THE HIGH COURT JUDICIAL REVIEW

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED) Record No. HJR 2023 1104

[2023] IEHC 636

BETWEEN/

CC

APPLICANT

AND

INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND MINISTER FOR JUSTICE

RESPONDENTS

***Ex Tempore* decision of Ms. Justice Hyland of 27 October 2023**

Introduction

1. This is an application to apply for leave to apply for judicial review. The applicant is seeking to quash the decision of the first respondent (the "Tribunal") of 26 July 2023 refusing the applicant's appeal of the International Protection Office refusal to grant him international protection within the State of 4 April 2023.
2. The applicant is a 43 year old Kosovo national who entered the State with his adult son in or around 8 December 2022 and they sought international protection. The applicant claimed that he was being threatened by agents from a large company in Kosovo to withdraw a civil claim he had against that company because his son was killed as a result of being electrocuted. The IPO found the applicant's account to lack credibility.

It was on this basis that the applicant sought an oral hearing for the Tribunal hearing. The applicant's solicitors wrote on 9 May indicating they wished to lodge additional material. That letter is considered in greater detail below. The Tribunal did not grant an oral hearing and handed down its decision refusing international protection on 26 July 2023. The Tribunal found that the credibility issues could be addressed without an oral hearing and ultimately did not make any adverse credibility findings against the applicant. The applicant does not seek to impugn the refusal to hold an oral hearing. However, the applicant seeks to challenge the decision on the sole ground that the Tribunal decided the appeal in the absence of the additional written submissions that the applicant had indicated it wished to lodge.

3. Having considered the papers, I directed that the application for leave be put on notice. The respondents filed an affidavit, and an oral hearing took place where submissions were made by counsel for the applicant and counsel for the respondent in this respect. The threshold in respect of leave is substantial grounds. The facts are those as set out at paragraphs 1 to 4 of the Statement of Grounds.

4. The sole legal question identified in the written submissions of the applicant is as follows:

> *"Did the first named respondent breach fair procedures in failing to notify the applicant that he should furnish the further submissions the respondent knew that he wanted to submit for the purposes of making his case for appeal?"*

Letter of 9 May 2023

5. The first factual matter that I must address is the letter in question upon which this application is based, being a letter from KOD Lyons of 9 May 2023 appealing the decision of the International Protection Officer. That letter enclosed a notice of appeal

and what was described as "skeleton grounds of appeal" in respect of the IPO decision. It read in relevant part as follows:

> *"It is our intention to brief counsel for our client's appeal before the Tribunal and lodge detailed and consolidated grounds and written submissions (regarding asylum and subsidiary protection) in advance of the appeal hearing. We request an oral hearing to be held for our client's appeal. We note that as the appellant did not have any legal representation for his s.35 IPO interview it is essential for an oral hearing to be held so that we can address any inconsistencies noted by the IPO in its decision concerning our client's case which may have arisen due to the appellant's lack of understanding of the international protection process due to his lack of legal representation."*

6. It is important to note in this case that, although there was a request for an oral hearing here, there is no challenge on the basis of a failure to hold an oral hearing in this case. Equally, the letter does not ask to be told whether an oral hearing is to be granted or not in advance of the decision to allow the applicant to put in particular submissions: rather it simply asks for an oral hearing.

7. Ultimately, the Tribunal made a written decision. In respect of the oral hearing issue, the decision recorded as follows:

> *"4. Kosovo has been designated a safe country of origin and so there is not an automatic entitlement to an oral hearing in a Kosovan case. The test is whether the Tribunal considers that it is in the interests of justice to hold an oral hearing. The Appellant applied for an oral hearing so as to address the credibility issues in his case. The Tribunal formed the opinion that the credibility issues raised in*

the s.39 report can be properly resolved without an oral hearing. The Tribunal kept that opinion under review while preparing this Decision.

Submission of additional material

8. As a factual matter, it seems important to note that there was no impediment to the solicitors for the applicant putting in the additional material that they wished to put in i.e., what is described in the letter as detailed and consolidated grounds of appeal, and written submissions. That they were entitled to do so is made clear by the Administrative Practice Note ("APN") issued by the Tribunal, and in particular paragraph 4.3 of same which identifies that the grounds of appeal may be augmented in later submissions.

