THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 413 J.R.]

BETWEEN

P.N.S. (CAMEROON)

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 22nd day of March, 2019

1. The applicant is a national of Cameroon who was granted a passport from that country on 11th April, 2001, valid until 10th April, 2006. The fragment of the passport that has been exhibited shows extensive travel between Cameroon and Nigeria. In his later asylum claim here, he was to lyingly claim that he had never travelled outside his country of origin (question 31a). He left blank the section regarding his passport and non-Irish visas. The asylum claim asserts that he left Cameroon on 23rd January, 2006. The applicant has instructed his lawyers that he came on a false passport, which was taken back by a people-smuggler, and it is suggested that this explains why there is no exit visa from Cameroon shown on the few fragmentary pages of his passport that have been put before the court. The Refugee Appeals Tribunal, in rejecting the asylum claim, held that the applicant had not provided a full and true explanation of how he travelled and how he arrived in Ireland.

2. Going back to January, 2006, the applicant sought asylum on the basis of fear of persecution on grounds related to religion. He came to Ireland at a time when his Cameroonian passport was in force. His claim was rejected at first instance. He appealed to the Refugee Appeals Tribunal and that appeal was refused in August, 2006. A formal decision refusing refugee status was made by the Minister in November, 2006.

3. On 30th April, 2006, the applicant sought subsidiary protection. That was refused in June, 2010. He impugned that refusal in his first set of judicial review proceedings [2017 No. 767 J.R.] but that aspect of the claim was not pursued. The applicant was notified of the issuing of a deportation order in June, 2010. On 30th June, 2011, he applied to revoke the order under s. 3(11) of the Immigration Act 1999. In February, 2012, he was offered the option of voluntarily returning to Cameroon without an escort, with his flight to be paid for by the Minister.

4. In 2013, his Cameroonian passport was renewed for a five-year period and I am told that he instructed his lawyers that it was renewed by his mother on his behalf. On 19th August, 2017, he applied for permission to re-enter the protection process under s. 22 of the International Protection Act 2015. That was refused by the International Protection Office on 24th November, 2017. The applicant appealed that refusal to the tribunal on 4th December, 2017, and that appeal was rejected on 23rd April, 2018.

5. In the first set of judicial review proceedings to which I have referred, the applicant sought a declaration that his deportation prior to the determination of the s. 22 application and prior to the determination of a separate application he had made to the Minister based on the *Zambrano* case (Case C-34/09 *Gerardo Ruiz-Zambrano v. Office national de l'emploi*) would be unlawful. That relief was refused in *P.N.S. (Cameroon) v. Minister for Justice and Equality (No. 1)* [2018] IEHC 504 [2018] 7 JIC 1607 (Unreported, High Court, 16th July, 2018). Leave to appeal was refused in *P.N.S. (Cameroon) v. Minister for Justice and Equality (No. 2)* [2018] IEHC 508 [2018] 7 JIC 2709 (Unreported, High Court, 27th July, 2018), by which point the s. 3(11) application had been effectively granted because the deportation order had been revoked on 6th July, 2018. That rendered moot the question of whether the applicant could not be deported pending the outcome of his applications. The applicant sought leave to appeal from the Supreme Court, and in its determination, *S. v. Minister for Justice and Equality* [2018] IESCDET 160, that court adjourned the matter to await the outcome of a separate case, *M. v. Minister for Justice and Equality* [2018] IESCDET 159. The revocation of the deportation order was essentially premised on the acceptance of the applicant's *Zambrano* application for permission to remain as the parent of an Irish citizen child.

6. In the present proceedings, the applicant seeks an order of *certiorari* quashing the tribunal's decision of 23rd April, 2018, refusing permission to make a reapplication for international protection under s. 22 of the 2015 Act. I have received helpful submissions from Mr. Michael Conlon S.C. (with Mr. Paul O'Shea B.L.) for the applicant and from Ms. Emily Farrell B.L. for the respondents.

