was therefore fatal to the applicant's contention that his Article 8 rights were breached by refusal of leave to remain. In these circumstances it cannot be said that any flaw in the sequencing has led to an unlawful outcome. The question of whether a refusal of leave to remain would be an unlawful interference with the applicant's Article 8 rights was addressed by the application to the same facts, of the approach which the law requires. In those circumstances it would, in my view, be an act of futility, and worse, to quash the decision of the Minister in this case."

38. O'Donnell C.J. explained the basis upon which relief was being refused as follows (at paragraph 33):

> "[…] The only issue for this Court, on this aspect of the case, however, is whether or not the decision made on 25 November, 2019 was invalid because it breached the rights guaranteed by Article 8 of the Convention. It did not do so, and accordingly is not invalid. I hope it is clear that I do not decide this case on the basis that while accepting the decision is invalid, I would refrain from ordering *certiorari*, on the grounds that the outcome would inevitably be the same. Instead for the reasons I have tried to set out, I do not consider that the decision of the Minister was invalid."

39. The present case is different in that it involves a complaint that there has been a failure to carry out the wider assessment required under Section 49 of the International Protection Act 2015, i.e. over and above that required for the purposes of the ECHR. The threshold for a successful application for permission to remain is lower as a matter of domestic law. It is not necessary to demonstrate a breach of the individual applicant's ECHR rights. There is nothing in the

domestic legislation which suggests that permission to remain will only be granted in "*exceptional circumstances*".

CONCLUSION AND PROPOSED FORM OF ORDER

40. The impugned decision is invalid on the grounds, first, that the Minister misinterpreted the statutory test and in consequence failed to ask herself the right question, and, secondly, that no proper statement of reasons is provided. Accordingly, orders of *certiorari* will be made setting aside both the decision of 13 June 2019 and the consequential deportation order of 8 July 2019. As to costs, my *provisional* view is that the Applicant, having succeeded in his application for judicial review, is entitled to recover his costs as against the Minister. This represents the default position under Section 169 of the Legal Services Regulation Act 2015.

41. This matter will be listed, for submissions on the final form of order, on Monday 22 January 2024 at 10.45 AM. The related judicial review proceedings, which are travelling with the present case, will be listed for mention only on the same date.

Appearances

Eamonn Dornan for the applicant instructed by Trayers Solicitors
Mark J Dunne SC and John P Gallagher for the respondent instructed by the Chief State Solicitor

Approved Garrett Simons