THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 603 J.R.]

BETWEEN

A.B. (ALBANIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of December, 2017

1. The applicant, an Albanian national, was born in Kosovo, and came to Ireland on 21st December, 2011. He applied for asylum, an application which was rejected in due course. A proposal to make a deportation order was issued and representations were made by the Refugee Legal Service on 6th June, 2012, stating that he was residing with his brother. On 5th November, 2014, the Refugee Legal Service made further submissions, enclosing a letter from a Ms. Nancy Garvey, a retired primary teacher. That letter stated, contrary to the previous submissions, that the applicant has "*moved around quite a bit*" and is "*semi-homeless*". Further representations were made on 20th October, 2016, by the Rev. John Rochford of the South East Refugee Information Centre. Those do not seem to be hugely material to the matters I have to decide.

2. A deportation order was made on 1st November, 2016, which is unchallenged. The analysis under art. 8 of the ECHR noted the contradiction between the original representations, which stated that the applicant was living with his brother, and subsequent representations indicating that he was living elsewhere and might be homeless. It noted significant omissions of material in relation to the brother.

3. On 24th April, 2017, the applicant went to a consultant psychiatrist. He was sent there by his solicitors because he told his solicitor he was depressed. It is accepted that the applicant's medical condition long predated this consultation. On 22nd May, 2017, the applicant submitted an undated medical report from the consultant psychiatrist which outlined his condition and treatment and noted that his brother was "*most supportive*".

4. On 21st June, 2017, the Minister refused the applicant's application to revoke the deportation order, which application had been made on 11th December, 2016. A further medical report was prepared in September, 2017, but is not relevant to the proceedings insofar as it had not been furnished to the Minister prior to the s. 3(11) decision, which the applicant now challenges. I have received helpful submissions from Mr. Michael Conlon S.C. (with Mr. Mel Christle S.C. and Mr. Ray Walsh B.L.) for the applicant, and from Ms. Gráinne Mullan B.L. for the respondent.

Alleged failure to properly consider art. 8 of the ECHR

5. Mr. Conlon submits that there was a failure to properly consider art. 8 of the ECHR, particularly in the context where the applicant's brother is a recognised refugee living in Ireland and where the applicant is, it is said, wholly dependant on his brother. The context here is the obligation on an applicant to put forward material to the Minister to enable appropriate consideration to take place. It seems to me there were considerable failings in that regard. As noted above, the original submissions supplied indicated the applicant was living with his brother. That was then contradicted by further submissions, a contradiction which was highlighted in the analysis under s. 3(6) of the Immigration Act 1999. The process of making a s. 3(11) application was therefore a heaven-sent opportunity to clarify the situation given that the contradiction in submissions had been highlighted in black and white and discussed in some detail. However, the s. 3(11) submissions actually made did not take up that opportunity in any meaningful sense, but merely included a one-liner to the effect that the applicant was living with his brother. It seems to me that the Minister was entitled to the view that the details of private life, dependency and related matters are simply not spelled out by the applicant.

6. Separately, the fundamental problem for the applicant here in the context of a judicial review of a refusal to revoke an order is that he is not raising anything that was not there at the time of the original deportation order. I would broadly accept Mr. Conlon's submission that in principle one can make s. 3(11) submissions by way of further detail about matters that were there originally, as opposed to new matters (see *Sivsivazde v. Minister for Justice* [2016] 2 I.R. 403 [2015] IESC 53 (*per* Murray J., at para. 52)). That does not mean that a s. 3(11) decision can be quashed if it fails to revisit original issues. As long as the s. 3(11) decision considers the submissions made (with consideration for these purposes to be distinguished from narrative discussion, which is not necessary), and as long as the Minister legitimately satisfies himself that the deportation would be lawful, then the s. 3(11) decision should not be quashed. The Minister is not obliged to reconsider everything *ab initio*. It seems to me that there is no inconsistency between the entitlement of an applicant to provide further material as going beyond change of circumstances, as recognised in *Sivsivadze,* and the case law to the effect that a s. 3(11) decision should be quashed only in exceptional circumstances: see *P.O. v. Minister for Justice* [2015] 3 I.R. 164 [2015] IESC 64, *per* Charleton J., *Smith v. Minister for Justice and Equality* [2013] IESC 4, *per* Clarke J., *Kouaype v. Minister for Justice and Equality* [2005] IEHC 380 [2011] 2 I.R. 1, *per* Clarke J., *Dada v. Minister for Justice Equality and Law Reform* [2006] IEHC 166 (Unreported, MacMenamin J., 31st January, 2006), *C.R.A. v. Minister for Justice Equality and Law Reform* [2007] 3 I.R. 603 [2007] IEHC 19, *per* MacMenamin J., and *L.C. v. Minister for Justice and Equality* [2007] 2 I.R. 133 [2006] IESC 44, *per* McCracken J. I also discussed these in *I.R.M. v. Minister for Justice and Equality* [2016] IEHC 478 [2016] 7 JIC 2932 (currently under appeal), at para. 50. On the particular facts, the obstacle for the applicant is that the s. 3(11) submissions are extremely skeletal on the issue relating to the brother, especially in the context of the detail given in the analysis at the time of the deportation order, which was available to the applicant at the time of making the s. 3(11) submissions. The Minister concluded that there was no truly new information presented (see para. 19 of the affidavit of Alan King) and that seems to me to be a lawful finding. Given the extremely thin gruel given to the Minister, it would be impossible to support a conclusion that the Minister's decision is invalid in law.