Applicant's immigration history

7. The applicant, who did not attend the hearing, did not exhibit a full version of his Cameroonian passport. In a sense, that is a striking omission given that his claim in relation to a fear of prosecution is based on the absence of an exit visa and one would have thought that there was an onus on the applicant to positively establish that he did not have such a visa. Instead, the applicant has only exhibited a couple of pages of the passport, which appear to relate to the years 2001 and 2002. I gave the parties an opportunity to agree to have the applicant attend with the original passport to see if that would clarify matters. Mr. Conlon said that he was effectively neutral on this and was not asking me to have him attend. Ms. Farrell similarly did not think it was necessary and was not asking me to do so either. Given that while neither side were massively objecting, nonetheless neither side specifically wanted me to have this further information adduced, so it was agreed by both parties that I should give a decision based on the papers as they now stand.

Basis of the applicant's claim for readmission

8. The applicant's claim for readmission was set out in his solicitor's letter of 19th August, 2017. At the outset of that letter, reference was made to the risk of imprisonment and punishment under the Cameroonian Penal Code and Laws, the allegedly harsh and life-threatening prison conditions there, and an allegation that the applicant did not have a fair subsidiary protection decision that complied with Irish and EU law in the first place. The latter allegation is not a valid or proper basis for an application for readmission to the protection process and Mr. Conlon expressly says that he is not relying on this as a ground. For a host of reasons, not least s. 5 of the Illegal Immigrants (Trafficking) Act 2000, a protection refusal is valid and binding unless set aside on judicial review. It is not open to protection decision-makers to conduct some sort of parallel judicial review process in the context of a re-application. Around 90% of the applicant's submission for readmission is a lengthy diatribe of a legalistic nature irrelevantly attacking the previous

unsuccessfully challenged refusal of protection. Such a process is inappropriate, and insofar as criticisms are made by the applicant of the tribunal in terms of its reasoning, that has to be put in the context of the fact that a vast amount of irrelevant submissions were made to the tribunal and it was simply left to the tribunal member to extract what sense from that that he could.

9. The claim regarding prison conditions rests on the logically prior claim that the applicant would be imprisoned on return to Cameroon. That scenario is derivative, so it is really the logically prior claim that is essential. The basis of that is the claim of there being a criminal offence of attempting to emigrate illegally. A related or possibly alternative way of looking at the claim is glancingly referred to in the very final paragraph of the applicant's solicitor's lengthy letter, which states that he is at risk as "*a failed asylum seeker absent for many years*". That is a passing reference with no detail or substance that is immediately apparent. The applicant's claim, viewed in the most favourable way possible, can be considered as raising two issues:

> (i) an alleged risk to the applicant by being compulsorily returned as a failed asylum seeker; and
>
> (ii) an alleged risk to the applicant by being present in the country of origin as a person who originally left without permission.

Mootness

10. Ms. Farrell makes a subtle argument regarding mootness. She does not deny that there is some specific possible advantage to the applicant in being readmitted to the protection process as distinct from having *Zambrano* permission to remain (see *D.D.A. v. Minister for Justice and Equality* [2012] IEHC 308 (Unreported, High Court, Cooke J., 18th July, 2012), *I.E. v. Refugee Appeals Tribunal* [2014] IEHC 409 (Unreported, High Court, MacEochaidh J., 31st July, 2014), *W.T. v. Minister for Justice and Equality* [2016] IEHC 108 (Unreported, High Court, 15th February, 2016)). Rather, Ms. Farrell submits that the gist of the applicant's claim is to do with his fears about being forcibly returned as opposed to simply being present in the country of origin, and that the applicant is not going to be forcibly returned because the deportation order has been revoked. Paragraph 8 of the applicant's affidavit says he fears serious harm "*in the event of my being returned to Cameroon.*" That is not going to happen, barring fundamental change of circumstances. Any claim to readmission based on fear of being returned is therefore bound to fail as being insufficiently substantial. Proceedings challenging such a refusal can, therefore, legitimately can be regarded as moot. The difference between this case and the run-of-the mill protection claim is that the common-or-garden protection claimant still has to face the hurdle of possible deportation, whereas this applicant knows that that is not going to happen barring some fundamental change of circumstances. If there was some such change of circumstances, presumably the s. 22 process would be operated in an *East Donegal* –compatible manner (see *East Donegal Co-operative Limited v. Attorney General* [1970] I.R. 317 104 I.L.T.R. 81), and could be reactivated at that stage in a way that had due regard to the applicant's rights. Insofar as the claim relates to his forced return as a failed asylum seeker, that seems to be moot because, as set out above, that is not going to happen as matters stand. Insofar as the claim that he emigrated illegally so he could be at risk even if he went on holidays to Cameroon, that is not moot, but as I note above under the discussion relating to the applicant's immigration history, he has not in fact established as a matter of evidence either to the decision-maker or, for what it's worth, to the court, that he emigrated illegally; and, therefore, the evidential basis for this claim is absent. Nonetheless, if I am wrong about that, I will go on to consider the claim on its merits, such as they are.

