THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 762 J.R.]

BETWEEN

D.S. (ZIMBABWE)

APPLICANT

AND

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

RESPONDENTS

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

1. The applicant is accepted to be a national of Zimbabwe and claims to have been born in 1976. On his account, he left Zimbabwe in 2008 for South Africa and remained there until 2015, returning from time to time to his home country. He claims that due to threatened persecution from the Zimbabwean government as an alleged known supporter of the opposition MDC he definitively left for South Africa following a protest on 6th July, 2016.

2. He says that an arrest warrant was issued against him on 14th July, 2016 and he then came to Ireland on 18th August, 2016 on a false South African passport. His original asylum application ASY 1 form states his nationality as South African. Thereafter in his questionnaire and subsequently he represented his nationality as Zimbabwean. The Refugee Applications Commissioner found that the applicant's nationality was the only element of the claim that was found to be credible, and the asylum claim was refused on credibility grounds. He then appealed to the Refugee Appeals Tribunal on 15th December, 2016. On 31st December, 2016 the International Protection Act 2015 came into operation and the applicant then submitted an application for subsidiary protection and leave to remain. That was refused and the applicant was so notified by letter dated 13th October, 2017.

3. On 2nd November, 2017 the applicant appealed the subsidiary protection refusal to the International Protection Appeals Tribunal. The IPAT then rejected the appeals on 13th February, 2018. On 16th February, 2018 the applicant's solicitors sought a review of the leave to remain refusal under s. 49(9) of the 2015 Act. The applicant was then notified by letter dated 21st August, 2018 that the review application had been rejected.

4. A deportation order was made on 3rd September, 2018 and the applicant was so notified by letter dated 7th September, 2018. The present proceedings were filed on 20th September, 2018, the primary relief sought being "*an order of* certiorari *by way of an application for judicial review quashing the decision of the first named respondent making a deportation order in respect of the applicant and notified to the applicant on or about 10th September, 2018".*

5. I granted leave on 24th September, 2018, and a statement of opposition was filed on behalf of the respondents on 14th December, 2018. I have received helpful submissions from Mr. Gerard Kiely S.C. (with Mr. Garry O'Halloran B.L.) for the applicant, and from Mr. Mark J. Dunne B.L. for the respondents. Mr. Kiely helpfully informs me that he is not proceeding with ground 1. Therefore, I will proceed to address the grounds that remain.

Ground 2 - reliance on IPAT decision

6. Ground 2 impugns the deportation order on the basis that "*the Minister's reliance when considering* refoulement*, on the IPAT's rejection of the credibility of the applicant's claim to be exposed to persecution on the basis of political opinion is irrational in circumstances where IPAT accepted that the applicant is an opponent of the present political regime in Zimbabwe, and that he was a well-wisher and supporter of MDC-T* 'from outside'".

7. First of all, this ground somewhat misunderstands the tribunal decision. The tribunal did not specifically find that the applicant is an MDC supporter but rather that his claim to be such a supporter was not surprising. The claim that he was a high profile supporter was expressly rejected. More fundamentally, where a protection decision is made that an applicant is not in need of international protection and such decision is either unchallenged or unsuccessfully challenged, the Minister is not acting unlawfully in placing reliance on such decision or taking it into account at the deportation stage, as I discussed in *A.W. v. Minister for Justice and Equality* [2016] IEHC 111 [2016] 2 JIC 1516 (Unreported, High Court, 15th February, 2016).