9. The applicant has submitted that paragraph 4.3 means that a person must be told whether they are getting an oral hearing or not so that they can tailor their submissions. In fact, that is not what paragraph 4.3 says. Rather, it simply makes it clear that a person is entitled to put in additional submissions. It is a recognition that a person will not be shut out from so doing. It cannot be interpreted to mean that the Tribunal cannot decide the matter until the applicant decides to provide the additional submissions that it wishes to put in, nor can it be interpreted to force the Tribunal to communicate a decision as to whether an oral hearing will be granted or not.

Legal context in which the appeal is lodged

10. The heart of the applicant's case is that he should be entitled to know whether he is getting an oral hearing so that he can tailor his submissions accordingly. The applicant argues at paragraph 9 of his written submissions that the Tribunal knew that the applicant was waiting for the decision on oral hearing to make submissions on the

appeal, and that to determine the appeal in the absence of written submissions was a breach of fair procedures.

11. That argument is misconceived. The Tribunal could not have known that from the letter in question. Moreover, the Tribunal was entitled to proceed on the basis that the applicant's solicitor was familiar with the legal regime governing appeals and in particular with the APN.

12. The detail of that regime is set out helpfully by Mary King, Higher Executive Officer with the Department of Justice in her affidavit sworn 19 October 2023 submitted by the respondents to ground their opposition to leave being granted. She sets out the legal regime at paragraphs 16 onwards. At paragraph 20 she deals with accelerated appeals and identifies a number of core features of the accelerated appeal process (the type of appeal at issue in the instant case). First, S.I. 116/2017 (International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017) makes it clear that, unless the Tribunal considers it is not in the interests of justice to do so, it shall make its decision in relation to an accelerated appeal without holding an oral hearing. Indeed, that comes from s.43(b) of the 2015 Act and therefore has a statutory basis.

13. There is a reference at paragraph 21 to the form set out in Schedule 2 of S.I. No. 542/2022 - International Protection Act 2015 (Procedures and Periods for Appeals) (Amendment) Regulations 2022 in relation to accelerated appeals which identifies *inter alia* that any additional information on which a person intends to rely must be submitted with the application for an appeal. There is also an identification on the form which allows the appellant to set out reasons as to why an oral hearing should be held. At paragraph 24, Ms. King deals with the APN and she refers to the two versions of the APN, the updated version having been introduced in 2023. She identifies that the Regulations contain an obligation to include copies of the documents listed with the

notice of appeal. She also identifies the contents of paragraph 4.3 that I identify above i.e., grounds may be augmented in later submissions.

14. Importantly, at paragraph 28 of her affidavit, she refers to p.7 of the 2022 APN and p.8 of the 2023 APN. This provides as follows -

> *"Any submissions as to why an oral hearing is deemed necessary by an appellant must be clearly made at the time the notice of appeal is submitted and while any such submissions will be taken into consideration parties should not expect the Tribunal to engage in correspondence on the issue. In other words, in the case of an accelerated appeal the Tribunal may determine without further notice that an oral hearing is not required and while the refusal of same will be addressed in the final decision the Tribunal might not contact the appellant/legal representative between the acceptance of the appeal and the issuing of the decision on the appeal for international protection"*

15. The position is set out very clearly. At paragraph 29, she goes on to say that at p.15 of the respective APNs it states that -

> *"While the Tribunal may seek further information in appeals of this type an appellant should not expect that there will in fact be any communication between the Tribunal to them from the time the notice of appeal is lodged until the time the decision is made"*

16. I will come later on to the practice of the Tribunal in this respect. Having regard to the terms of the APN, I think the solicitor must be taken to understand the legal context in which their letter of 9 May 2023 was written. That is a matter that I should take into account in considering whether substantial grounds have been identified here.

17. The applicant's case is that he is entitled to know whether he should put in submissions for an oral hearing or for no oral hearing, and that to vindicate that entitlement he must be told whether he is having an oral hearing or not. In my view, he has no entitlement *per se* to such a communication. The applicant is seeking to manufacture an obligation to inform him as to whether an oral hearing would be provided, based on the request for additional submissions.

