

## THE HIGH COURT

[2019 No. 458 JR]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT  
2000, AS AMENDED

BETWEEN

H

APPLICANT

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

**JUDGMENT of Mr Justice Max Barrett delivered on 9th December, 2019.**

1. The immigration history of Mr H, a non-EU national, is perhaps best detailed by way of the chronological summary that follows:

20.12.2010.	Mr H travels from a non-EU country to UK on a visa issued to him under a false identity.
07.03.2011.	Mr H arrives in Ireland.
16.06.2011.	Office of the Refugee Applications Commissioner ("ORAC") makes an order for Mr H's Dublin II transfer to the UK.
20.07.2011.	Mr H fails to present to the Garda National Immigration Bureau ("GNIB") for transfer to the UK.
28.03.2013.	Having accepted the processing of Mr H's claim due to the passage of time, ORAC recommends that Mr H not be given refugee status.
24.06.2013.	Refugee Appeals Tribunal ("RAT") refuses Mr H's refugee status appeal.
21.08.2013.	Mr H applies for subsidiary protection.
27.08.2015.	ORAC notifies Mr H of its refusal of subsidiary protection.
14.09.2015.	Mr H attempts subsidiary protection appeal to the RAT.

25.10.2015.	Mr H attempts to take flight from Belfast to Birmingham and flees airport when approached by immigration officials.
02.05.2017.	Mr H attends RAT appeal hearing.
23.11.2017.	RAT refuses Mr H's subsidiary protection appeal.
06.02.2018.	Mr H's solicitors make representations under s.3 of the Immigration Act 1999.
11.02.2019.	Minister writes to Mr H's solicitors seeking explanation of photos on Mr H's Facebook page that were apparently taken in 2016.
28.02.2019.	Mr H's solicitors explain that Mr H had sought to establish on his Facebook page that he was somewhere where he was not.
07.03.2019.	Minister seeks further explanation re. Facebook issue.
28.03.2019.	Mr H's solicitors make further submissions and enclose evidence purporting to show Mr H's residence in Ireland since 2011.
12.06.2019.	Deportation order is communicated to Mr H, together with an Examination of File concluding that "it cannot be stated with certainty" that Mr H was resident in Ireland since 2011.
08.07.2019.	Mr H granted leave to challenge deportation order.
09.07.2019.	Mr H is arrested and remanded on burglary and theft charges.

01.08.2019.	Mr H released on bail and required to sign at Garda station daily in County Galway.
07.08.2019.	Mr H signs on with Gardaí in Galway but fails to present as required to GNIB in Dublin.
22.08.2019.	Mr H's solicitors write to GNIB seeking new presentation date.
23.08.2019.	Chief State Solicitor's Office ("CSSO") send (by email) a letter dated 22.08.2019 to Mr H's solicitors withdrawing the undertaking not to deport in light of the non-presentation on 07.08.2019.
Aug-Oct 2019.	Correspondence between Mr H's solicitors and CSSO culminating in CSSO refusal (in letter of 18.10.2019) to provide undertaking.

2. Arising from the foregoing, Mr H has brought the within application seeking (a) an order of *certiorari* quashing the decision of the Minister of 24.05.2019 to make a deportation order in respect of Mr H, and (b) an order directing that Mr H's application for permission to remain be remitted to the Minister for fresh consideration.
3. The grounds upon which the reliefs aforesaid are sought are twofold, being, per the Statement of Grounds:
  - "A. *In requiring that the Applicant prove 'with certainty' that he was ordinarily and continuously resident in the State [during a certain period]...the Respondent imposed an unreasonable and unlawful standard of proof in relation to this central issue. The Respondent's failure to determine this issue on a balance of probabilities basis renders the deportation order decision invalid.*
  - B. *The Respondent acted unreasonably and irrationally in finding [that] 'the doubts which exist in relation to [the Applicant's] continuous residence in the State at all times since March 2011 are so great that the benefit of the doubt cannot reasonably be applied in [the Applicant's] favour'. In circumstances where the Respondent's doubts were based solely on Facebook photos uploaded by the Applicant during the relevant period, an issue fully explained by the Applicant, the Respondent's finding in this regard was unreasonable and irrational."*

4. Three legal questions are posited to arise from the foregoing. These are considered hereafter. Before proceeding to consider them, the court notes that the section of the Examination of File that has been impugned arises from the Minister's application to the facts before him of the McMahon Report, *i.e. the Final Report of the Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers* (June 2015). (The section is headed "*Possible relevance of the Recommendations contained in the Working Group' on the Protection Process to [Mr H's]...case*"; however, it clearly involves an effort to apply the said recommendations so far as relevant). The court accepts the submission of counsel for the Minister that the said Final Report, however impressive (and it is impressive), is, at this time, but a report, nothing more. It has not, at this time, been adopted as Government policy and/or transposed into law. The speech of the incumbent Minister to which the court was referred, in which the Minister states that "*I want to reiterate my absolute commitment to ensuring the McMahon Report is implemented*" seems to the court to involve no more than an aspirational statement of intention that the report will be implemented, presumably in some formal manner. All that said, when one comes to the section of the Examination of File that has been impugned here, once the Minister voluntarily elected in that section to apply the McMahon Report so far as relevant – and the Minister clearly did not so proceed out of mere intellectual curiosity but rather out of a sense that had the requirements of the Report been satisfied a permission to remain would have been granted – yielded a concomitant obligation, as a matter of fair procedures, to do so faithfully and properly, notwithstanding that it was an elective standard which the Minister had brought to bear in this regard.

