THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 743 J.R.]

BETWEEN

E.T. (ETHIOPIA)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 1st day of March, 2019

1. The applicant is a citizen of Ethiopia, born in 1992. As result of a claim of torture, which was accepted, he was granted international protection in Italy on 28th October, 2014. He received medical treatment in Italy and avers that he believes that that treatment saved his life. Apart from that minor detail however, he contends that his overall experience in Italy was negative. He came to Ireland on 8th July, 2016 on a flight from Munich. At passport control he produced what is known as a 1951 travel document, apparently issued to recognised refugees, that was given to him by the Italian authorities. That document allows visa-free travel, but staying in excess of 90 days requires the permission of the Minister for Justice and Equality under the Immigration Act 2004. The applicant stated that he was only coming to Ireland to visit an alleged uncle. The purported uncle was then contacted by telephone and a person claiming to be such an uncle confirmed that the applicant was visiting him. The applicant stated to the Border Management Unit of the Department that he was intending to return to Milan on 21st July, 2016 *via* Frankfurt, although he did not do so. In a later interview for the purposes of the Dublin III regulation, he admitted that he had no family members in Ireland, thus impliedly acknowledging that the whole arrangement with an alleged uncle was a sham.

2. He was granted permission at the border until 21st July, 2016, but as noted above did not board the flight home. Since then, mysteriously and coincidentally, he parted company with his travel documents. These details were not mentioned in the applicant's grounding affidavit and nor indeed did the applicant reply to or dispute the State's affidavits in that regard. The applicant then sought asylum in Ireland on 2nd August, 2016. The following day his fingerprints were found to match those of an asylum applicant in Italy.

3. On 9th August, 2016 he requested a temporary residence card. He was interviewed on 17th August, 2016 when it was put to him that he had been fingerprinted in Italy in the context of an asylum application there, at which point he admitted his previous successful application. On 25th August, 2016, his solicitors at the time, the Legal Aid Board, wrote to the Refugee Applications Commissioner acknowledging that the applicant had previously been granted asylum in Italy and was therefore not pursuing an application for asylum in Ireland, but instead "*we intend to lodge an application for humanitarian leave to remain".*

4. On 28th September, 2016, the Italian authorities confirmed to the authorities here that the applicant, under the alias of a Mr. E.T.O., was granted international protection in Italy and had been given a residence permit, expiring on 11th December, 2019. On 20th October, 2016, the applicant was advised that he should attend the commissioner's office to complete a withdrawal form, which was subsequently done. The Minister then formally refused international protection on 19th April, 2017. Misunderstanding or ignoring these developments, the Legal Aid Board wrote on 4th May, 2017, stating that the applicant wished to withdraw his application for international protection. On 4th May, 2018, the Department replied to say that the application had already been withdrawn and also proposed to make a deportation order. It is unclear why there was a delay of over one year from refusal of protection to the proposal to deport.

5. On 23rd May, 2018, the applicant's representations seeking leave to remain under s. 3 of the Immigration Act 1999 were submitted. That is an important document in the context of the present proceedings. The representations themselves purport to set out "*reasons why the applicant should be granted humanitarian leave to remain in this jurisdiction*". No expressed reliance whatsoever is placed on art. 3 of the ECHR, as applied by the European Convention on Human Rights Act 2003.

6. An account of the applicant's circumstances in Italy was set out on the basis that "*after receiving his declaration in Italy the applicant lived in difficult circumstances. He could not find work or accommodation. He lived in a bus station and begged for money. He tried to establish himself but was unsuccessful*". Reliance was placed on Italian authorities having threatened to close the borders to refugee ships, although that has no particular relevance to this applicant. There was also reference to a new coalition government, including a "*far right anti-immigration party"* and reference was made to an Amnesty report on Italy 2017/18 to the effect that hundreds of people were evicted from a building in the centre of Rome (again, something of limited relevance to this applicant), that inadequate alternative housing was provided and that some families were eventually rehoused temporarily outside Rome. It was further suggested that fear has grown amongst declared refugees that permissions will not be renewed and a claim is made of "*sub-human living conditions as well as an anti-immigrant attitude. Further, the applicant was not given access to much needed mental health services which he is now receiving in Ireland".* Further representations were then submitted on 28th May, 2018, 12th and 26th June, 2018 and 19th July, 2018.

7. An examination of file was carried out on 17th July, 2018, which acknowledges and refers to the applicant's submissions regarding the lack of proper treatment in Italy, although most of those submissions are not expressly considered under the heading of art. 3 which is mentioned in the context of health conditions at p. 3 of 9 of the submission. By letter dated 2nd August, 2018, the applicant was notified of the making of a deportation order dated 20th July, 2018.

8. The present proceedings seeking *certiorari* of the deportation order were issued on 13th September, 2018 and I granted leave on 24th September, 2018.

