THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 802 J.R.]

BETWEEN

R.A. (PAKISTAN)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 10th day of May, 2019

1. The applicant claims that he left Pakistan in 2005. He appears to have been in the UK with a six-month visa on a passport that expired in 2009. When the visa expired he lived in the UK illegally and was served with papers from the Home Office as an over-stayer. He applied for leave to remain in the UK on 21st June, 2012 and then made an application on the basis of his family and private life on 20th January, 2013. The leave to remain claim was refused on 12th August, 2013 and the family and private life claim was refused on 28th January, 2014.

2. As regards the applicant's whereabouts in the meantime, he claims that he returned to Pakistan in 2013, remaining there for two years, and that he was exposed to persecution in the 2013 to 2015 period. However, the Minister's belief is that this is a cock-and-bull story and that the applicant never went back to Pakistan but remained in the UK. No evidence was provided that he returned to Pakistan and he gave contradictory accounts of what passport was used. He originally said that he travelled on the passport that expired in 2009 and when asked how he was able to board a plane on an expired passport he said that officials "*did not check it, they only looked at the ticket*" (s. 11 interview, question 72).

3. The UK authorities indicated that he made a second application regarding his private life entitling him to remain on 3rd February, 2014, which was refused on 22nd March, 2014. As regards what happened then in the context of the applicant's claim to have been in Pakistan at that time, he asserted that he travelled from Pakistan to the UK in 2015 where he remained from March to June of that year. It doesn't ever appear to have occurred to him to apply for international protection in the UK.

4. On 16th June, 2015 he arrived in the State *via* Belfast. On 17th June, 2015, he applied to the Refugee Applications Commissioner for asylum and completed a questionnaire on 16th February, 2015. His application form and interview under s. 8 of the Refugee Act 1996 record that he suffered from a heart condition and depression. The applicant's claim for asylum was refused on 6th May, 2016 and the Commissioner found on the balance of probabilities that the applicant did not leave the UK for Pakistan in 2013 to 2015. On 5th August, 2016 the applicant appealed this decision to the Refugee Appeals Tribunal. Following the commencement of the International Protection Act 2015, the applicant applied for subsidiary protection on 1st April, 2017. That was refused on 17th November, 2017, and the applicant also received a decision by the International Protection Office that he should not be given permission to remain in the State under s. 49(4)(b) of the 2015 Act.

5. On 17th January, 2017 the applicant appealed to the International Protection Appeals Tribunal. An oral hearing took place on 12th April, 2018. Ms. Nóra Ní Loinsigh B.L. appeared for the applicant. On 15th May, 2018 the tribunal rejected the appeals. That decision was not challenged. At paras. 4.3 to 4.12 of the tribunal decision, the tribunal member also rejected the applicant's claim that he returned to Pakistan in 2013 to 2015.

6. The tribunal accepted as a material fact that the applicant had open-heart surgery and was on heart medication but noted that he had had access to heart medication in Pakistan in the past and found that a risk of serious harm there had not been demonstrated. Again, such finding is unchallenged.

7. On 21st May, 2018, the applicant made representations to the Minister seeking a review of the permission to remain decision under s. 49(9) of the 2015 Act and supplied the Minister with further material regarding his circumstances, including a medical letter from his doctor, Dr. Glen Lecky, dated 23rd May, 2018. This letter made reference to the applicant's history of heart disease, symptoms of that condition, medications, symptoms of depression, aches and pains, suicidal ideation and that the applicant was awaiting counselling.

8. On 14th August, 2018 the IPO rejected the applicant's request for a review of the permission to remain decision and on 18th September, 2018 the applicant was given notice of that decision and notice that if he did not return to Pakistan voluntarily a deportation order would be made.

9. On 19th October, 2018 the applicant was notified that the Minister had issued a deportation order. He was required to leave the State on or before 18th September, 2018 or to present for removal on 21st November, 2018.

10. I granted leave in the present proceedings on 8th October, 2018, the primary relief sought being an order of *certiorari* of the Minister's decision on the review dated 14th August, 2018. An amendment was subsequently made to the proceedings to also seek to quash an addendum to the review decision dated 9th April, 2019. Also sought was an order of *certiorari* of the deportation order. A statement of opposition was filed on 17th December, 2018.

11. At the hearing on 5th April, 2019, I made an order by consent that the substantive challenge to the review decision be adjourned and in the interim, without prejudice to that challenge, the decision be remitted back to the Minister for any clerical or other amendments that the Minister considered appropriate, on the basis that, subject to any application to amend the proceedings, any reissued decision was to be treated as encompassed by the existing statement of grounds and statement of opposition. The decision-maker then issued an addendum dated 9th April, 2019 correcting para. 6 of the original decision, explaining that the reference to an incorrect country of origin (Ghana rather than Pakistan) was a "*simple typographical error*", and substituting a new para. 6.