(1) What is the appropriate standard of proof for the Minister to apply in relation to factual matters relevant to a decision on whether to make a deportation order?

5. In deciding how to proceed under s.3 of the Immigration Act 1999, the Minister is engaged in a civil administrative procedure concerning people whom it is proposed to deport; he is not punishing them; the balance of probabilities is therefore the applicable standard when it comes to assessing factual matters relevant to his decision. If the Oireachtas wants to establish a more favourable standard, it may, but it has not. Counsel for the Minister has noted that there is no precedent on this aspect of matters. The court inclines to the view that the likely reason for an absence of precedent is because the answer is clear. There are related cases (admittedly not quite on point) concerning the applicability of the civil standard of proof in the immigration law context, *e.g., O.N. v. Refugee Appeals Tribunal* [2017] IEHC 13, *W.H. v. The International Protection Appeals Tribunal* [2019] IEHC 297 and *M.E.O. (Nigeria) v. The International Protection Appeals Tribunal* [2018] IEHC 782, which buttress the court in its conclusion as to the standard of proof in the s.3 context.

(2) If the appropriate standard of proof in such circumstances is the balance of probabilities, did the Minister err in law in requiring that Mr H prove "with certainty" that he was in Ireland at all times during a stated timeframe? (The "with certainty" wording appears in the Examination of File of 02.05.2019).

6. 'Yes'. Had this just been a single slip, the court would likely have reached the opposite conclusion and offered as its reason that administrative decisions do not fall to be parsed word-by-word when it comes to assessing their lawfulness. However, it is not just a single slip. Thus (i) the Minister's letter of 11.02.2019 states that "*Where doubts exist as to a person's...residence...INIS reserves the right to carry out such reasonable checks as will serve to dispel such doubts*" (but doubts can continue to present even when the balance of probabilities falls to be applied in one's favour and this reference to doubts, and more particularly to the need for them to be dispelled, suggests that a more stringent standard than the civil standard was being brought to bear); (ii) the Minister's letter of 07.03.2019 refers to "*the Minister's doubts*" (again, however, doubts can continue to present even when the balance of probabilities falls to be applied in one's favour and this reference to doubts, in effect as something to be overcome, suggests that a more stringent standard than the civil standard was being applied); and (iii) the Examination of File aforesaid states "*The doubts which exist in relation to his continuous residence in the State at all times since March 2011 are so great that the benefit of the doubt cannot reasonably be applied*" (again, however, (a) doubts can continue to present even when the balance of probabilities falls to be applied in one's favour and this reference to doubts suggests that a more stringent standard than the civil standard was being applied; also (b) the reference to the benefit of a doubt being reasonably applied is highly redolent of the criminal standard of 'beyond reasonable doubt' being brought to bear). Each of these instances ((i) - (iii)) is problematic; cumulatively the court does not see that it could conclude otherwise than it has, viz. that the wrong standard of proof has been brought to bear.
- (3) Did the respondent act unreasonably and irrationally in finding that "*the doubts which exist in relation to [the applicant's] continuous residence in the State at all times since March 2011 are so great that the benefit of the doubt cannot reasonably be applied in [the applicant's] favour*", in circumstances where the respondent's doubts were based solely on Facebook photos uploaded by the applicant during the relevant period, "*an issue which had fully been explained by the Applicant*" (the last-quoted text is the wording of Mr H's counsel).
7. Providing a purported excuse for an issue perceived to present does not inexorably yield the logical conclusion that the said perceived issue has "*fully been explained*", (ii) the entire file was considered, not just the Facebook photos, (iii) it was well within the competence of the Minister as decision-maker to decide whether or not he accepted (and that he did not accept) the explanation provided, (iv) were it not for the fact that the wrong standard of proof appears to have been brought to bear, the court does not see that any other difficulty would present in terms of the conclusion reached in this regard.

### **Conclusion**

8. Applying the wrong standard of proof is so fundamental an error that the court does not see that it can do anything other than grant the order of *certiorari* sought and remit the within matter to the Minister for fresh consideration. A number of reasons have been offered to the court as to why it might otherwise exercise its discretion. These largely

concern the fact that Mr H has sought (and he has repeatedly sought) to 'play ducks and drakes' with the immigration system. However, even such a man is entitled to have the correct standard of proof brought to bear in such applications as he makes. What gave the court greater cause for pause in terms of how to exercise its discretion was the fact of the charges that have been brought against Mr H and for which he has been bailed pending trial. There was suggestion in the submissions that even if Mr H is acquitted the mere fact that he has been charged would adversely affect any fresh character/conduct assessment that might be made under para.3.129 of the McMahon Report. Even if that is so, it seems to the court that as Mr H enjoys the presumption of innocence at this time and may be acquitted, it is still better that a decision which has been decided by reference to the wrong standard of proof be quashed and the matter re-decided. It may well make no difference to the outcome of the deportation process; however, it is necessary that matters be processed correctly and by reference to the correct standard of proof. The granting of the order of *certiorari* and the remittal of matters to the Minister for fresh consideration will not, of course, make any difference as regards how Mr H fares within the criminal trial process or what penalty will follow *if* he is found guilty, and he may be acquitted. As Charleton J. observed earlier this year in *B.S. v. The Refugee Appeals Tribunal* [2019] IESC 32, para. 18, "[j]udicial review is not granted as of right but by reason of justice". It would be a striking injustice to leave standing a decision that has been decided by reference to the wrong standard of proof.