[2020] IEHC 364

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 271 JR]

BETWEEN

M.H. (PAKISTAN)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 31st day of July, 2020

1. Lady Hale in *R. (Cart) v. Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663, at para. 47, said that *"[i]t is not difficult to dress up an argument as a point of law when in truth it is no more than an attack upon … factual conclusions".* Just how easy that is is demonstrated by the present application.

2. The applicant is a Pakistani national who entered the UK on a passport with a false date of birth. He violated the terms of his UK visitor's visa by overstaying, worked in the UK illegally and was then arrested for possession of a false passport. He absconded from his accommodation centre and evaded UK reporting requirements. He then entered the State without permission and claimed asylum for the first time eight years after leaving his home country, going on to tell outright falsehoods to the Irish protection authorities in the course of an evasive interview. He never provided any direct evidence of the core element of his claim. His protection claim was rejected at all stages and the rejection is unchallenged. After the present judicial review proceedings were instituted, he failed to present to GNIB as required. He now challenges the deportation order and the associated decision-making process. The challenge re-heats points rejected many times before and is largely constituted by a disagreement with the factual conclusions of the decision-maker camouflaged in legalese.

Facts

3. The applicant claims a fear of persecution arising from the alleged murder of his uncle and cousins in Pakistan in 2005. Later that year he moved to Rawalpindi and worked in a hotel. He claims that in 2007 he was located and accosted by individuals involved in the alleged murders.

4. He then came to the UK on a visitor's visa on the basis of a passport in his own name, but with an incorrect date of birth. The applicant's brother also resides in the UK. The applicant overstayed his visitor's visa, but never applied for international protection in that jurisdiction.

5. He worked illegally and was arrested in possession of a false British passport on 15th May, 2015 by Thames Valley and Surrey arrest team. He was then allowed to stay in the UK for the purposes of applying for asylum (which he did not pursue) and was informed of a requirement to report to the Eaton House Reporting Centre. He failed to report or to seek asylum, but instead absconded and came to the State, arriving on 26th May, 2015.

6. At the time of his interview under s. 8 of the Refugee Act 1996 on 9th June, 2015 he was resident in Balseskin Refugee Centre in Finglas. He was interviewed under s. 11 of the 1996 Act in November, 2015 and at that stage had an address in Clonmel, Co. Tipperary.

7. On 31st March, 2016 his application for refugee status was refused. His narrative was considered to lack credibility. He appealed on 5th April, 2016 and following the commencement of the International Protection Act 2015 he applied for protection on 25th April, 2017. When interviewed under s. 35 of the 2015 Act on 6th December, 2017, he was asked "*Where did you work?"* in response to which he said *"I did not work. My brother satisfied all my financial needs"* (Question 17.11). When the fact that the UK authorities told the Irish authorities that he was working illegally when arrested was put to him, his response to the next question was immediately contradictory: "*It was my first week"* (Question 17.12). He admitted (Question 17.17) to using false identification papers saying that "*An agent provided a fake Romanian ID card and I got arrested. I did not know it was a British passport as I am illiterate*." When he was asked, *"Is the fact you were arrested by the UK police the real reason why you left the UK and travelled to Ireland?"*, he replied "*I could not apply for asylum there"* (Question 17.19). When asked why not he said *"Because I was scared I would be sent back to my country"* (Question 17.20).

8. He was asked why he was unable to provide any evidence of the death of his uncle and cousins, such as death certificates. At Question 15.16 he was asked, *"Do you have any proof of your uncle and cousins' deaths?"* The answer was "*I made a very strong effort to obtain the information but unfortunately my dad has now died and my younger brother is also facing the fears*." The next question was "*I find it difficult to understand that you cannot provide proof of the deaths of your uncle and his sons. You still have family living in your home area. Can you explain why you are not able to supply such proof?"* The answer was, "*I do not want to put anyone in trouble. My dad passed away yesterday and I did not cancel the interview. I can speak to my brother to make an effort to get proof*" (Question 20.22).

9. He was given 14 days to produce any evidence, which as noted above he failed to do. He was informed that his protection claim had been refused on 6th April, 2018 and he appealed to the tribunal on 26th April, 2018. The tribunal dismissed that appeal on 4th October, 2018.