8. When considering the relevance of a previous failed protection claim to a claim of *refoulement* at the deportation stage, Hogan J. said in T.*K. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 99 (Unreported, High Court, 9th February, 2011) that*: "it is irrelevant that both the Commissioner and the Tribunal rejected the applicant's account on credibility grounds, since this was also true of the applicant in Meadows"* (para. 26). However, that is, respectfully, clearly an erroneous reading of *Meadows v. Minister for Justice and Equality* [2010] IESC 3 [2010] 2 I.R. 701 [2011] 2 I.L.R.M. 157. The decision impugned in the *Meadows* case was extremely stark. It was merely an assertion that "*the Minister has satisfied himself that the provisions of s. 5 (prohibition of* refoulement*) of the Refugee Act 1996 are complied with in your case*" (p. 714) and "refoulement *was found not to be an issue in this case"* (p. 715). *Meadows* was not a case where the Minister considered and adopted previous credibility findings. Rather it was one where it was baldly asserted that *refoulement* was not an issue. *Meadows* is certainly not authority for the proposition that the Minister is disentitled from considering and adopting findings by protection decision makers. That the Minister is so entitled appears from decisions in *Kouaype v. Minister for Justice, Equality and Law Reform* [2005] IEHC 380 [2011] 2 I.R. 1 *per* Clarke J., as he then was, and *F.N. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 107 [2009] 1 I.R. 88 at p. 116 *per* Charleton J. Overall, the credibility of the applicant's account emerges poorly from his evidence, with inconsistencies as to the number of his children, the basis of his claim, his account of a protest inconsistent with country information, the fact that he lived in South Africa without difficulty for many years and returned to Zimbabwe on a number of occasions, and his lack of knowledge of Zimbabwean elections despite claiming to be an MDC supporter. The tribunal member thought that it was not credible that the applicant returned to Zimbabwe during violence-plagued elections if he was a well-known supporter of the MDC and would thereby put himself at risk of harm, noting that he has presented *"a vague and unspecific narrative in relation to this aspect of his case."*

Ground 3 - alleged error in decision

9. Ground 3 pleads that *"the s. 49(9) report erroneously states that the applicant is a national of South Africa".* The alleged error is

on page one of ten in the review decision, which states "*Nationality: South Africa*". Mr. Kiely submits that this is an error which permeates the whole decision but that is not so. On the same page the review decision states that the applicant presented as South African but that the International Protection Office accepted he was Zimbabwean. As Mr. Dunne correctly puts it in written submissions at para. 15 "*it is notable that apart from this heading, nowhere in the decision is there any reference to South Africa. From start to finish the Minister considered the applicant's review application in the context of Zimbabwe*". Thus if one wishes to characterise this as an error it is distinct from the error in *I.E. v. Minister for Justice and Equality* [2016] IEHC 85 [2016] 2 JIC 1505 (Unreported, High Court, 15th February, 2016) which did affect the decision overall. However, it might not be entirely fair to the Minister to regard it as an error because in the context of the full narrative on p. 1 of the decision one can only read the heading as referable to the applicant's nationality as it was originally presented rather than as it is now to be considered. But even if it was an error, it is one caused by confusion which was entirely of the applicant's own making and therefore could not be a basis for an order of *certiorari* in favour of the applicant.

Ground 4 - alleged erroneous finding of no new information
10. Ground 4 alleges that "*in revisiting the* refoulement *issue in the s. 49(9) review, the finding that* 'although the leader of the MDC died after the applicant was issued with the decision from the IPAT, he has not submitted any new information or material change to his circumstances which would impact in (sic) his return to Zimbabwe' *is irrational".*

11. I think it might be a fair comment that the wording of this aspect of the decision at page seven of ten is suboptimal, but infelicity in wording does not automatically equate to grounds for *certiorari*. The decision does note the new information provided by the applicant and then says that the applicant "*has not submitted any new information or material change to his circumstances which would impact in (sic) his return to Zimbabwe. He has not provided any additional information on the situation of his family who remain there".* In context this can only mean that the new information provided by the applicant was not such as to materially change the previous assessment of the likelihood of *refoulement* or risk of *refoulement* on his return to Zimbabwe, in the opinion of the Minister. Such a conclusion was open to the Minister on this material.

Ground 5 - failure to consider evidence
12. Ground 5 alleges that the decision should be quashed because "*the failure by the Minister to consider the evidence tendered by the applicant and including the country of origin information submitted is in breach of s. 50(2) of the International Protection Act, 2015".* The applicant has not established that the Minister failed to consider the material submitted: see *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401.

Order
13. Accordingly, the application is dismissed.