9. The applicant was an evader for a period in that he failed to attend at the GNIB on 5th September, 2018. He seems to have engaged in a DIY presentation on a date chosen by him of 20th September, 2018, which obviously does not constitute compliance with his legal obligations. When the matter came before me in October, 2018, I indicated I would consider striking out the proceedings if the applicant did not present in accordance with the Immigration Act 1999 and subsequent to that he did attend on a date which had been the subject of a notice under s. 3 of the 1999 Act, namely 16th October, 2018.

10. A statement of opposition was delivered on 13th December, 2018. I have received helpful submissions from Mr. Garry O'Halloran B.L. for the applicant and Mr. Alexander Caffrey B.L. for the respondents.

Amendment application
11. At the opening of the hearing, Mr. O'Halloran sought an amendment to the statement of grounds which essentially deleted all of the pre-existing grounds and substituted the sole ground that "*the deportation decision of the Minister is vitiated because of the failure to apply the law to the facts when considering the possible interference with Art. 3 of the ECHR, resulting in a failure to consider whether the facts amounted to evidence of experiencing treatment in Italy of a kind falling within the prohibition of Art. 3".*

12. The test for allowing an amendment, as set out by the Court of Appeal in *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296 [2018] 2 I.L.R.M. 56, requires a showing of explanation, arguability and lack of irremediable prejudice. As far as explanation is concerned, reliance is placed on oversight on behalf of the applicant by his legal advisers. Mr. O'Halloran says that the point now sought to be made emerged and became clear to him "*only on a further reading of the papers the night before the hearing*". Anyone who has had to argue a case before a court will identify with that feeling immediately. The heading of the requirement of explanation has been made out. As far as arguability is concerned, if one puts aside for a moment the pleading difficulty that the ECHR is not directly justiciable but only by virtue of the European Convention on Human Rights Act 2003, then even by reference to substantial grounds, the proposed amendment meets that hurdle. That does not of course mean that it is bound to succeed but simply that, as of the point in time at which I considered the amendment, it appeared that sufficient grounds had been made out.

13. Mr. Caffrey's main argument in opposing the amendment was that the matter was not a real or meritorious ground and that the applicant had engaged in an abuse of the system, but those points go more to the merits rather than necessarily being a conclusive reason not to allow an amendment. No particular point was made under the heading of irremediable prejudice, so for all of those reasons I allowed the amendment on the basis that the statement of opposition already delivered would be taken to constitute an adequate traverse of the new point now being made.

Time
14. The deportation order was notified to the applicant on or about 7th August, 2018. The 28 day time limit under s. 5 of the Illegal Immigrants (Trafficking) Act 2000 applies. Proceedings were filed on 13th September, 2018, and the date of filing is the operative one (see *McCreesh v. An Bord Pleanála* [2016] IEHC 394 [2016] 1 I.R. 535). The relatively modest delay is explained in para. 8 of the applicant's grounding affidavit. Given that most of that period was during the month of August I would accept that explanation. The case also highlights the point that the question of whether proceedings were issued in time or not relates to the date the original proceedings were instituted. A subsequent amendment is to be considered under the heading of explanation rather than under the test for an extension of time. As follows from *B.W. v. Refugee Appeals Tribunal* and as discussed in more detail in *Habte v. Minister for Justice and Equality (No. 1)* [2019] IEHC 47 (Unreported, High Court, 4th February, 2019), allowing an amendment does not require compliance with the strict requirements for extension of time. As I noted in *Habte* the whole erroneous line of thought which conflates delay in initiation of proceedings with delay in amendment was anticipated by Keane J., as he then was, in *Krops v. Irish Forestry Board* [1995] 2 I.R. 113, in which he concluded that: "*the pleadings which initiate an action in this court carry with them from the time they are issued or delivered the potentiality of being amended by the court in the exercise of its general jurisdiction to allow a party to amend his indorsement or pleadings 'in such manner and on such terms as may be just'".*

Discretion
15. As art. 3 is an absolute prohibition I would not propose to decide the case on the basis of discretion if the applicant had a point under the heading of art. 3 that would otherwise entitle him to relief. While discretion is generally relevant in the asylum and immigration context, especially regarding objections of a legalistic character (see *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 603 *per* MacMenamin J. and *Youssef v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 *per* Lord Carnwath at para. 61), it is of less relevance if there is a substantive point under art. 3 of the ECHR, and in fairness Mr. Caffrey did not strongly dispute that principle. While nonetheless pressing the discretion point, his main point under this heading was that there was no real art. 3 point in the case. If there was or had been such a point, it followed that the respondents might not have put such emphasis on the discretionary heading. Having said all of that, the discretionary factors that but for the art. 3 context could have been determinative might still be relevant to any consequential applications, in particular:

(i). the fact that the applicant abused the immigration system of the State by lying to immigration officials at Dublin Airport on arrival;

(ii). the applicant arranged for a person posing as an alleged uncle to be telephoned, but in his Dublin III interview admitted that he had no family members in Ireland;

(iii). the coincidental and unexplained loss of his travel documents;

(iv). the fact that he sought asylum in the State knowing that he had already been granted refugee status in Italy;

(v). the fact that he only withdrew the asylum claim after his fraud had been detected; and

(vi). the fact that he evaded his reporting obligations for a period.