The test for readmission

11. The test for readmission to the protection process arises from s. 22(4)(a) of the 2015 Act and involves three elements:

> (i) a requirement that "*since the determination of the previous application concerned, new elements or findings have arisen or have been presented by the person";*
>
> (ii) the second requirement is that these new elements "*make it significantly more likely that the person would qualify for international protection*";
>
> (iii) it is an independent, equally necessary requirement that "*the person was, through no fault of the person, incapable of presenting those elements or findings for the purposes of his or her previous application".*

12. The tribunal rejected all three of these elements, so the applicant cannot succeed in the present judicial review unless he shows that the tribunal was wrong on all three. They are entirely independent requirements.

Was the applicant unable to make the point previously?

13. The applicant did not make a case about criminalised unauthorised departure, or indeed being a failed asylum seeker, at the time of the original subsidiary protection application. The really fatal thing for the applicant here is the finding by the tribunal at the re-application stage that "*there is nothing whatsoever to suggest (and the applicant's solicitors have wisely refrained from suggesting) that this man was in any way incapable of presenting findings or elements of his claim at any stage*" (para. 4.2.a of the tribunal's decision). Such failure means that the claim cannot succeed, so it would be utterly futile to think in terms of quashing a decision the outcome of which must be correct. Either the applicant's failure to suggest to the tribunal that the point could not have been made earlier, or the perfectly reasonable finding that there is nothing to suggest that this was the case, would be determinative.

14. Mr. Conlon gamely suggests that the applicant could not have presented as a failed asylum seeker earlier, but that is not the case. He was refused asylum prior to the application for subsidiary protection. Mr. Conlon also accepts, as he must, that there is no evidence as to whether he could or could not have made the point regarding prison conditions and Cameroonian law at the time of the original subsidiary protection application. While it is true that the applicant presented country information from 2015, the law on which he relies was there from 1990. The absolutely necessary concession that such evidence had not been introduced is fatal to the present application. The fact that there is more recent country of origin information than the original subsidiary protection claim is not an answer because that it is potentially the case in any situation where there is a particular problem in a country of origin. One can anticipate an ongoing production of country material on such a problem, but that does not mean in and of itself that the problem was not available to the applicant on the date of the original protection application. The finding that the applicant hasn't shown that the point was unavailable at the time of the original application is impregnable. Mr. Conlon's interesting complaints about whether the tribunal dealt with the questions of the existence of new elements or whether they were of substance in an unduly summary, or otherwise incorrect, manner, are therefore simply irrelevant. The applicant's failure to overcome the hurdle that the point was always available, indeed his failure to even attempt to do so before the tribunal, renders such a complaint academic and dooms the present judicial review at the outset.

Order

15. The tribunal's decision was somewhat dismissive; but that is more reflective of the flimsiness of the application made than it is of

fundamental error on the part of the tribunal warranting relief by way of judicial review. As eloquently put in oral submissions by Ms. Farrell, a notice of appeal to the tribunal is not an orienteering map. The applicant is not a passive participant in the process and has an active obligation to assist in the establishment of the elements of the claim (see *In Re Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19 [2000] 2 I.R. 360 at 395). Insofar as there is a contrast between the notice of appeal lodged, and the submissions made on judicial review, one could legitimately say that the applicant did not conspicuously assist in that regard here. There is nothing necessarily impermissible in a decision-maker brusquely dismissing a meritless claim; but in this case, if there was any superabundance of brusqueness, that can be traced squarely to the unfocused and predominantly irrelevant nature of the applicant's submissions to the tribunal. The proceedings are dismissed.