THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 509 J.R.]

BETWEEN

RAFIO ABDUL AZEEM AND KHAIR DIN AZEEM AND

KHADIJA AZEEM (AN INFANT SUING BY AND THROUGH HER MOTHER AND NEXT FRIEND RAFIA ABDUL AZEEM) AND

NARWAL AZEEM (AN INFANT SUING BY AND THROUGH HER MOTHER AND NEXT FRIEND RAFIA ABDUL AZEEM) AND

MUHAMMAS UMAR (AN INFANT SUING BY AND THROUGH HIS MOTHER AND NEXT FRIEND RAFIA ABDUL AZEEM)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

[2016 No. 480 J.R.]

V.D. (ZIMBABWE)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 26th day of February, 2018

1. In *Azeem v. Minister for Justice and Equality (No. 1)* [2017] IEHC 719 (Unreported, High Court, 10th November, 2017) I set aside a deportation order by reference to art. 8 of the ECHR (as applied by the European Convention on Human Rights Act 2003) having regard to a combination of certain matters, particularly:

(i). a confusion between arts. 3 and 8 of the ECHR in the decision;

(ii). a failure to correctly appreciate the ramifications of art. 8 that could include health issues that did not meet the art. 3 threshold;

(iii). the fact that a discussion included a purported summary of case law which did not seem to be totally accurate, which the State could not stand over, and in relation to the provenance of which the State could not account; and

(iv). the specific way in which the exceptionally severe medical difficulties in that case were dealt with.

2. In *V.D. v Minister for Justice and Equality (No. 1)* [2018] IEHC 56, I held that the medical difficulties in that case were not such as to require a proportionality analysis under art. 8(2), and therefore upheld the deportation order.

3. Both the State in *Azeem* and the applicant in *V.D.* now apply for leave to appeal. I have received helpful submissions from Mr. David Conlan Smyth S.C. (with Ms. Kilda Mooney B.L.) for the respondent and from Mr. Conor Power S.C. (with Mr. Ian Whelan B.L.) for the applicant in *Azeem*, and from Mr. Michael Conlon S.C. (with Mr. Ian Whelan B.L.) for the applicant and Ms. Denise Brett S.C. (with Mr. Tim O'Connor B.L.) for the respondent in *V.D.* I have considered the law in relation to leave to appeal as set out in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250, as well as *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646 [2016] 11 JIC 1404 para. 2, and *Y.Y. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 185[2017] 3 JIC 2405 at para. 72 .

4. It seems to me that the substantive law in relation to art. 8 is fairly clear, drawing from the various authorities cited in both of the substantive judgments and relied on by the parties in the present applications, which I can attempt to summarise as follows;

(i). For unsettled migrants, deportation will breach art. 8 only in very exceptional circumstances (see Stanley, *Immigration and Citizenship Law* (Dublin, 2017) p. 398).

(ii). This principle includes where the deportation impacts on physical health, even if there is no breach of art. 3, as well as impact on other aspects of private life and family life. That is clear from the judgment of Finlay Geoghegan J. in *C.I. v. Minister for Justice and Equality* [2015] IECA 192 [2015] 3 I.R. 385, at paras. 35 and 36.

(iii). The onus is on the applicant to demonstrate and establish exceptional circumstances. That needs to be established as a matter of probability and not merely on a *prima facie* basis. In the absence of such circumstances being established, there is no onus on the State to rebut any possibility of, or even a *prima facie* case of, any interference with art. 8, unless the applicant overcomes the high hurdle to show that the damage is so severe as to constitute a *prima facie* breach of art. 3. *Paposhvili v. Belgium* (Application no. 41838/10, European Court of Human Rights, 13 December 2016) does not apply unless that initial *prima facie* hurdle in relation to art. 3 is overcome.

(iv). Therefore, there is no onus on the State to investigate the disparity between Irish and foreign medical care save in such very exceptional circumstances.

(v). A mere disparity, or even significant disparity, in treatment between Irish and foreign healthcare systems is

insufficient unless the overall circumstances amount to the type of very exceptional circumstances at issue.

(vi). The fact that there may be a significant diminishment in medical care available to an applicant is not in itself such an exceptional circumstance, any more than a significant diminishment in educational provision, housing provision, or any other social and economic rights would be a ground to remain in Ireland, by analogy with the Court of Appeal decision in *K.R.A. and B.M.A (A Minor) v Minister for Justice and Equality* [2017] IECA 284 (Unreported, Court of Appeal, 27th October 2017).

(vii). The combination of the four matters referred to at the outset of this judgment in respect of *Azeem* constituted such exceptional circumstances. The disparity relied on by the applicant in *V.D.* did not.

5. In view of the substantive law in relation to this issue, as set out above, it seems to me that the questions raised by the respondent in *Azeem* do not seem to apply.

6. Turning to *V.D.*, the applicant's first proposed question of exceptional public importance warranting leave to appeal is in what circumstances art. 8(2) will be engaged in the case of an applicant availing of medical treatment. That question has already been answered. It will be engaged in very exceptional circumstances. I will come back to the need for (or even possibility of) a more precise definition.

7. The second question is what is the significance of a prior finding, such as that of the IPAT here, that there is a reasonable chance that the applicant would become homeless or not have access to appropriate medical care. Apart from the very fact-specific nature of that question which precludes its recognition as a point of law of exceptional public importance, it follows from the approach taken by me in *Y.Y. v. Minister for Justice and Equality (No. 1)* [2017] IEHC 176 (Unreported, High Court, 13th March, 2017) and consistent with that taken by the Supreme Court in their judgment in *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 (Unreported, Supreme Court. 27th July, 2017) (O'Donnell J.) that the finding of a protection body in the course of rejecting a protection claim is not binding when one gets to the deportation stage. But in any event, the issue of homelessness or lack of medical care is by definition only relevant in very exceptional circumstances.

8. The final question is what level of reasoning is required for the Minister to reject humanitarian considerations. It seems to me that has already been dealt with in *Kouaype v. Minister for Justice, Equality and Law Reform* [2005] IEHC 380 [2011] 2 I.R. 1 to the effect that the exercise of the Minister's discretion under s. 3 of the Immigration Act 1999 is not reviewable by the courts unless there is evidence that he did not afford the person an opportunity to make representations, or did not consider the representations or the factors set out in s. 3(6) of that Act (see also *KRA*).

9. All that is left then in the case is how to define exceptional circumstances. By definition, exceptional circumstances are the sort of thing that eludes precise abstract definition. Even if that were possible, it does not seem to me to be necessary to engage in some sort of abstract, academic debate to establish that principle in some theoretical sense as long as it is clear on a case by case basis on which side of the line a particular case falls. Indeed, as the respondent's submissions in *V.D.* in effect point out, a case by case elaboration provides all the clarification that is required - and that has occurred here by virtue of the clarification of *Azeem* by *V.D.* That is the common law method. *Azeem* is not set out in stone any more than any other case is, and further cases can contribute to highlighting in the contours of the rights involved, and what constitutes exceptional circumstances, more effectively than some sort of abstract declaration. Recourse to the appellate courts for a more precise and essentially theoretical definition (even if such was possible) is not essential in that regard.

10. All Mr. Conlon can really say is that his case exhibited the necessary very exceptional circumstances having regard to his medical reports. That essentially amounts to an allegation that I failed to apply the test correctly. The correctness or otherwise of the routine application to particular facts of established case law is not a basis for leave to appeal.

Order

11. The order therefore will be that both applications for leave to appeal will be refused.