18. However, as I have pointed out above, even absent such a notification there was nothing to stop him putting in the submissions.

Decision in FP

19. I turn to the decision in *FP v IPAT* [2022] IEHC 535 as significant reliance was placed by the applicant's counsel on that decision. That is a decision of Ferriter J. of 28 July 2022. In that particular case, the IPO made a decision, and the applicant lodged a notice of appeal. It was identified that the applicant wished to have an oral hearing. There was a concern about being out of time. The solicitor sent a notice of appeal looking for an extension of time to lodge the appeal. She obtained an extension of time but said she did not know that the extension of time had been granted and the appeal accepted, and that she did not have a chance to make submissions in circumstances where a decision was made substantively refusing the applicant's appeal. It turned out that, as a matter of fact, there had been an email in respect of a grant of an extension of time, but she had not received that.

20. In that particular case, an affidavit was sworn by the chairperson of the Tribunal who averred that there was no standard practice in relation to notifying an applicant whether there would be an oral hearing or not and that it was a matter for each Tribunal member as to whether an applicant is corresponded with prior to arriving at a decision on whether to hold an oral hearing or whether the issue is dealt with in the decision itself

(paragraph 20). Ferriter J. indicated that it would appear that some Tribunal members indicate in advance that an oral hearing is not to be granted, and others simply deal with that issue in the decision itself.

21. In *FP*, it is recorded at paragraph 21 that the solicitor had averred that she had received other decisions from the Tribunal, where the Tribunal either indicated that it would hold an oral hearing and provide for the lodging of submissions, or would refuse it but invite further submissions about determining the appeal on the papers.

22. Counsel for the applicant relied on paragraph 21 of the judgment in this respect to seek to show that it is a practice of the Tribunal to correspond as to whether an oral hearing will be provided or not, and to support her assertion that in some way the Tribunal had departed from its normal practice here. There was no affidavit evidence from her solicitor in that respect.

23. However, even based on *FP*, I cannot accept that submission, given that the chairperson of the Tribunal who indicated that there is no fixed practice in this respect must be considered to have greater experience of a procedure of the Tribunal, as opposed to any one individual solicitor.

24. In any case, the position is made quite clear as I have already identified by the APN which explicitly addresses this issue, as referred to at paragraph 28 of Ms. King's affidavit.

25. Returning to the decision of *FP*, at paragraph 28, Ferriter J. indicated that his decision in *SK v IPAT* [2021] IEHC 781is not authority for the proposition that there must be a two-stage process in any appeal under s.43, with the first stage involving a communication of the Tribunal's view as to whether or not it is in the interest of justice that there should be an oral hearing of the appeal, and the second stage involving - depending on the decision reached - a papers only determination or an oral hearing. He

notes that the passages from the APN make it clear that an appellant should not assume there will be any further communication for the Tribunal following receipt of a notice of appeal where the accelerated appeal procedure appeals.

26. At paragraph 31 of the judgment, he points out that the onus is fundamentally on an appellant to prosecute his or her appeal. He hypothesises that it may be that fair procedures, in certain circumstances, would require a decision on the issue as to whether or not there should be an oral hearing. He said that would be for example if a person advances grounds of submissions in support of an oral hearing that such an assessment would have to be fact sensitive and the parameters of what may be required as a matter of fair procedures would have to await consideration in an appropriate case.

27. It does not seem to me that this is such a case. The argument being made here is a different one i.e., that the applicant had to be told whether or not there would be an oral hearing in order to make the submissions they needed. This is not the same type of case as envisaged at paragraph 31. In any case, I think it important to emphasise that paragraph 31 includes the following observation:

> "*It could not be said as a matter of statutory interpretation, or as a matter of principle as regards the operation of the appeal procedure under s.43(b), that the Tribunal is under an onus to determine the oral hearing first and to actively invite submissions from an appellant on that question, in advance of proceeding to a final determination."*

28. In relation to fair procedures, the applicant argues that fair procedures may require a decision on whether to grant an oral hearing in advance of the substantive appeal determination. For the reasons I have already set out, in my view, no substantial grounds have been advanced to demonstrate that this is a case where fair procedures required such a communication. The only reason advanced for such a proposition here is that the

appellant needed to know what kind of submissions to put in. The appellant had an opportunity to put in whatever submissions he wished and did not take it.

