

**THE HIGH COURT
JUDICIAL REVIEW**

[2019 No. 959 J.R.]

BETWEEN

X.Z. (ALBANIA)

APPLICANT

AND

**THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND THE MINISTER FOR
JUSTICE AND EQUALITY**

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 10th day of February, 2020

1. The applicant claims to have been born in 1967 in Albania and to have had a husband and two children there. One son allegedly became subject to threats and left Albania in July 2012, travelling to Belgium and then to the State. The husband died in 2014. The other son travelled to Greece, Italy and Spain before returning to Albania, and finally leaving that country again and coming to the State in 2017. The applicant left Albania in April 2018 and came to the State *via* Italy to join her two children here.
2. She applied for international protection, which was refused by the International Protection Office, and in May 2019 appealed to the International Protection Appeals Tribunal. Oral hearings took place on 16th July, 2019, 24th September, 2019 and 10th October, 2019. The applicant was represented by Ms. Eve Bourached B.L., and very commendably her solicitors have engaged the same counsel for the judicial review, which is a practice that never fails to assist the court.
3. On 30th October, 2019 the applicant was notified of the rejection of her appeal. A statement of grounds was filed on 23rd December, 2019, the primary relief claimed being *certiorari* of the IPAT decision. However, relief 2 sought an order as follows: "*As and if necessary an injunction restraining the second named respondent from refusing the applicant a declaration of refugee and/or subsidiary protection status pursuant to s. 47 (5) (d) of the [International Protection Act, 2015] and restraining him from conducting a review of the decision made in respect of the applicant under s. 49 (4) thereof pending the outcome of these proceedings*".
4. I granted leave on 27th January, 2020. On 7th February, 2020 the applicant sought an undertaking from the State, in the terms of relief 2, to obviate the need for such an injunction. That undertaking was not furnished, and indeed I have been informed that such an undertaking has never been furnished at any time since the commencement of the 2015 Act. The applicant now seeks an interlocutory injunction in terms of relief 2 of the statement of grounds, and in that regard I have received helpful submissions from Ms. Bourached B.L. for the applicant as mentioned above, and from Ms. Maeve Brennan B.L. for the respondents.

Should the Minister be restrained from operating the statutory process?

5. If the applicant does not get an undertaking or injunction, the Minister is mandatorily required to refuse protection under s. 47 of the 2015 Act. The Department will then

review the leave to remain refusal with the possibility of a positive decision of course or alternatively an adverse review decision and consequential deportation order. However, the applicant is not in fact disadvantaged by that alone, because if she wins the present judicial review, any adverse decision predicated on refusal of protection would automatically fall and the applicant does not need to do anything in that regard. Ms. Brennan confirms that in such an event all subsequent adverse decisions premised on the IPAT decision (such as refusal of protection and an adverse review decision or deportation order) would be withdrawn. If the applicant loses the present judicial review, she would have to cross the hurdle of those other processes anyway. The applicant complains that she will have to engage with *refoulement* at a time when she is challenging the IPAT decision, but that is only on the premise that the IPAT decision stands. The applicant is challenging that premise in these proceedings and if she succeeds in that challenge, any adverse review decision that is based on such a premise would automatically fall.

6. Ms. Bourached complains that the prejudice arising to the applicant here is that she has "*been put into a process starting with a decision that is impugned*", but merely challenging step one of a process is not a basis to say that you cannot be subjected to step two, if you will also have the opportunity to challenge step two if the outcome is adverse. There must be a general preference in law to let a process take place and to allow a challenge to the result if adverse, with, if appropriate, a stay on that result pending the challenge, rather than to cut the process off at the knees, unless for example that process is *ultra vires* or *mala fides*: see by analogy the recent judgment of Murray J. (Whelan and Power JJ. concurring) in *Habte v. Minister for Justice and Equality* (Unreported, Court of Appeal, 5th February, 2020). Prohibition and prohibition-like remedies, such as injunctions to prevent a process from even taking place, need to be used with caution and apply only in significantly restricted circumstances; and decisions allowing a challenge to cut off a process before it even begins, such as *Osmanovic v D.P.P.* [2006] IESC 50, [2006] 3 I.R. 504, for example, need to be seen as outlying and exceptional.
7. Ms. Brennan informs me that her instructions are that there is no conscious practice of holding up decision-making if an IPAT decision is challenged. I find that not immediately easy to reconcile with the fact that experience indicates that statutory decision-makers generally seem to down tools in practice whenever a particular step is challenged, even without a stay. That is a questionable practice, but whether, conscious of its questionability, officialdom does not wish to acknowledge what it is doing, or whether there is a genuine willingness to move matters along, notwithstanding a challenge to a particular step, is not something I can really resolve here.
8. Admittedly, there is a further "*prejudice*" to the applicant in the sense of having to amend her proceedings in the hypothetical event of needing to challenge any adverse further decision. Ms. Brennan calls this a "*small price to pay*" and that is a fair characterisation in the context of what is a balancing exercise to be conducted by the court in accordance with the Supreme Court decision in *Okunade v. Minister for Justice and Others* [2012] IESC 49, [2012] 3 I.R. 152, the basic question being, where does the least risk of

injustice lie? There is no real risk of injustice to the applicant in allowing the Minister to operate the statutory process in a situation where the only prejudice is the purely legal one of having to challenge any adverse decision. The principle of giving effect to *prima facie* valid decisions acknowledged in *Okunade* is doubly strong if one is only talking about allowing a *prima facie* valid process to proceed. However, Ms. Brennan was not in a position to give any particular assurances about the non-enforcement of a deportation order, if one were actually to be made prior to the finalisation of these proceedings. So, under those circumstances it does not seem appropriate to refuse the stay sought outright. Certainly one can say that different factors would be in play for *Okunade* purposes if we were talking about a deportation order.

Order

9. The appropriate order then will be to refuse the interlocutory stay at the present time, but with liberty to renew the application if any relevant circumstances change.