THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 946 J.R.]

BETWEEN

F.Z. (PAKISTAN)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Richard Justice Humphreys delivered on the 12th day of April, 2019

1. The applicant is a single 28-year-old national of Pakistan. His family live there and he has no familial connections to the State. According to the UK Border Agency he was issued with a tier 4 general student visa from 2nd August, 2010 to 23rd January, 2012. He apparently travelled to the UK on this visa in September, 2010.

2. He claims that in 2011 he "*met*" a Ms. S. online. He claims they met in person in 2012 and started a relationship and that he only later found out that she was married.

3. After January, 2012 he resided illegally in the UK and worked part-time during that period as a security guard in Manchester. He claims that in March, 2014, Ms. S. became pregnant. A child was allegedly born on 25th December, 2014 and the applicant claims to be the father.

4. On 28th March, 2015 Ms. S. asked the applicant by way of a Facebook message "*when are you going to Ireland?"* and the applicant replied "*IDK* [I don't know] *man, I will email you".*

5. He claims that after April, 2015 he was threatened by Ms. S.'s husband and so decided to go to Ireland. Unsurprisingly, the tribunal was to consider that this tale was inconsistent with the evidence that he had already been considering going to Ireland in March, 2015.

6. The applicant claims to have ceased contact with Ms. S. after April, 2015. He came to the State illegally on 16th June, 2015. He then applied for asylum, which was refused on 23rd August, 2016. On 1st November, 2017, the IPO issued an examination of file under s. 49(3) of the International Protection Act 2015 to the effect that the applicant should not be given permission to remain in the State. That was in conjunction with a refusal of international protection by that Office on 8th November, 2017.

7. The applicant appealed the protection refusal to the International Protection Appeals Tribunal. An oral hearing took place on 15th March, 2018 at which point Mr. Ciaran Doherty B.L. appeared for the applicant. The tribunal rejected the appeals on 19th April, 2018. The applicant then sought a review under s. 49(7) and (9) of the 2015 Act on 30th April, 2018. That review application consisted of a one-page handwritten s. 49 review form which made no reference to art. 8 of the ECHR (whether as applied by the European Convention of Human Rights Act 2003 or at all) or to family life either in the UK or Ireland, or indeed specifically to private life, although it did refer to his friends. It included some references as well as a strange document which purported to be a job offer, a document which the respondent suggests does not on its face command much confidence. It purports to be a job offer from Four Star Pizza, although it is headed "*Four Star Pizz*" and purports to be signed on behalf of "*For* (sic) *star pizza Phisboro* (sic)".

8. On 8th August, 2018 the International Protection Office decided pursuant to s. 49(9) of the 2015 Act that permission to remain should not be granted on review.

9. On 9th November, 2018 leave to seek judicial review was granted, the primary reliefs being *certiorari* of the s. 49(7) review decision and of the deportation order when issued. That order was formally made on 19th November, 2018 and notified to the applicant on 29th November, 2018, along with a requirement to present for removal from the State on 9th January, 2019. I have received helpful submissions from Mr. Eamonn Dornan B.L. for the applicant and from Mr. Alexander Caffrey B.L. for the respondent.

Alleged lack of proper or adequate determination

10. Ground 1(i) of the Statement of Grounds alleges that "*In making the Impugned Decision, the Respondent, his servants and agents erred in law and/or engaged in unfairness and irrationality in the consideration of the private and family rights of the Applicant and in the manner in which the review under s. 49 of the act was conducted: (i) No proper or adequate determination was made in relation to additional documentation submitted under the factors set out at Section 49(3) of the Act, namely, (a) the nature of the Applicant's connection with the State, (b) humanitarian considerations (c) the character and conduct of the Applicant (d) considerations of national security and public order, and (e) any other considerations of the common good".*

11. The decision states that the matters set out in s. 49(3) of the 2015 Act were considered and there is therefore an onus on an applicant to show that this is not so, an onus which has not been discharged here: see *per* Hardiman J. in G*.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401. The argument made involves the classic error of confusing failure to engage in narrative discussion with failure to consider relevant matters (see e.g. *A.B. (Albania) v. Minister for Justice and Equality* [2017] IEHC 814 [2017] 12 JIC 2113 (Unreported, High Court, 21st December, 2017), *J.M. (Malawi) v. International Protection Appeals Tribunal* [2018] IEHC 663 [2018] 11 JIC 2004 (Unreported, High Court, 20th November, 2019), *Jahangir v. Minister for Justice and Equality* [2018] IEHC 37 [2018] 2 JIC 0102 (Unreported, High Court, 1st February, 2018) and *C.M. (Zimbabwe) v. International Protection Appeals Tribunal* [2018] IEHC 35 [2018] 1 JIC 2304 (Unreported, High Court, 23rd January, 2018)).