12. The matter then came back before the court on 12th April, 2019 at which stage counsel for the applicant submitted that the

addendum raised new issues and sought an amendment to the proceedings. A proposed amended statement of grounds was furnished on 3rd May, 2019. After further discussion, that was proposed to be amended further, so the matter was adjourned to 7th May, 2019 to finalise the amendment. On that date I allowed the amendment, and an amended statement of opposition was then delivered, and the parties made further oral submissions. I have received helpful submissions from Mr. Eamonn Dornan B.L. for the applicant and from Ms. Sarah K.M. Cooney B.L. for the respondent.

Ground 1(i) - lack of proper determination

13. The first ground contends that "*In making the Impugned 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 private and family rights of the Applicant and in the manner in which the review under Section 49 of the Act was determined: (i)A proper determination was not made in relation to 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 Applicant (d) considerations of national security and public order, and (e) any other considerations of the common good".*

14. The ground as pleaded does not specify why the Minister's determination was improper. An applicant cannot succeed on the basis of a generic plea such as this; but if I am wrong about that I will consider whether the point has any merit.

15. Section 49(3) requires the Minister to have regard to certain factors in deciding whether to grant leave to remain. That provision states that: "*In deciding whether to give an applicant a permission, the Minister shall have regard to the applicant's family and personal circumstances and his or her right to respect for his or her private and family life, having due regard to (a) the nature of the applicant's connection with the State, if any, (b) humanitarian considerations, (c) the character and conduct of the applicant both within and (where relevant and ascertainable) outside the State (including any criminal convictions), (d) considerations of national security and public order, and (e) any other considerations of the common good."*

16. This applies to the review process as well under sub-s. (7). Section 49 (8) provides that: "*Subsections (2) to (5) shall apply to a review under subsection (7), subject to [a modification not immediately relevant for present purposes] and any other necessary modifications*."

17. Nonetheless, the point remains that this is a review decision. The original decision referred more extensively to all of these points and by definition the review decision must be read in conjunction with it. Nonetheless the Minister in the impugned decision at p. 2 of 10 specifically refers to all of the factors required by s. 49(3). The decision is somewhat discursive. It begins by referring to the key point of medical information, which is the issue on which Mr. Dornan majored. It then discusses art. 3 of the ECHR, as applied by the European Convention on Human Rights Act 2003. It then noted correctly that art. 8 covers both physical and mental health and that there could be an art. 8 issue even if there was no art. 3 issue. It then considered art. 8 of the ECHR and concluded "*having considered the humanitarian information on file in this case there is nothing to suggest that the applicant should not be returned to Pakistan*" and "*on review and having considered the additional/new representations submitted on behalf of the applicant and noting that there has been no material change in the applicant's personal circumstances under the heading set out above it is not recommended the applicant should be granted permission to remain in the State on a temporary basis for the reasons set out herein".*

18. Section 49 of the 2015 Act is somewhat wider than art. 8 of the ECHR, although there is an overlap. Section 49(3) covers "*the applicant's family and personal circumstances and his or her right to respect for his or her private and family life*" whereas art. 8(1) of the ECHR provides for "*the right to respect for his private and family life, his home and his correspondence*". It certainly has not been established that the Minister failed to consider the elements of s. 49 that are wider than art. 8. It is clear that the Minister first considered the applicant's rights under the relevant headings, namely arts. 3 and 8 of the ECHR, and then proceeded to consider the non-rights based matters, which concerned humanitarian considerations and the applicant's personal circumstances. So the decision is lawfully worded even if the concluding section could have alternatively used the language of s. 49(3) more explicitly. There is no magic formula as long as it is clear that the points required to be considered by s. 49 had been considered; and that is the case here.

Ground 1(ii) - failure to make a proper determination under art. 8

19. The second ground alleges that "*The Respondent erred in failing to make a proper assessment or determination of the Applicant's rights under Article 8 of the European Convention on Human Rights ("ECHR") in light of the medical report of Dr. Glen Lecky dated 23rd May 2018, which confirmed that the Applicant has continuing medical problems arising from serious cardiac valvular disease, that he has suicidal ideation and is awaiting counselling".*

20. Failure to make a proper assessment is not, without at least some particularisation, a ground for judicial review as such. One must ask why is the assessment improper; and that is not specified in the applicant's pleadings. Again, an applicant cannot succeed on such unspecific and generalised pleadings but even if he could, there is nothing improper about how the Minister considered the letter from the applicant's GP.

