[2019] IEHC 867

THE HIGH COURT

[2019 No. 372 JR]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED), AND IN THE MATTER OF THE INTERNATIONAL PROTECTION ACT 2015

BETWEEN

M

APPLICANT

– AND –

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL, AND IRELAND

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 19th December, 2019.

1. Mr M is a national of Albania. He is the brother/uncle of a man/boy who were murdered in Greece by a criminal gang which allegedly has an international reach to its operations. Mr M claims to believe that he too is at risk of being killed by the criminal gang and, as a result, has fled to Ireland. His initial application for international protection and his papers-only appeal to the International Protection Appeals Tribunal ("IPAT"), which was the subject of a decision of 7th March 2019 (the "Impugned Decision") have been unsuccessful. The Impugned Decision is assailed in the within application on two grounds, viz., per the statement of grounds:

> "*1. The Tribunal erred in law and acted in breach of natural and constitutional justice in making fresh findings without prior notice on a papers-only appeal*. [The court notes that Ground 1 does not object to the papers-only appeal per se but to the making of certain findings in the context of same].
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> *2. The Tribunal acted ultra vires in accepting, considering and determining the appeal of the decision of the…IPO…in circumstances where a lawful examination of the Applicant's application for international protection was not carried out by an authorised person of the IPO."*

2. When it comes to Ground 1, the central question is whether Mr M can reasonably be taken to have been on notice of the matters in respect of which the IPAT made adverse conclusions. The short answer to this question is 'Mr M can be so taken', the court respectfully adopting, in support of this conclusion, the lengthy 'compare and contrast' grid undertaken by counsel for the respondent in his written submissions which shows the overlap between the International Protection Office ("IPO") and IPAT decisions. Two points of that grid were the subject of particular comment at hearing, viz. [a] the reference to the IPAT finding that the whereabouts of the alleged aggressor was a central issue, and [b] the reliance placed by the IPAT (in the context of credibility) on Mr M's apparent lack of knowledge about the gang members whom he claims to fear. As to:

> [a] the issue of location was clearly 'in play' before the IPO and expressly considered (see p. 355 of the pleadings);

[b] this lack of knowledge was likewise 'in play' before the IPO, with the IPO expressly making comment in this regard (see pp. 356-7 of the pleadings). Indeed, the significance of the issue of credibility was expressly brought home by the IPAT to Mr M in a letter of 8th April 2019 which expressly states that "*the Tribunal has noted the generic nature of your grounds of appeal. Please feel free to engage with the specific credibility findings made by the IPO should you make any further submission to assist the Tribunal in determining this appeal*". Surprisingly, perhaps even astonishingly, no reply issued from or for Mr M to this letter. Mr M may regret this now, but that does not yield the conclusion that the IPAT is somehow at fault in proceeding as it did.

3. It will be clear from the foregoing that the court respectfully does not accept that the IPAT erred in law and/or acted in breach of natural and constitutional justice in making fresh findings without prior notice in the context of a papers-only appeal. The court is mindful in this regard:

. that, following on the judgments of, *inter alia*, Fennelly J. in *Ezeani & Allen v. Minister for Justice, Equality & Law Reform & Ors.* [2011] IESC 23, Cooke J. in *S.U.N. v. Refugee Applications Commissioner* [2013] 2 IR 555, Mac Eochaidh J. in *M.A. v. Refugee Appeals Tribunal* [2015] IEHC 528 and *C.N.K. v. Minister for Justice & Equality* [2016] IEHC 424, and Peart J. in B.W. v. Refugee Appeals Tribunal [2017] IECA 296, it is clear that it is only when a decision-maker, here the IPAT, contemplates making a finding based on an issue on which the applicant has not had an opportunity to comment, that an obligation presents to notify the applicant of the nature of its concern. That is not the factual matrix that presents here.

. of the "*extreme care"* which Clark J. suggests in *V.M. (Kenya) v. Refugee Appeals Tribunal & Ors.* [2013] IEHC 24, at para. 22, falls to be brought to bear when a court engaged in a judicial review application in considering what was a documents-only appeal, and respectfully considers Clark J.'s observations to be as well-founded in the context of the current legal scheme as they were when *V.M.* was decided. However, such "*extreme care*" does not offer a basis for finding error where there has been none (nor, the court should note, was this suggested), and here there has been no error.

. that although Charleton J. observes in *M.A.R.A. (Nigeria) (infant) v. Minister for Justice & Equality* [2015] 1 IR 561, at para. 16, that the Refugee Appeals Tribunal "*examine*[s] *afresh*" the initial, appealed Refugee Applications Commissioner decision (with the same applying in the IPAT/IPO context), that does not mean, nor does it fall properly to be read as meaning, that an appellate body cannot consider something entirely "*afresh*", come to the same conclusion as the previous decision-maker, and thus make no 'fresh' finding (in the ordinary use of the English language).

4. When it comes to Ground 2, in truth this was not given a lot of 'airtime' at the hearing of the within application, counsel for Mr M acknowledging that following the decision in *I.X.*

v. The International Protection Office [2019] IEHC 21, the law at this time is against him in this regard. That decision having been appealed to and heard by the Supreme Court, with judgment awaited, Ground 2 is in truth something of a 'placeholder' argument that may arise to be relied upon in some (if any) future appeal by Mr M of the within judgment, depending on how the awaited judgment of the Supreme Court goes.

5. For the reasons stated above, the various reliefs sought by Mr M are respectfully refused.

6. In passing, and by way of *obiter* comment only, the court admits to continuing unease that in Mr M's grounding affidavit, as is standard, Mr M has been required to swear to his religion, an arrangement which would appear, ostensibly, to trespass on his right to privacy. One would have thought that, as a nation, we have endured enough of religious wars, discrimination, persecution and killings, to have learned that it is best not to demand of anyone, including those who come seeking international protection, that they swear to any (if any) private religious beliefs held. It is not difficult to conceive of means whereby the significance of an affidavit can be brought home to deponents without the need for disclosure of the inherently private.