THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 480 J.R.]

BETWEEN

V.D. (ZIMBABWE)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 30th day of January, 2018

1. The applicant is a national of Zimbabwe, born in 1985. He moved to South Africa and worked illegally there. He was assaulted and developed an illness and brain injury resulting in epilepsy and symptoms of memory loss, poor judgment and seizures. He contends that he requires ongoing care, medication and rehabilitation.

2. On 3rd November, 2013, he entered the State unlawfully. He applied for asylum, a claim which was rejected by the Refugee Applications Commissioner. An appeal to the Refugee Appeals Tribunal was also rejected. He did not make an application for subsidiary protection. He has family members in Ireland, his mother and three children. One of those family members is a citizen and the others have permission to be here. He also has a brother in Zimbabwe, although he avers that he has no one to look after him there. Needless to say, he does not explain on affidavit as to why his brother cannot assist him in Zimbabwe.

3. Particular reliance is placed on a report from his G.P. dated 24th June, 2014, which stated that "*there is no doubt that his life expectancy would be dramatically reduced by having to return to the vagaries of a crumbling third world healthcare system. The lack of family to care for him and the absence of a home for him in Zimbabwe would pose a significant risk to his safety and wellbeing*". These are highly generalised statements from a non-specialist. There is no basis to assume that the applicant's G.P. has any objective knowledge of the situation in Zimbabwe. Also, the reference to having no one to care for him appears to involve simply a regurgitation of the applicant's case. Merely finding a qualified person to state one's subjective position does not make it any weightier. It seems to me that the respondent is correct to contend in para. 4 of the written submissions that these reports "*are not grounded in objective knowledge of the position on the ground in Zimbabwe*". The applicant speculates that he would be homeless in Zimbabwe. That is accepted by the tribunal, but nonetheless that position still remains somewhat prospective and speculative.

4. A deportation order was made on 8th May, 2016, and a statement of grounds was filed, dated 30th June, 2016. An order was made by MacEochaidh J. giving leave on 18th July, 2016, and an injunction restraining deportation was granted. Due to some form of procedural or related confusion, it took until 15th December, 2017 to deliver a statement of opposition.

5. I received helpful submissions from Mr. Michael Conlon S.C. (with Mr. Ian Whelan B.L.) for the applicant, and from Ms. Denise Brett S.C. (with Mr. Tim O'Connor B.L.) for the respondent.

Relief sought

6. The substantive relief sought is an order of *certiorari* against the deportation order. An extension of time is also sought, but no contest appears to be made of that in the submissions on behalf of the respondent.

No art. 3 issue is pleaded

7. No issue under art. 3 of the ECHR (as implemented by the European Convention on Human Rights Act 2003) is pleaded. On his feet opening the case, Mr. Conlon suggested adding "*and/or Article 3*" to the pleadings. No draft amended statement of grounds was furnished and no particular place for such an insertion was suggested; and it was clear that such an amendment at a late stage would have required an amended statement of opposition and amended submissions. The issue was not strongly pressed by Mr. Conlon, who rather fell back on an attempt to submit that ground 4 of the statement of grounds covered art. 3 of the ECHR. It seems to me such a major point would need to be pleaded specifically, having regard to O. 84 r. 20(3) and practice direction HC69 on asylum and immigration as in force at the time. Ground 4 must be read in the context of the rest of the claim, which relates to art. 8.

8. In any event, on the facts the threshold required to thrust the onus on the State to dispel doubts under art. 3 of the ECHR is not overcome, given the entirely nebulous and subjective nature of the information provided by the applicant. This would not be an appropriate case to grant the amendment in any event, even if it was properly before the court.

Assessment of the humanitarian factors is entirely a matter for the Minister

9. Insofar as the decision assessed the humanitarian factors, as distinct from art. 8, this is a matter for the Minister. The conclusion is perhaps somewhat blunt that "*having considered the humanitarian information on file in this case there is nothing to suggest that [V.D.] should not be returned to Zimbabwe".* However, we are dealing here with the sharp edge of executive discretion. The Minister's decision essentially amounts to saying that such humanitarian factors as were advanced were insufficient to outweigh the public interest in deportation. It clearly requires sufficient counter-considerations to persuade the Minister that such a public interest in deporting an illegal immigrant is outweighed. The Minister is not required to give any particular level of detail in finding an applicant's submissions to be insufficient. The reason for the deportation decision is thus essentially that the submissions were insufficient to preclude deportation, and it seems to me that is a lawful reason. As it was put by Clarke J. in *Kouaype v. Minister for Justice, Equality and Law Reform* [2011] 2 I.R. 1 [2005] IEHC 380, the weighing of s. 3 factors is "*entirely a matter for the Minister"* (see also *K.R.A. and B.M.A. v. Minister for Justice and Equality* [2017] IECA 284 (Unreported, Court of Appeal, 27th October, 2017) *per* Ryan P.