The applicant's failure to make any case to the Minister of treatment contrary to art. 3 of the ECHR in Italy
16. Reliance was placed by Mr. O'Halloran on *Budina v. Russia* (Application no. 45603/05, European Court of Human Rights, 18th June, 2009), an admissibility decision in relation to art. 3, as authority for the proposition that failure to afford basic necessities for normal human life and participation in the normal human community could amount to treatment contrary to art. 3. The court held that "*official indifference when in a situation of serious deprivation or want incompatible with human dignity*" could not be excluded as coming within art. 3, citing *O'Rourke v. United Kingdom* (Application no. 39022/97, European Court of Human Rights, 26th June, 2001).

17. The main problem for the applicant is that he did not make any submission based on art. 3 of the ECHR. The submissions actually made were considered. It would be unrealistic and inappropriate to quash a decision for a failure to consider a point that the applicant did not actually make. The point made by Clarke C.J. in *D.E. v. Minister for Justice and Equality* [2018] IESC 16 [2018] 2 I.L.R.M. 324 at para. 10.3 applies here, where he held that "*the evidence and materials which were presented to the Minister were not, for understandable reasons …sufficiently directed to the questions which the ECtHR has indicated must be assessed. On that basis I am not satisfied that there are arguable grounds for suggesting that D.E. complied with the initial obligation which rests on an applicant to put forward evidence of a real risk that Article 3 rights will be interfered with if deported or returned. On that basis I have*

consequently concluded that substantial grounds have not been made out for a judicial review challenge to the decision of the Minister". As the applicant did not make an art. 3 point to the Minister he cannot expect the court to quash the Minister's decision on that ground.

The Minister dealt with the applicant's art. 3 points in substance under the heading of s. 50 of the International Protection Act 2015.

18. One can look at this another way. The Minister considered in substance the case actually made. There is extensive discussion of the situation initially under the heading of non-*refoulement* and s. 50 of the International Protection Act 2015. Section 50(1)(b) provides that: *"A person shall not be expelled or returned in any manner whatsoever to the frontier of a territory where, in the opinion of the Minister … there is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."* Article 3 of the ECHR provides that: *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."* Therefore s. 50 overlaps with, and encompasses, the substance of art. 3 of the ECHR; and consideration of s. 50 amounts in substance to consideration of art. 3.

19. Mr. O'Halloran valiantly but unsuccessfully struggled to identify any concrete matter that would have arisen under art. 3 that did not also arise under s. 50. The clear wording of those provisions dooms such a quixotic attempt from the outset. While the Minister does not deal with the applicant's points under the heading of art. 3, neither did the applicant. The Minister can hardly be condemned for being less favourable to the applicant than the applicant himself was. Whether one characterises it as the Minister dealing in substance with the applicant's points or the applicant's failure to identify his own case as one under art. 3, the result is the same. The applicant cannot succeed on the case now made.

Factual basis of the applicant's circumstances falls well short of the high hurdle of art. 3

20. If I am wrong about all of the foregoing, and even if the applicant was entitled to make the point, and if the Minister did not adequately consider it under the heading of s. 50, the case actually made is one of hardship in Italy that hasn't been shown to surmount the high *prima facie* hurdle under art. 3, much as the applicant in D*.E. v. Minister for Justice and Equality* similarly failed. A great deal of the applicant's submission does not reach even the allegation of official indifference to the applicant's plight, and as noted above the applicant's representations themselves set out *"reasons why the applicant should be granted humanitarian leave to remain".* Here the applicant is well short of showing a *prima facie* issue under art. 3, which is "*the first obligation*" under that article, as referred to by Clarke C.J. in *D.E. v. Minister for Justice and Equality* at para. 8.10 (see also *Saadi v. Italy* (Application No. 37201/06, European Court of Human Rights, 28th February, 2008) at para. 129, *Azeem v. Minister for Justice and Equality* [2017] IEHC 719 (Unreported, High Court, 10th November, 2017)).

Order

21. To summarise, while I am rejecting the respondents' procedural objections regarding the amendment, the extension of time and discretion, I am upholding the respondents' submissions that the applicant cannot succeed because he did not make an art. 3 case to the Minister, because the Minister dealt in substance with any art. 3 points and because in any event the case made does not surmount the *prima facie* threshold to engage the necessity for doubts to be dispelled by the State under art. 3.

22. The Order therefore will be:

(i). that time be extended for the making of the application up to the date on which it was made; and

(ii). that the application be dismissed.