21. The letter itself is of somewhat limited value, and indeed contains only one sentence specifically relating to the alleged suicide risk. The applicant is an unsettled migrant and deportation of unsettled migrants breaches art. 8 of the ECHR only in exceptional circumstances, as indeed the Strasbourg court and national courts have repeatedly held: out of many possible examples see e.g. *Costello-Roberts v. the United Kingdom* [1993] 19 E.H.R.R. 112 (Application no. 13134/87, European Court of Human Rights, 25th March, 1993), *Rodrigues de Silva and Hoogkamer v. the Netherlands* (Application No. 50435/99, European Court of Human Rights, 31st January, 2006), C.*I. v. Minister for Justice and Equality* [2015] IECA 192 [2015] 3 I.R. 385, at 408 *per* Finlay-Geoghegan J., *P.O. v. Minister for Justice and Equality* [2015] 3 I.R. 164 [2015] IESC 64, *P.S.M. v. Minister for Justice and Equality* [2016] IEHC 474 [2016] 7 JIC 2930 (Unreported, High Court, 29th July, 2016), *Nagra v. Minister for Justice and Equality* [2018] IEHC 398 para. 5, *C.M. v. Minister for Justice and Equality* [2018] IEHC 217 [2018] 4 JIC 2501 (Unreported, High Court, 25th April, 2018) para. 9; see also John Stanley, *Immigration and Citizenship Law* (Dublin, 2017) at pp. 397 *et seq*.

22. Such exceptional circumstances are not demonstrated here. Evaluation of the weight to be attached to any given piece of evidence (such as the medical letter in the present case) is essentially a matter for the decision-maker: see D.*E. v. Minister for Justice and Equality* [2016] IEHC 650 [2016] 11 JIC 1408 (Unreported, High Court, 14th November, 2016). As Birmingham J. as he then was said in *M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192 (Unreported, High Court, 27th June, 2008) at para. 27 "*the assessment of whether a particular piece of evidence is of probative value, or the extent to which it is of probative value, is quintessentially a matter for the Tribunal Member*", and the same goes for any decision-maker.

Ground 1(iii) - alleged confusion between arts. 3 and 8 of the ECHR

23. The third ground alleges that "*The Respondent found that* "…there is no obligation on the State to provide ongoing treatment to the applicant in Ireland. It was found that the applicant could access adequate medical treatment in their country of origin.

Therefore, his medical condition does not reach the threshold of a violation of Article 3." *This consideration was erroneous in that the right to respect for private and family life under the s.49(3) of the Act is not a matter for consideration under Article 3 ECHR but rather under Article 8 ECHR".*

24. In one sense the point in the applicant's mind here is not entirely devoid of merit to the limited extent that the personal circumstances of the applicant and his private and family life rights are not confined to art. 3 of the ECHR. If the Minister had stopped at consideration of art. 3, the applicant might have a legitimate complaint. But the Minister is perfectly entitled to consider art. 3 as part of the overall consideration of the application, as long as he doesn't stop there, which he didn't. He in fact went on to consider both art. 8 and the "*humanitarian considerations*" which include the non-rights based personal circumstances required by s. 49(3). Indeed, the Minister specifically made the point that there could be an art. 8 issue even if there is no art. 3 issue, which is a *verbatim* quote from *Azeem v. Minister for Justice and Equality (No. 1)* [2017] IEHC 719 [2017] 11 JIC 1012 (Unreported, High Court, 10th November, 2017), although that case is not expressly cited. That statement from the Minister really knocks the applicant's point under this heading on the head.

25. Insofar as the applicant thinks that art. 3 should not have been considered at all, that is hardly a point of much substance especially given the nature of the applicant's own representations during the process. It is not a breach of the applicant's rights to consider whether deportation would breach the applicant's rights. Mr. Dornan's argument that art. 3 should not have been considered at all certainly makes up in novelty, innovation and boldness for what it lacks in legal and logical merit and common sense.

Ground 1(iv) - error in respect of reference to Ghana
26. The fourth ground contends that "*Whereas the IPO recognized that* "Article 8 includes the impact on both the mental and physical health of the application" and that "[t]here could be an article 8 issue even if there is no Article 3 issue," t*he IPO then erred in fact and in law in finding that* "[t]he applicant submitted representations in relation to their medical matters in the State, however, they have not submitted any evidence on how the impact of returning to Ghana would affect their mental or physical health. Therefore, Article 8 has not been engaged and there is no interference with respect to his private life on the basis of medical grounds."

