

## THE HIGH COURT

## JUDICIAL REVIEW

[2018 No. 386 J.R.]

BETWEEN

M.S.R. (PAKISTAN)

APPLICANT

AND

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

RESPONDENTS

AND

[2018 No. 437 J.R.]

BETWEEN

M.S.

APPLICANT

AND

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

RESPONDENTS

(No. 2)

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 4th day of February, 2019**

1. In *M.S.R. (Pakistan) v. International Protection Appeals Tribunal (No. 1)* [2018] IEHC 692 [2018] 11 JIC 2603 (Unreported, High Court, 26th November, 2018), I refused *certiorari* of IPAT decisions which refused the applicants' protection claims. The applicants, who are a married couple, now seek leave to appeal.

2. I have considered the caselaw on leave to appeal as set out in *Glancre Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, MacMenamin J., 13th November, 2006) and *Arklow Holidays v. An Bord Pleanála* [2008] IEHC 2, per Clarke J. (as he then was). I have also discussed these criteria in a number of cases, including *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646 [2016] 11 JIC 1404 (Unreported, High Court, 14th November, 2016) (para. 2), and *Y.Y. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 185 [2017] 3 JIC 2405 (Unreported, High Court, 24th March, 2017) (para. 72). I have received helpful submissions from Mr. Eamonn Dorman B.L. for the husband, Mr. Paul O'Shea B.L. for the wife, and from Ms. Eva Humphreys B.L. for the respondents.

3. The question proposed by both applicants is "what are the 'special circumstances' as set out by the Court of Appeal in *A.O. v. Refugee Appeals Tribunal* which would compel an International Protection decision-maker to engage in an investigation into the authenticity of a document relied on by an applicant for International Protection".

4. There are a number of reasons why these applications cannot succeed.

5. Firstly, the fundamental problem is that the alleged obligation to investigate documents was not pleaded (see para. 10 of the No. 1 judgment). So it is not an appropriate point on which the applicants can appeal.

6. Secondly, the judgment makes no reference to the A.O. decision anyway so the point can hardly arise out of that judgment and thus is not appropriate for leave to appeal in accordance with the caselaw referred to above.

7. Thirdly, the proposed question involves a fundamental misunderstanding of European Convention law. The short answer to the question is that there are no circumstances in which a protection decision-maker is "compel[led]" to investigate the authenticity of a document in the sense of the question, at least as a matter of ECHR obligation (as applied by the European Convention on Human Rights Act 2003). The *ratio* of *A.O. v. Refugee Appeals Tribunal* [2017] IECA 51 (Unreported, Court of Appeal, 27th February, 2017) is that the protection decision in that case was not invalid by reference to the ECHR (impliedly as applied by the 2003 Act, although that is not specifically referred to in the judgment) by reason of the failure of the tribunal to make its own enquiries as to the validity of the documents in that case. Insofar as Hogan J. said that there could be special circumstances where a protection decision-maker was so obliged, that was of course *obiter*.

8. While I would strike a different note from an *obiter* view of an appellate judge or court only very diffidently and respectfully, it is clear that on further examination that that suggestion does not stand up in the terms in which it was phrased. Those *obiter* views did not factor in that there is no ECHR right to asylum or international protection and that *Singh v. Belgium* (Application no. 33210/11, European Court of Human Rights, 2nd October, 2012) was a deportation case, which is a context that *does* trigger relevant ECHR rights, and not simply a protection case. There can be no ECHR-based obligation to process a protection claim in a particular way for the very simple reason that there is no underlying ECHR right to protection. At para. 45 of Hogan J.'s judgment, the learned judge reads straight across from the ECHR and *Singh* on the one hand, to obligations on international protection decision-makers on the other, without acknowledging the crucial distinction involved between deportation (which engages relevant ECHR rights) and refusal of protection (which does not). To put it another way, a denial of international protection in itself does not infringe rights under arts. 3 and 13 of the ECHR, which were the rights at issue in *Singh* that were held to give rise exceptionally to a duty of investigation. Only the subsequent deportation of an applicant could do so. Therefore no obligation to investigate at the protection stage could arise under the *Singh* doctrine. Thus, the *obiter* comment in *A.O.* is best read as being to the effect that it is desirable rather than obligatory to investigate documents in exceptional circumstances (see para. 16 of *T.T. (Zimbabwe) v. Minister for Justice and Equality* [2017] IEHC 750 [2017] 10 JIC 3105 (Unreported, High Court, 31st October, 2017)), provided that doing so can be achieved without revealing the applicant's identity, but failure to so investigate, by definition, does not give grounds for *certiorari*.

9. I should add by way of postscript that, in relation to that final qualification, a further problem with that *obiter* comment in *A.O.* is that, independently of the foregoing, it would not generally be lawful for a protection decision-maker to make inquiries with persons or entities in the country of origin about the documents of an identifiable applicant, as to do so would communicate either expressly or impliedly to third parties that such person was a protection-seeker, contrary to the statutory obligation of confidentiality in s. 26 of the International Protection Act 2015. The implications of the corresponding provision in the Refugee Act 1996 for the suggested "*special circumstances*" obligation were not specifically considered in the judgment of Hogan J. on the grounds that it was "*unnecessary*" to do so (para. 46); that reinforces the view that the comments on special circumstances can only have been *obiter* because otherwise one would have to confront the difficulty that any "*special circumstances*"-type obligation would in general conflict with those statutory provisions (see *A.A.L. (Nigeria) v. International Protection Appeals Tribunal* [2018] IEHC 795 at para. 20(v)).

10. Finally it would only be fair to add that the present case is one where the applicants' accounts were rejected as incoherent and implausible, where the husband lived in Pakistan for years after the alleged persecution, where both parties lived in the UK without claiming asylum, and where they only sought protection here after their visas ran out there. This is not a borderline case. Doubts about the applicants' documents were very far from the sole or even main basis on which their claims failed. Thus this case is not a suitable occasion to require appellate examination of any question of law in that regard, even if the applicants had counterfactually established any such legitimate question.

11. Accordingly, the applications are refused.