10. The applicant's solicitors then sought review of the refusal of permission to remain by letter dated 31st October, 2018. That letter contains the surprising suggestion that *"It is submitted that for periods in excess of 6 months duration in the State should be regarded as evidence that would lead to the granting of Leave to Remain in the State"*. It then went on to plead for further time to produce evidence of the alleged deaths of his alleged uncle and alleged cousins, which up to that point he had failed to provide.

11. The Minister made a decision on the review application of 14th December, 2018, rejecting it. The applicant had by that point continued to fail to provide any evidence or supporting

documentation in respect of the alleged deaths of the alleged relatives. A deportation order was then made on 1st March, 2019.

12. The original statement of grounds was filed on 9th May, 2019. The applicant was granted leave to apply for judicial review on 27th May, 2019. The reliefs were later amended, and as amended the primary reliefs are *certiorari* of the permission to remain review decision of 5th February, 2019, *certiorari* of what is described as a s. 50 decision of 5th February, 2019, and *certiorari* of a deportation order of 1st March, 2019.

13. In July, 2019 the court was informed that the applicant had not presented to GNIB. He was given until 12th August, 2019 to present himself. On 7th October, 2019 his counsel endeavoured to explain to the court that the applicant wished to regularise the situation and apparently he later did so. On 18th November, 2019 leave to deliver an amended statement of grounds was granted.

14. I have now received helpful submissions from Mr. Eamonn Dornan B.L. for the applicant and from Mr. Alan Dodd B.L. for the respondents.

Some general considerations

15. It is worthwhile to contextualise challenges of this kind to set out a number of general considerations:

    (i) there is a presumption of validity for administrative decisions: *per* Finlay P., as he then was, in *In re Comhaltas Ceoltóirí Éireann* (Unreported, High Court, 5th December, 1977) and *per* Keane J., as he then was, in *Campus Oil v. Minister for Industry and Energy (No. 2*) [1983] I.R. 88 at 102;

    (ii) there is a presumption that material has been considered if the decision says so: *per* Hardiman J. in *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418, [2002] 1 I.L.R.M. 401;

    (iii) the State has a wide discretion in immigration matters: *per* Keane C.J. for the court in *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19, [2000] 2 I.R. 360 (paras. 82-83), citing Costello J., as he then was, in *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593 at 599;

    (iv) the common good includes the control of non-nationals, and the normal system of application to enter the State is from outside: *per* Hardiman J. in *F.P. v. Minister for Justice* [2002] 1 I.R. 164 at p. 174;

    (v) judicial review is not an appeal on the merits and it is not for the court to step into the shoes of the decision maker: *per* Finlay C.J. in *the State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 at 654; *per* Denham J., as she then was, in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701 at 743; and *per* Clarke J., as he then was (McKechnie and Dunne JJ. concurring), in *Sweeney v. Fahy* [2014] IESC 50 (Unreported, Supreme Court, 31st July, 2014), at paras. 3.8 to 3.15;

(vi) the weight to be given to the evidence is quintessentially a matter for the decision-maker: *per* Birmingham J., as he then was, in *M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192 (Unreported, High Court, 27th June, 2008) at para. 27;

(vii) the onus of proof remains on the applicant at all times: *per* Denham J. as she then was in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701 at 743;

(viii) it is not for the applicant to dictate the procedures to be adopted: see *per* Ryan P. in *A.B. v. The Minister for Justice and Equality* [2016] IECA 48 (Unreported, Court of Appeal, 26th February, 2016) at para. 43;

(ix) an applicant does not have a legal entitlement to a discursive narrative decision addressing all submissions: *per* Clarke J., as he then was (Fennelly and MacMenamin JJ. concurring) in *Rawson v. Minister for Defence* [2012] IESC 26 (Unreported, Supreme Court, 1st May, 2012) at para. 6.9;

(x) a judicial review applicant is confined to what is pleaded: while the view of Costello P. regarding the circumstances of amendment of pleadings evolved significantly since *McCormack v. Garda Síochána Complaints Board* [1997] 2 I.R. 489, at 503, his view that the scope of judicial review is limited by the order granting leave remains fundamental; and

(xi) a judicial review applicant must plead with specificity: O. 84, r. 20(3) that an *"assertion in general terms"* is inadequate, but the applicant must *"state precisely each such ground, giving particulars where appropriate".*