The applicant is an unsettled migrant

10. An important factor here is that the applicant is an unsettled migrant for ECHR purposes, and indeed that is accepted on his behalf. It is clear that the extent to which an unsettled applicant can seek to quash an immigration decision based on art. 8 of the ECHR is significantly more constrained than in the case of a settled migrant. While in *Azeem v. Minister for Justice and Equality* [2017] IEHC 719 (Unreported, High Court, 10th November, 2017) the applicants were also unsettled, a point noted by the State at para. 12 of their written submissions in that case, no developed argument was made as to the consequences of such a situation, and no

specific case law was expressly relied on by the respondent in the written submissions under this heading. By contrast here, considerable case law is relied on in the respondent's submissions, particularly the judgment of Finlay Geoghegan J. for the Court of Appeal in *C.I. v. Minister for Justice and Equality* [2015] IECA 192 [2015] 3 I.R. 385 and of Charleton J. for the Supreme Court in *P.O. v. Minister for Justice Equality and Law Reform* [2015] IESC 64 [2015] 3 I.R. 164 at para. 85, citing *Sarumi v. the United Kingdom* (Application no. 43279/98, European Court of Human Rights, 26 January 1999) and *Sheabashov v. Latvia* (Application no. 50065/99, European Court of Human Rights, 22 May 1999). Reliance is also placed upon *Nunez v. Norway* (European Court of Human Rights, 28 June 2011), *Antwi v. Norway* (Application no. 26940/10, European Court of Human Rights, 14 February 2012) *Üner v. the Netherlands* (Application no. 46410/00, European Court of Human Rights, 18 October 2006), *Maslov v. Austria* (Application no. 1638/03, European Court of Human Rights, 22 March 2007*), Butt v. Norway* (Application no. 27017/09, European Court of Human Rights, 4 December 2012), and *Omoregie v. Norway* (Application no. 2645/07, European Court of Human Rights, 31 July 2008).

11. In that context, my judgment in *Azeem*, which did not expressly deal with the issue of settled *versus* unsettled migrants because no developed argument was made, can be best understood as being confined to its peculiar facts as an exceptional case where the extremely severe nature of the medical condition rendered a proportionality exercise appropriate. It is also relevant that in that case there were a number of very fact-specific elements, in particular (a) there was confusion in the Minister's analysis between arts. 3 and 8, a factor which does not arise here where the Minister clearly distinguished between those two headings; (b) the related point that the discussion included a purported summary of the caselaw which did not appear to be terribly accurate, over which the State was unable effectively to stand, and as to the provenance of which the State was unable to account; and (c) a related failure to acknowledge that significant adverse impact on physical health arising from a significant disparity in the medical systems between Ireland and the receiving country could engage art. 8, even if that disparity was not at a level such as to engage art. 3. That is not a finding that such a significant disparity always engages art. 8, only that it "*could*" do so. In that context it is important to note that it is clear from the reference to physical integrity in paras. 35 and 36 of *C.I. v. Minister for Justice and Equality*, that the limitation on the use of art. 8 by unsettled migrants applies to health factors just as it applies to family life. Thus, even where there is a significant disparity in health care systems between Ireland and abroad, that does not engage art. 8 in the context of unsettled migrants in general but only in exceptional circumstances. *Azeem* is thus best understood as being such an exceptional circumstance. That cannot necessarily be generalised to the present case or any other art. 8 case.