27. The actual error relied on is not expressly specified in the ground so perhaps strictly speaking the applicant should not obtain relief on that basis but one assumes the primary error being hinted at is the reference to Ghana rather than Pakistan. The affidavit of Grainne Keane, on behalf of the respondent, does not, strangely enough, expressly acknowledge that there was such an error or that it was typographical but it does at para. 3 verify the statement of opposition, para. 6 of which states that "*the respondent acknowledges that the reference to Ghana should have been Pakistan*". Insofar as that issue is concerned, as noted above I remitted the matter back to the Minister to give him an opportunity to issue an addendum or correction, which has been done, and that has essentially disposed of this point subject to the new amended ground, which I will deal with below.

Ground 1(v) - error in application of caselaw
28. The fifth ground contends that "*The Respondent erred in law in its application of the holding of* BS v. Minister for Justice [*2014] IEHC 502 to the facts of this case. The Applicant has provided a contemporaneous medical report raising risk of suicide, which is not inconsistent with his international protection history, and which warrants a grant of permission to remain following* BS v. Minister for Justice, supra."

29. This misunderstands *B.S. v. Minister for Justice and Equality*, where Barr J. rejected a challenge to a deportation order on a similar ground. A medical letter worded in the general manner such as that submitted here does not come near, let alone surmount, the high threshold that would make the deportation unlawful. The Minister was perfectly entitled to consider the issue in the way he did: see *C.M. v. Minister for Justice and Equality* [2018] IEHC 217 [2018] 4 JIC 2501 (Unreported, High Court, 25th April, 2018) at paras. 10 to 13.

Ground 1(vi) - added ground regarding lack of consideration
30. The sixth ground added by amendment contends that "*In deciding whether to give the Applicant permission to remain, the Respondent gave inadequate regard to humanitarian considerations and/or the Applicant's rights under Art. 8 ECHR, and in particular gave inadequate consideration to the impact on the Applicant's physical or mental health of being returned to his Country of Origin notwithstanding the corrections made in the Amended Decision dated 9th April 2019".*

31. A claim of inadequate consideration needs to be distinguished from a claim of lack of consideration altogether.

32. Failure to consider the matters referred to in the ground at all has not been made out, because the issues referred to in s. 49(3) and all material in the case is expressly cited in the decision: see *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.

33. Failure to give adequate consideration to matters that were in fact considered by the decision-maker is a merits-based challenge, normally functionally equivalent to a complaint that the decision-maker did not give *favourable* consideration to an applicant's case. As noted above, the weight to be attached to the various relevant considerations is quintessentially a matter for the decision-maker unless some unlawfulness is clearly demonstrated. The corrections made to the decision are hardly fundamental and are essentially semantic or clerical. They do not demonstrate an inadequate consideration in and of themselves. To err is human; so making a minor mistake, particularly a clerical-type mistake, is not in itself sufficient evidence of legally ineffective or careless decision-making that would warrant *certiorari*, and certainly not so here.

Non-refoulement
34. In the applicant's submissions at paras. 46 to 60, the argument is made that there are errors in the analysis of non-*refoulement* for the purposes of s. 50 of the 2015 Act. That complaint is not pleaded so the applicant cannot succeed under that heading. The s. 50 issue is referred to only as part of the factual narrative at para. xiv and indeed Mr. Dornan accepts that it is not pleaded as a ground of challenge. But in any event, no error has been demonstrated. As regards the particular sub-points made in the submissions under this heading:

> (i). Complaint is made that the Minister said that the applicant made no representations regarding *refoulement* and that that does not end the decision-maker's obligations. That may well be so, but it did not end the decision-maker's obligations here because he went on to consider all matters.
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> (ii). It is said that it was not open to the Minister to disregard the applicant's medical condition for the purposes of s. 50; but that condition was not "disregarded". The decision says all information on file was considered and again the applicant runs up against the obstacle of *G.K. v. Minister for Justice, Equality and Law Reform*.

(iii). Complaint is made that the Minister did not provide reasons as to why country information given in 2017 had any relevance to the applicant's claim. A decision of this nature, especially a review of a previous decision, is not a discussion with the applicant; and a decision-maker does not have to give reasons for his or her reasons.

(iv). The applicant complains that he furnished a contemporaneous medical report which warranted a grant of permission to remain following what is described as a "*proper application*" of *B.S. v. Minister for Justice and Equality*. That is repetitive of the point I have addressed above.

Order

35. As noted above, I made an interim order remitting the matter back to the Minister for clarification. Following an addendum having been made to the decision, the final order will be to dismiss the proceedings. However, the fact that the original wording of the Minister's decision was flawed to some extent may have consequences in terms of costs.