Grounds pleaded

16. A notable feature of the oral submissions was that they made only limited reference to the grounds as pleaded. That is too common a practice to single out any one case as illustrating it, but a statement of grounds is frequently seen simply as an opening gambit to be expanded usually in written submissions (here running to 7,450 words) and then supplemented by new branchings-out on one's feet at the hearing. The technique seems to be to expand the field of excavation indefinitely in the hope of striking oil, on the premise that an applicant can have as many dry wells as he or she likes, but if he or she hits one just one gusher they win the case. That however is not a correct procedure.

Ground 1(i) - alleged unlawful consideration of private and family life

17. This ground alleges *"In making the Impugned Decision, the Respondent, his servants and agents, erred in law, including s.49(3) of the Act and/or Article 8(1) of the European Convention on Human Rights ("ECHR"), and/or fettered his discretion and/or engaged in unfairness in the consideration of the private and family rights of the Applicant and in the manner in which the review under Section 49 of the Act was conducted:*

(i) The Respondent acted unfairly and/or fettered his discretion in the assessment of the additional documentation submitted under the factors set out at Section 49(3) of the Act, namely, (a) the nature of the Applicant's connection with the State, (b)

humanitarian considerations (c) the character and conduct of the Applicants (d) considerations of national security and public order, and (e) any other considerations of the common good;"

18. That is not a proper ground for judicial review. It is wholly unparticularised and does not specify any basis to hold that the Minister erred in law, fettered his discretion or acted unfairly on these facts. The applicant attempted to make up for some of the inadequacies of the statement of grounds in legal submissions, but that is not a permissible procedure. The actual alleged infirmities in the decision and the legal basis for relief need to be specified in the grounds. In any event, no illegality as suggested has been demonstrated.

Ground 1(ii) - alleged failure to consider medical condition

19. This ground alleges *"The Respondent erred in law in its consideration of the First Named Applicant's medical condition in finding that: "… the applicant's medical condition does not reach the threshold of a violation of Article 3 and therefore no further consideration of Article 3 is required." The right to respect for private and family life under the provisions of s.49(3) of the Act is not a matter for consideration under Article 3 ECHR but rather under Article 8 ECHR".*

20. Again, that is almost totally unparticularised in that it fails to specify why the finding is an error of law. Pleading baldly that the respondent erred in fact and in law in finding X is, as the respondents correctly submitted at para. 3 of the statement of opposition, *"unparticularised, general and unsubstantiated by any pleaded facts"*. I would uphold that objection which also applies to many of the other grounds. Anyway, no error of law has been demonstrated.

21. Furthermore, the assertion that the right to respect for private and family life under the provisions of s. 49(3) of the Act is not a matter for consideration under art. 3 of the ECHR but rather under art. 8 of the ECHR is garbled and it does not make sense. In fact it would be strictly more correct to also say that *"right[s] …under … s. 49(3) [are] not a matter for consideration … under Article 8 ECHR"*. Section 49 is a separate statutory provision which was considered separately and distinctly from art. 8 of the ECHR here. Furthermore, the ground as drafted impermissibly pleads the ECHR as if it was directly effective in law. It fails to plead the European Convention on Human Rights Act 2003, so the point cannot succeed as pleaded, even if there was a point here, which there isn't.

22. Insofar as an attempt is being made to suggest that the Minister should not have considered art. 3 of the ECHR, that is a repeat of a point rejected in previous caselaw. The Minister considered the applicant's case under the heading of art. 8 - that is clear on the face of the decision. The fact that he also considered it under the heading of art. 3 does not disadvantage the applicant and is not a ground for judicial review. The written submissions impermissibly go way beyond what is pleaded and claim that there is no evidence that the correct standard was applied for the art. 8 consideration, which incorrectly reverses the burden of proof, but in any event the decision expressly acknowledges that there can be an art. 8 issue even if there is no art. 3 issue. It also expressly refers to s. 49(3), which renders unfounded the complaint of non-consideration.