7. Mr. Conlon complains there was no analysis in accordance with *R. (Razgar) v. Home Secretary* [2004] UKHL 27, but again there is no obligation to review everything *ab initio.* One has to look at the submissions made, which the Minister did.

8. Finally under this heading, the precarious and unlawful status of the applicant does not assist his claim under art. 8 of the ECHR.

Alleged failure to properly consider art. 3 of the ECHR
9. Again, the fundamental problem here is that the applicant is not raising anything that was not there at the time of the deportation order. Mr. Conlon accepts that making headway under this point is "*quite challenging*" and did not particularly seek to advance this argument. Fundamentally, an applicant must overcome a threshold to show substantial grounds exist to contend that there is a real risk of treatment contrary to art. 3 before an onus can be thrust on the State to dispel doubts in that regard (see *Saadi v. Italy* (Application no. 37201/06, European Court of Human Rights, 28 February, 2008) para. 129, citing *N. v. Finland* (Application no. 38885/02, European Court of Human Rights, 26 July 2005), para. 167). That was not done, so the issue does not arise. Consequently, the factual basis for an argument based on *Paposhvili v. Belgium* (Application no. 41738/10, European Court of Human Rights, 13 December 2016) does not exist.

Alleged failure to consider representations under s. 3(11)
10. The difficulty for the applicant here is the judgment of 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. The Minister states that the representations were considered and, in the absence of any evidence to the contrary, the applicant must be held to have failed to overcome the burden of proof in that regard.

Alleged failure to give adequate consideration for the applicant's medical condition
11. Again, the fundamental difficulty for the applicant here is that he is not raising anything that was not there at the time of the deportation order. The applicant's migraine problem was referred to in his asylum application. Depression is not referred to, but did pre-exist the s. 3(11) process. While it is true that the applicant was not being treated prior to April, 2013, merely choosing not to get treatment does not absolve one from the requirement to put forward one's point at the deportation order stage. In any event, the Minister concluded that the new medical information did not amount to exceptional circumstances. That seems to me to be a lawful finding in the circumstances. Furthermore, it seems to me that *G.K.* applies here. The medical report is quoted in the decision, so it cannot be said that it was not considered.

Claim for declaratory relief relating to the EU Charter
12. For the sake of completeness, I should say that declaratory relief was also sought in relation to an alleged breach of the EU Charter. That is a fundamentally misconceived application because deportation in a case such as this is not a process covered by EU law (see *N.N. v. Minister for Justice and Equality* [2016] IEHC 470 [2016] 7 JIC 2926, *Y.Y. v. Minister for Justice and Equality (No. 1)* [2017] IEHC 176, and see *Y.Y. v. Minister for Justice and Equality* [2017] IESCDET 38 para. 11).

Order
13. For the foregoing reasons the order will be:

(i). that the proceedings be dismissed; and

(ii). considering and applying *Okunade v. Minister for Justice, Equality and Law Reform* [2012] IESC 49 [2012] 3 I.R. 152 that the injunction restraining deportation be discharged.