Alleged failure to deal properly with the family rights of the applicant under art. 8

12. A pattern one sees from time to time (particularly but not exclusively in the asylum list) is that interesting legal points are dangled for the court's consideration, but in a manner that overlooks the minor difficulty that they are balanced on either somewhat slender evidence, none of relevance, or even none at all. While I appreciate that it may be overwhelming at times, the temptation to bite at the interesting point in such circumstances must be resisted if the legal system is to have any coherence. Here, only vague assertions were offered by the applicant in terms of the level of dependency he has on his mother. The letter submitted from his mother states that the applicant "*requires constant care and attention. His quality of life would be vastly improved by being in my care*". That assertion seems to me to be nebulous in the extreme. What specific care is required is not specified. The allegation that he needs "*constant*" care has all the appearance of a significant exaggeration, as it is not borne out in G.P.'s reports, themselves documents that appear to lean in every way possible to be favourable to the applicant. The Minister held in those circumstances that "*little or no detail has been provided as to what care is actually required by [V.D.]. No information has been submitted to detail the level of dependency between him and his mother and siblings*". In that regard, it seems to me that the principle that relationships between adults do not engage art. 8 absent more than normal ties (see e.g. *B.I.S. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 398 (Unreported, Dunne J., 30th November, 2007)) was open to the Minister to apply; but even if I am wrong about that, the Minister went on to say that family life is established at a time when the applicant's presence in the State is precarious, and thus it was not accepted that any potential interference would have consequences of such gravity as to engage art. 8. It seems to me that was an entirely lawful approach. I have noted the deportation decision against an unsettled migrant will only require proportionality analysis and justification in exceptional circumstances. As is put in John Stanley's excellent recent text book *Immigration and Citizenship Law* (Dublin, 2017) at p. 398, in relation to circumstances alleged to engage art. 8 "*such circumstances would have to be* "wholly exceptional*" to compel a proportionality analysis*". Given the very loose wording of the submission and the absence of detailed description as to how the applicant's condition affects his day to day life and what specific care he actually requires, together with the dramatic nature of the assertions by his G.P. without any clear objective basis, the applicant has not come within the wholly exceptional circumstances here to enable me to condemn as unlawful the Minister's view that a proportionality analysis under art. 8 is not necessary.

Alleged failure to properly consider the private life rights of the applicant under art. 8

13. Considering the matter from the point of view of the health needs and private life of the applicant, the Minister notes the presence of epilepsy supports in Zimbabwe and the availability of healthcare specifically for that condition. I note here that the conclusions under art. 3 of the ECHR, s. 5 of the Refugee Act 1996 and s. 4 of the Criminal Justice (United Nations Convention Against Torture) Act 2000 are not challenged. The Minister's conclusions crucially note that "*no details have been provided as to the effective cognitive impairment and memory loss on the applicant*" and "*no details have been provided as to the extent of care required"* by the applicant. No expert report was furnished despite the applicant being referred to neurology. Any risk to the applicant's health was speculative based on the level of information provided, and it was not accepted that he had no family members in Zimbabwe, seeing as he has a brother there. It seems to me that whether the claim is formulated under art. 8, or alternatively art. 3 of the ECHR, I would hold the Minister's conclusions well within the scope of what is lawfully open to him.

Alleged failure to correctly consider the treatment available on return

14. Mr. Conlon attempts proposing a requirement on the State to make detailed enquiry into the conditions in the country of origin. In this regard, he endeavours to rely on *Paposhvili v. Belgium* (Application no. 41738/10, European Court of Human Rights, 13 December 2016). However, a number of difficulties arise there. Firstly, as noted art. 3 is not pleaded. Secondly, and perhaps more importantly, he has not got over the threshold (set out clearly and repetitively in Strasbourg caselaw going back to *Saadi v. Italy* (Application no. 37201/06, European Court of Human Rights 28 February 2008)) of showing a *prima facie* case of breach of that provision which would thrust a burden on the State to dispel doubts in that regard. It seems to me that the applicant has not established that the Minister's conclusions are unlawful. Yet again, this case raises the point that applicants are not entitled to remain in the State to avail of better healthcare here than in their own countries save in truly exceptional circumstances.

Order

15. I do have a certain sympathy for the applicant given that his mother and three siblings are here. However, as I said in *Gayle v. Governor of the Dóchas Centre (No. 2)* [2017] IEHC 753 (Unreported, High Court, 7th December, 2017) (para. 18), the way to achieve family reunification is to apply for it from outside the State, not to engage in a DIY immigration process of one's own initiative without the permission of the Minister. The order therefore will be that the proceedings will be dismissed.