Ground 1(iii) - alleged error in relation to art. 8

23. This ground pleads that *"The Respondent further erred in fact and law in finding that the Applicant had submitted "…insufficient evidence to engage Article 8 on the basis of his mental and physical health" and in the determination that "there is no interference with respect to his private life on the basis of his medical grounds.""*

24. Again this misunderstands the requirements of pleadings. It is insufficient to assert that a particular statement in a decision is erroneous - an applicant must particularise why it is erroneous in a legally cognizable manner. Here there is no attempt to do so. The claim that ministerial decision *"erred in fact"* is simply a direct challenge to the merits, not a permissible ground for judicial review as phrased. Anyway, no error has been demonstrated. The decision is within the scope of what was open to the Minister.

Ground 1(iv)

25. This ground pleads that *"The Respondent erred in law in finding that the decision to refuse the Applicant permission to remain does not constitute a "breach of the right to respect for private life under of Article 8(1) of the ECHR"".*

26. An assertion of an error in law is not an adequate particularisation of why it is an error of law. But there is a reason why the applicant had not been able to specify why these alleged errors exist - they don't. The finding was open to the Minister. The applicant was at all times an unsettled migrant, and deportation of unsettled migrants breaches art. 8 only in exceptional circumstances: see *P.O. v. Minister for Justice* [2015] IESC 64, [2015] 3 I.R. 164, at 216.

27. The applicant coming forward with a medical report does not entitle him to leave to remain. That is a matter for the Minister to assess. The fact that the medical report refers to extreme PTSD does not create an obligation on the Minister to accommodate the applicant. The Minister expressly acknowledged and considered the medical report and was perfectly entitled to point out that the medical report had to rely on the applicant's subjective account. That must be situated in the context of the fact that the applicant's core account was rejected by the protection decision-makers. The respondents are also perfectly correct to point out in submissions (at p. 15) that *"[t]he medical report is not grounded in objective knowledge of the position in Pakistan".*

28. Reliance in submissions on *Paposhvili v. Belgium*, Application No. 41738/10 (European Court of Human Rights, 13th December, 2016) falls flat. First of all, *Paposhvili* is a decision under art. 3 and the applicant in these pleadings complains that the Minister considered the case under art. 3 at all, so this point is not only not pleaded, but contradicts the pleadings. Even if it had been pleaded, on these particular facts the applicant simply has not overcome the onus to show that the damage to his health by deportation is so severe as to constitute a *prima facie* breach of art. 3: see the approach referred to by Clarke C.J. in *D.E. v. Minister for Justice and Equality* [2018] IESC 16, [2018] 3 I.R. 326, at para. 8.10.

29. The applicant generally re-heats points rejected in *R.A. (Pakistan) v. Minister for Justice and Equality* [2019] IEHC 319, [2019] 5 JIC 1010 (Unreported, High Court, 10th May,

2019), *S.O. (Nigeria) v. Minister for Justice and Equality* [2019] IEHC 573, [2019] 7 JIC 2313 (Unreported, High Court, 23rd July, 2019) and *S.O. (Nigeria) v. Minister for Justice and Equality (No. 2)* [2019] IEHC 728, [2019] 10 JIC 2109 (Unreported, High Court, 21st October, 2019). These points do not improve with repetition.

Ground 2 - alleged breach of *audi alteram partem*

30. This ground complains that *"The Respondent engaged in unfairness, and acted contrary to s.49(7) of the Act, and the natural law principle of audi alterem partem, in making adverse inferences in relation to the Applicant's immigration status in the U.K. and/or his move from Direct Provision Accommodation to the private rental sector without providing the Applicant with any opportunity to address or respond to this concern."*

31. The applicant was on notice of the information from the UK authorities. It was put to him in interview and appears in the IPO decision, and he chose not to contest it. Indeed he seems to have admitted most of it. To assert unfairness in such circumstances is to join the ranks of those for whom *"Real-world facts are irrelevant"* (*per* Alito J. in *Mathis v. United States*, 579 US ___ (2016), (slip op., at p. 9)).