Alleged inadequate regard to material submitted

12. Ground 1(ii) contends that "*The Respondent gave no adequate regard to the offer to the Applicant of full time work in the State or to his character references."*

13. These matters manifestly were considered. The weight to be given to them is quintessentially a matter for the Minister. No

illegality in that consideration has been demonstrated.

Alleged unfairness of procedure
14. Ground 1(iii) alleges that "*The Respondent engaged in unfairness, and acted contrary to the natural law principle of* audi alterem (sic) partem, *in making adverse inferences in relation to the applicant's move from Direct Provision Accommodation to the private rental sector without providing the Applicant with any opportunity to address or respond to this concern".*

15. The decision notes that the applicant had been in Reception and Integration Agency accommodation and made transfer requests in December, 2015, January, 2016 and February, 2016, which were all refused. He was then absent for the week ending 21st March, 2016 onwards with no explanation. He lived in private rented accommodation from 13th April, 2016 onwards and had not provided sufficient evidence as to how he had supported himself financially.

16. First of all, this observation by the Minister is hardly central. These matters are noted but the decision does not pivot on them. They are noted as part of the record of facts (as correctly contended at para. 38 of the respondent's written submissions).

17. Secondly, all of these matters were within the applicant's knowledge. On that basis, I would uphold the plea at para. 4 of the statement of opposition (a statement that I might observe has been drafted with commendable succinctness, taking full and appropriate account of Practice Direction HC81) to the effect that "*the applicant was clearly aware of his choice to move from Direct Provision into private rented accommodation since 13 April 2016 and that his ability to support himself would be relevant to any assessment. Indeed, it is an offence under Section 16(5) of the International Protection Act, 2015 for the Applicant not to inform the Respondent of a change of address as soon as possible. In this regard, the Applicant resided at four separate addresses during the currency of this international protection application."*

18. A third fatal obstacle to the applicant's succeeding under this heading is that he simply has not disputed the correctness of the matters referred to in the Minister's decision. Thus, even if assuming *arguendo* there was an obligation to put this point specifically to the applicant, a proposition which I reject, the applicant was not in a position to controvert it.

19. Fourthly and relatedly, the applicant has not stated what he would have said by way of answer had this point been put to him. An applicant cannot get relief by way of judicial review under the heading of failure to have a point put to him or her unless that applicant shows that they would have had something to say in that context.

20. Fifthly, personal circumstances are matters that the Minister is obligated to have regard to under s. 49 anyway. The point being made by Mr. Dornan is totally unreal in this context because the applicant himself through his solicitors notified the Minister of the various addresses in the private rented sector during the course of the very process we are talking about. It can hardly be said that the Minister then has to revert to the applicant and say "I am going to take into account the fact that you have written me letters saying that you are living at these various addresses." The applicant's position as somebody prohibited from working is one that arises inherently as a matter of law from his situation as a protection seeker and then a failed protection seeker; and his self-evident ability to afford rent is something that arises inherently from the fact that he is living in the private rented sector. Under those conditions it hardly can be said to be something that has to be specifically put.

21. Finally, even if I am wrong in all of this and if the Minister breached some duty to offer an opportunity to explain to the applicant I would refuse relief on a discretionary basis in circumstances where, as put at para. 37 of Mr. Caffrey's written submissions, *"It is most improper that the Applicant would complain to the High Court about this alleged failure on the Minister's part to provide him with an opportunity to respond whilst simultaneously failing to provide any explanations to this honourable court as to how he was able to sustain himself in private accommodation".*

22. Mr. Dornan also submitted that the applicant was not put on notice that other aspects of his immigration history would be taken into account, specifically the fact that he remained illegally in the UK after his visa ran out, but that is not pleaded so the applicant cannot succeed on that point. Anyway, the applicant's immigration history is well within his own knowledge and no disadvantage to him has been shown in the Minister not having reminded him of it. The Minister is not obliged to give an applicant a draft decision or notice of specific points other than the ones that would not be within an applicant's reasonable contemplation, expectation or knowledge; and no such point has been demonstrated here.