29. Indeed, that was one of the reasons that Ferriter J. gave for refusing relief in *FP*. At paragraph 33 he noted that an applicant was on clear notice of the fact that the default position would be that an appeal of this type would be dealt with on the merits, pointing out that the applicant's solicitor could have corresponded with the Tribunal in relation to the facts of his particular case.

30. Similarly, here the solicitor could have put in whatever additional consolidated grounds or submissions that he wished. There was no unfairness in this respect. If the solicitor believed based on his own experience that he would be told whether an oral hearing was to take place or not, thus allowing him to put in the type of submissions he wanted, that was clearly a misconceived belief since the APN makes it clear that is not the position.

31. Returning to the decision in *FP*, at paragraph 34, Ferriter J. notes that there is no standard practice in relation to Tribunal members conveying a decision as to whether or not there would be an oral hearing with some members issuing a decision on some requests in advance and inviting further submissions. He refers to it as a helpful practice. But this does not mean in my view that a different approach by a Tribunal member, entirely in accordance with the APN can be treated as unlawful, or that the applicant can be treated as having substantial grounds in respect of the alleged legality in this respect.

32. At paragraph 36 Ferriter J. notes that the question as to whether there should be a prior decision on a request for an oral hearing, where there is a request for a decision on that issue, is a question that will have to await resolution in an appropriate case. I have

already noted the letter written by the solicitors in this case in fact did not make such a request.

Submissions on safe country of origin

33. Finally, counsel argues that it was particularly important here for the applicant to have an opportunity to put in additional submissions, because the Tribunal decision concludes that the applicant's failure to submit serious grounds for considering Kosovo not to be a safe country of origin deprived him of jurisdiction to make any finding other than the fact that it was a safe country of origin.

34. Counsel argues that it was therefore particularly important for the applicant to be heard on this point. But when one goes to the grounds of appeal, one can see that the applicant was aware of this issue and was aware of the potential requirement and necessity for him to deal with this issue. At the third part of his submissions, he says that the IPO erred in finding that Albania is a safe country in accordance with s.39(4)(e) of the 2015 Act. He refers to the cover letter of 9 May 2023 where he said-

> *"Our client respectfully wishes to appeal the decision of Albania[1] as a safe country in his circumstances given that he repeatedly pointed to evidence which undermines their assertion. The International Protection Office did not appear to have investigated this claim opting instead to defer to the Minister's decision to designate Albania as a safe country without any meaningful examination of same. In doing so, it is submitted that the International Protection Office abdicated its duty to consider the facts presented and to investigate the claim put forward by our client"*

[1] Although the submissions and letter refer to Albania, in fact the decisions of the IPO and IPAT, and the evidence tendered by the applicant all referred to Kosovo, as do the written legal submissions in support of leave to seek judicial review.

35. What is notable is that the applicant does not identify the evidence which allegedly undermines the assertion. The applicant was clearly aware that this was an issue. There seems to be no identification as to why he chose not to provide additional submissions on this point, either at that time or indeed later. The applicant must be taken to know that this is a *de novo* appeal and therefore must put forward grounds as to why, in his particular circumstances, it was not a safe country.

Conclusion

36. There was no basis for the applicant's solicitors to sit on their hands and wait for notification in relation to an oral hearing when the legal context i.e., the APN, makes it clear that this may not be provided. Whether or not the applicant was going to obtain an oral hearing, he clearly needed to put in additional material in this respect but failed to do so. In short, nothing about the factual scenario identified by the applicant undermines the decision that was made by the Tribunal in this respect.
37. In all of the circumstances, in particular the fact that 77 days went by between the lodging of the notice of appeal and the substantive decision, without any explanation by the applicant as to why the further submissions it wished to make, were not made, it seems to me that the applicant has failed to identify substantial grounds to challenge the decision of the Minister on the sole ground identified.
38. I therefore refuse leave in its entirety.