32. Similarly, the statement in the decision that the applicant has not provided information as to how he has sustained himself since leaving direct provision is simply a statement of fact, a matter which the applicant himself drew attention to with the notice of change of addresses and one that the Minister is obliged to have regard to under the heading of personal circumstances (as pleaded in para. 9 of the statement of opposition). If the applicant does not give any information as to his detailed personal circumstances, he cannot object to the Minister stating that no such information is provided. To dress that up as a fair procedures complaint is simply a misuse of language. In any event, the applicant has not given any evidence that he would have had anything to say under this heading. Even if there was a fair procedures right to be notified that the Minister was thinking of commenting on his personal circumstances (which the Minister is obliged to consider by statute anyway), which there isn't, fair procedures does not exist as mere box ticking exercise but only if an applicant has some point they wish to make. He has not given any evidence in these proceedings in that regard: see *F.Z. (Pakistan) v. Minister for Justice Equality* [2019] IEHC 368, [2019] 4 JIC 1223 (Unreported, High Court, 12th April, 2019).

The so-called s. 50 decision is not a separate decision

33. The so-called s. 50 decision included in the review consideration is not a separately reviewable decision. It is a consideration that does not in itself have legal effect above and beyond the permission to remain refusal until such time as a deportation order is made. At that point it takes legal shape as one of the jurisdictional bases of the deportation order. It is not separately reviewable, so the separate relief unusually sought falls away, but even if it was a separate decision, a challenge to it would be a collateral challenge to the deportation order so s. 5 of the Illegal Immigrants (Trafficking) Act 2000 would apply anyway.

34. In any event there is simply nothing in the point. The Minister considered all relevant material in a lawful manner. Insofar as health points and *Paposhvili* points are raised in oral submissions under this heading, they were not pleaded so cannot succeed, but anyway I have dealt with those above. As regards the specific sub-grounds I can comment as follows.

Ground 3(i) - alleged failure to have regard to relevant personal information

35. This ground pleads that *"in making the s.50 decision the respondent, his servants and agents erred in law and/or fettered his discretion and/or engaged in unfairness in the consideration of the prohibition of refoulement under s.50 of the Act (I) informing his opinion under s. 50 (1) of the Act that there was no threat to the applicant's life or freedom for convention reasons and no risk to him of serious harm. The respondent failed to have regard to "relevant information presented by the person in his or her application for international protection" as required under s. 50 (2) of the Act".*

36. The applicant here makes the classic error of confusing lack of narrative discussion with lack of consideration. The decision is presumed valid and is presumed to have considered all relevant material. The applicant has not displaced those presumptions.

Ground 3(ii) - alleged failure to consider applicant's account of assault and evidence of PTSD

37. This pleads that *"the respondent gave no consideration in the individual assessment of refoulement to the fact that the applicant was a victim of assault in his home country and that presented (sic) in evidence of suffering from "extreme post-traumatic stress disorder which would be exacerbated should he return to Pakistan".*

38. Again the same point applies. The fact that the Minister did not discuss the matter narratively in a way dictated by the applicant is not the same as not considering relevant matters.

Ground 3(iii) - alleged erroneous consideration of reliance on testimony of the applicant

39. This ground pleads that *"the respondent erred in finding that the probative value of the medical report presented was 'diminished by the fact that it had to rely for background on the information on the anecdotal testimony of the applicant'".*

40. The applicant fundamentally misunderstands the relevance of medical reports. Where a report depends significantly on subjective accounts from an applicant then that is a major qualification on the value of the report. That is simply a fact, unfortunate and all as it is from an applicant's point of view. It is not an error in either fact or in law. In any event, even if there was a point here (which there isn't), medical reports can only take an applicant so far. They are not a ticket to a right to remain. The point was made in *H.E. (DRC) v. Secretary of State for the Home Department* [2004] UKIAT 00321 by Ouseley J. that *"rather than offering significant separate support for the claim, a conclusion as to mere consistency generally only has the effect of not negating the claim"* (para. 17) and the same is generally true for other kinds of medical report.

Ground 3(iv) - country of origin information

41. This ground pleads that *"the only section of the sole country of origin information report which was considered by the respondent simply discloses that Pakistan provides for freedom of movement but that the government limited these rights. This does not address the grounds of the applicant fear of refoulement in any meaningful way".*

42. Again the applicant seems attached to the misunderstanding that only what is quoted or referred to in a decision has been considered. Nor is there any obligation on a decision-maker to "*address*" the applicant's points in the sense of narratively discussing them. These propositions have been knocked on the head many times before in the decided cases.

Order

43. The application is dismissed.