Alleged erroneous reliance on precarious nature of the applicant's immigration status
23. Ground 1(iv) alleges that "*The Respondent erred in law in finding, in essence, that the* "precarious" *nature of the Applicant's immigration status in the State precludes permission to remain under a consideration of his Article 8 ECHR rights, rather than one of the factors to be considered".*

24. The actual sentence complained of in the decision is "*the applicant is an international protection applicant who has been given temporary legal permission and no expectation has been given that he can form a private life in Ireland and it is not open to him to seek to rely on Article 8 to circumvent the immigration rules which he would ordinarily be subject to."*

25. In a perfect world the Minister would perhaps have added "*save in exceptional circumstances which do not apply here*". But judicial review is not a mechanism for awarding marks out of a hundred to legal essays written by the Minister.

26. The sentence understood in context is not fatally erroneous, but even if it is erroneous, that is as a matter of wording rather than substance. The applicant hasn't shown that a more permissive approach to art. 8 rights would have benefitted him because he has not demonstrated the sort of exceptional circumstances to bring him within the category whereby a breach would arise given his precarious status. Indeed, counsel acknowledged, as he must, that his position under art. 8 is not necessarily the strongest.

27. The legal submissions make some complaint about an exceptionality test (see paras. 33 and 34) but as pointed out in Mr. Caffrey's written submissions at para. 28, this point is not pleaded so the applicant cannot succeed under this heading. In any event, it is a point of no substance because the legal position in relation to the private life of rights of unsettled migrants has been clarified on a number of occasions both by Strasbourg and by the appellate courts here.

Alleged failure to consider applicant's private life under s. 49(3) of the 2015 Act
28. Ground 1(v) alleges that "*The Respondent erred in stating that* '…it is not open to [the Applicant] to seek and rely on Article 8 to circumvent the immigration rules...' *The Applicant's right to private life must be considered under s. 49(3) of the International Protection Act 2015".*

29. An administrative decision is not a box-ticking exercise. The applicant's private life rights were considered. The decision also

specifically quotes s. 49(3), and again the point made by Hardiman J. in *G.K. v. Minister for Justice, Equality and Law Reform* applies here.

30. The assumption made in the ground is that the Minister collapsed the distinction between s. 49 of the 2015 Act and art. 8 of the ECHR as applied by the 2003 Act, but that is not so. The conclusion to the decision makes clear that both were considered (see p. 11 of the decision).

Alleged error of law
31. Ground 1(vi) alleges that "*The Respondent erred in fact and/or law in finding that* "…there has been no material change in the applicant's personal circumstances under the headings as set out above...".

32. That is not an error of fact or indeed law. Some sort of complaint was made that the applicant's art. 8 rights built up in the UK had not been considered but that is not pleaded, and in any event that claim is unfounded.

33. Mr. Dornan complained in oral submissions that the applicant's alleged child in the UK was not referred to in the s. 49 review but that appears to be very much a back-of-an-envelope submission because such a point was not pleaded. There has been no contact by the applicant with the child's mother for four years, no evidence of any contact with the child at any stage and no basis whatsoever to suggest that this point needed narrative discussion. Furthermore, the point is not legally relevant because the child is in the UK rather than Ireland. Even more fatally, if such were possible, the applicant's one-page handwritten s. 49(7) application doesn't make any reference to such alleged art. 8 rights, either in the UK or in Ireland.

34. Complaint is also made at para. 40 of the written submission that the respondent did not provide reasons for the *refoulement* decision, and in particular did not provide reasons why the US State Department Country Report on Human Rights Practices, Pakistan, 2017 was relevant. As noted by Mr. Caffrey at para. 39 of the written submissions, that point is not pleaded so the applicant cannot succeed under that heading. In any event, reasons for the Minister's views on *refoulement* are evident from the terms of the decision and its context.

Order
35. The case is an (unfortunately not unrepresentative) witches' brew of:

(i). points made in written or oral submissions that are not pleaded;

(ii). points advanced to the court that were never made to the decision-maker;

(iii). points advanced that have previously been rejected in circulated judgments; and

(iv). legalistic points which only arise tenuously if at all, on the facts and where the applicant has failed to put before the court highly material information and explanations.

36. It also features the sadly not unfamiliar spectre of questionable documents, in particular the alleged job offer from Four Star Pizza. Mr. Caffrey all but contended that this document is bogus, but that does not appear to have ever been formally investigated. Maybe it should be. In the meantime I do not hold it specifically against the applicant and simply note the question-mark that has been raised by the Minister over the document.

37. The order will be as follows:

(i). I note that the respondent is not pressing a time objection;

(ii). the proceedings are dismissed; and

(iii). the respondent is released from his undertaking not to deport the applicant.